

Community Guidelines for the application of State aid rules in relation to rapid deployment of broadband networks

Ireland's Comments

1. General observations

Ireland very much welcomes the publication of the Guidelines which, Ireland believes, will be invaluable in guiding MSs in implementing effective and efficient broadband intervention initiatives.

Ireland wishes to acknowledge (i) the expertise that has been developed by DG Competition in this area and (ii) the thoroughly professional advice and assistance provided to Ireland in the development of its broadband initiatives. While the advice of DG Competition conflicted, from time to time, with Ireland's intentions (which in turn required Ireland to modify or drop its proposals accordingly) the advice was always erudite and welcomed.

Ireland also welcomes the references to the EU Commission decisions on Irish initiatives, i.e. Decision No 284/2005 (Regional Broadband Programme: Metropolitan Area Networks (MANs) Phase II and III) and Decision No. 475/2007 (Ireland, National Broadband Scheme).

- 2. Paragraph 15:** It is stated that *“Moreover, the intervention of the State tends to alter existing market conditions, in that a number of firms would now choose to subscribe to the services provided by the selected suppliers instead of existing, possibly more expensive alternative market-based solutions (for instance, leased lines services).”*

Comment: This appears to suggest that there would be some substitutability between leased lines and broadband products. The basis for this statement is not clear and, should this be the case, it would suggest that these products fall within the same market. Current generation broadband products are unlikely to be either demand or supply substitutes for leased lines due to functional differences.

- 3. Paragraph 36:** It is stated that *“Thus, the Commission accepts that by providing financial support for the provision of broadband services in areas where broadband is currently not available and where there are no plans for the near future, Member States pursue genuine cohesion and economic development objectives and thus, their intervention is likely to be in line with the common interest.”*

Comment: Issues will arise in seeking to assess whether there are ‘plans for the near future’. Where service providers realise that national Government’s or regional authorities are examining the possibility of the provision of aid to support the provision of broadband services (either current generation or next generation) and that there is the possibility of forestalling this intervention on the basis of purported

investment plans (whether these be real or otherwise), then this opportunity is likely to be seized upon. A difficulty will arise in firstly, assessing the veracity/validity of any investment plans by service providers and, secondly, in assessing whether such investment plans are likely to be successful in practice and deliver the purported outcome (say in terms of coverage and service quality). Some clarity on this issue including the level of any assessment would be useful.

Note: this issue also arises in the context of similar references in paragraphs 44, 63, 64, 65, 69

- 4. Paragraph 37:** It is stated that “*When in a given geographical zone at least two broadband network providers are present and broadband services are provided under competitive conditions (facilities-based competition), there is no market failure.*”

Comment: Two cumulative tests appear to be identified here. Firstly, that at least two network providers are present. The basis upon which ‘two’ providers have been selected is not clear. Two providers could operate in the same geography, provide functionally different broadband products and have differing market shares. Some clarification of ‘presence’ would also be useful as although an operator may be present in an area, they may not be capable of providing broadband services to all users in that area (for example, in the case of copper based broadband services, the quality of the infrastructure can impact service availability. Equally so, for wireless services, line of sight issues can impact the availability.)

The second test relates to broadband being provided under competitive conditions, which is then related to infrastructure competition. Some further clarity as to what is meant by ‘competitive conditions’ would be useful.

Note: this theme regarding ‘presence’ is also relevant in the context of the discussion of ‘grey areas’ – see Sections 2.3.2.3, 3.4.2. and 3.4.3. In a National Broadband Scheme context, this was a very real issue that was addressed through a coverage assessment and a corresponding coverage threshold below which an area(s) was deemed to be effectively unserved.

- 5. Paragraph 44:** It is stated that “*Regarding the incentive effect of the measure, it needs to be verified whether the broadband network investment concerned would not have been undertaken within the same timeframe without any State aid.*”

Comment: Some clarity regarding the level of ‘verification’ required would be useful. See also comment under point 2 above.

- 6. Paragraph 45:** It is stated that “*In assessing the proportional character of the notified measures in "white" or "grey" areas, through its decision-making practice, the Commission has highlighted a number of necessary conditions to minimise the State aid involved and the potential distortions of competition.*”

Comment: Suggested that reference should also be made to ‘black areas’ as the potential for such areas to receive State Aid approval has been recognised in paragraph 37 subject to there being “...a clearly demonstrated market failure...”

7. Paragraph (45)(a)

“a) Detailed mapping and coverage analysis – market analysis: Member States should clearly identify which geographic areas will be covered by the support measure in question. By conducting in parallel a market analysis and consulting with all stakeholders affected by the relevant measure, Member States minimise distortions of competition with existing providers and with those who already have investment plans for the near future and enable these investors to plan their activities. A detailed mapping exercise and a thorough consultation exercise ensure accordingly not only a high degree of transparency but serve also as an essential tool for defining the existence of “white”, “grey” and “black” zones. ”

Comment 1: Ireland suggests that more clarity and guidance on “Detailed mapping and coverage analysis” be provided by the Commission where a MS wishes to provide a broadband service in an area that is partially served by an existing broadband service provider.

For the purposes of Ireland’s National Broadband Scheme (NBS, Decision No. 475/2007) a detailed mapping exercise was undertaken as part of the Department’s assessment of the extent of wireless and DSL broadband coverage in the State. Following completion of that assessment and in order to implement the NBS, a separate map based on electoral divisions (“EDs”), which are the smallest administrative areas used for statistical purposes in the country, was developed for the following reasons:

- EDs facilitated the efficient operation of the NBS procurement process because it ensured that service providers would bid on a defined area;
- EDs ensured that no ambiguity existed with respect to the geographic areas that fall within the scope of the NBS and in which the winning NBS provider would be required to provide service;
- EDs allow the Department to measure and monitor coverage achieved as the project evolves;
- EDs would assist consumers in identifying whether they lived within a geographic area within which a broadband service can be availed of via the NBS;
- EDs met technology neutrality considerations.

Following the decision to adopt the ED model, the Department was faced with a further decision to determine which EDs should be addressed by the NBS. This decision was taken based on levels of the existing combined broadband coverage in relevant EDs.

Where an ED is completely unserved by any existing service provider it is included in the NBS. Where it is completely served by existing service providers it is excluded from the NBS. Where an ED is not substantially covered by existing service providers, it will be addressed by the Scheme.

As regards the criteria used to determine substantial coverage, it is important to note that the approach developed aims to maximise the number of unserved buildings (while minimising served buildings) that will be covered by the NBS and was based on different percentage thresholds for EDs within different size ranges (based on total buildings in each ED).

This criteria and methodology which we used, and which we communicated to the Commission, will achieve the policy objectives of the NBS which are (i) to provide broadband coverage to rural areas in the State, (ii) to address national economic and social exclusion concerns due to a lack of broadband access and (iii) to enhance the competitiveness of the regions for foreign and indigenous investment. In order to avoid reinventing the wheel, and to assist other MS facing similar challenges, it would be useful if Ireland's NBS could be used as a case study to guide other MS in the development of their mapping processes for the deployment of broadband and NGA broadband.

- 8. Comment 2:** On the reference to a 'market analysis', it is assumed that this relates to a mapping and coverage analysis and NOT and ex-ante market analysis pursuant to the Framework (and other) Directive.
- 9. Paragraph 45c:** It is stated that "*Within the context of an open tender procedure, in order to reduce the amount of aid to be granted, at similar quality conditions, the bidder with the lowest amount of aid requested should in principle receive more priority points within the overall assessment of its bid. In this way the Member State can shift the burden of how much aid is really necessary to the market and reduce thus the information asymmetry that most of the times benefits private investors.*"

Comment: The level of aid requested will be a significant function of the coverage and type of 'service' required. These issues will often have equal priority (in terms of a tender requirement) to the price of the tender. Generally speaking, through the competitive tension posed by all parties participating in the open and competitive tender process, along with the risk of not winning the tender process itself should drive the optimal solution across all tender criteria, including price.

- 10. Paragraph 45f:** It is stated that "*Mandating third parties wholesale access to a subsidised broadband infrastructure is a necessary component of any State measure funding the construction of a new broadband infrastructure.*"

Comment: Ireland suggests the insertion of the words "effective and efficient" in front of "wholesale access". Reference should also perhaps be made to 'non-

discrimination’ and ‘transparency’ to ensure equal treatment of service providers.

- 11. Paragraph 45g:** It is stated that *“In order to ensure effective wholesale access and to minimise potential distortion of competition, it is crucial to avoid excessive wholesale prices or, by contrast, predatory pricing or price squeezes by the selected bidder. Access wholesale prices should be based on the average published (regulated) wholesale prices that prevail in other more competitive areas of the country or in other more competitive areas of the EU or, in the absence of such published prices, on prices set or approved by the national regulatory authority. Benchmarking is an important safeguard since it enables Member States to avoid having to set in advance detailed retail or wholesale access prices, as well as to ensure that the aid granted will serve to replicate market conditions like those prevailing in other competitive broadband markets. The benchmarking criteria should be clearly indicated in the tender documents.”*

Comment: Various references are made to “competitive” in the context of the benchmarking exercise. Presumably this refers to the presence of a number of service providers rather than effective competition as, in the latter case, there is unlikely to be ex-ante regulation.

It would be worth clarifying the reference to “...approval by the national regulatory authority”. Presumably this relates to the specific case where, firstly, wholesale prices are regulated (and approved/set) and, secondly, where such prices are not published.

- 12. Comment on Paragraphs 47 and 48:** Ireland notes the definition of NGA networks contained in the document and highlights that there is minimal availability of optical based access services capable of providing a minimum of 40mbps in Ireland.
- 13. Paragraph 61:** This paragraph states *“To the extent that NGA networks imply a wholly different network architecture, offering significantly better quality broadband services than today as well as the provision of services that could not be supported by today’s broadband networks, it is likely that in the future there will be marked differences emerging between areas that will be covered and areas that will not be covered by NGA networks.”*

Comment: Ireland queries the use of the term ‘...wholly [emphasis added] different network architecture.’ Some NGA deployments will utilise parts of existing networks. For example, in the case of a deployment of a VDSL in a fibre to the cabinet (FTTC) scenario, fibre is deployed deeper into the network, typically to a street cabinet, with the connection between the street cabinet and the customer premises utilising the existing copper network.

- 14. Paragraphs 63 (also in 64, 65, 69).** This paragraph states that *“Accordingly, for the purposes of assessing state aid for NGA networks, an area where such networks do not at present exist and where they are not likely to be built and be fully operational in the near future by private investors should be considered to be a*

"white NGA" area. 52 In that regard, the term 'in the near future' should correspond to a period of [5] years.53 Public authorities should be entitled to intervene, under certain conditions, in order to address social cohesion issues, regional development or a market failure when it can be demonstrated that private investors have no intention to deploy NGA networks in the coming [5] years. It would not be appropriate to take a longer time horizon as this may risk damaging the interests of underserved regions relative to other parts of a country that are adequately served by such advanced broadband networks."

Comment: 'in the near future' is defined as 'in the coming 5 years'. The guidelines deal with the application of State aid rules in relation to the 'rapid' deployment of networks. The 5 year period chosen appears to set the limit on what is acceptable in terms of speed of deployment (i.e. 'rapid' would mean to secure rollout no earlier than 5 years) and that any intervention to advance NGA broadband in a shorter timeframe would not be viewed as being acceptable.

Some clarity on what should be achieved within any timeframe that is chosen would be useful, i.e. is it to complete a NGA network roll-out or to start one? For example, a service provider could indicate that he will commence a network upgrade/roll-out in 4 years and this could then take a number of years to complete. This may not be desirable from a public policy perspective where the aim is to secure a rapid deployment of NGA networks that would be provided by the market. How would such circumstances be viewed in applying the guidelines?

Note: see also comments at point 3 above regarding the ability to assess the veracity of service providers' purported NGA investment plans.

15. Paragraph 66 states: *"As mentioned above in paragraph (61) and (62), although NGA networks are qualitative far more advanced than existing traditional copper-based broadband networks, in assessing the compatibility of a state aid for the deployment of a NGA network with the State aid rules, the Commission will also look into the effects of such aid on existing broadband networks given the degree of substitution that at present appears to exist with regard to broadband services offered over broadband and NGA networks alike."*

Comment: Ireland would welcome clarity on the basis of this statement.

16. Paragraph 72 states: *"The Commission considers that traditional black areas, that is areas where current broadband services are being delivered by competing broadband infrastructures (xDSL and cable networks), are areas in which existing network operators should have the incentives to upgrade their current traditional broadband networks to very fast, NGA networks [EMPHASIS ADDED] to which they could migrate their existing customers. In such areas no further State intervention should in principle be necessary."*

Comment: The basis for this statement is not clear. There are many factors which will

affect the incentive for a service provider to upgrade its network. It is also worth noting that the economics of building a NGA network differs to that associated with maintaining and existing network.

17. *Paragraph 74 first bullet states: “In exchange for receiving state support, the beneficiary should be required to provide third parties with wholesale access for at least [7] years. In particular, the access obligation imposed should also include the right to use ducts and/or street cabinets in order to allow third parties to have access to passive and not only active infrastructure. This is without prejudice to any likely similar regulatory obligations that may be imposed by the NRA in parallel or after the expiry of that period.”*

Comment: Firstly, some clarity on the 7 year period would be useful. Typically, the beneficiary will also be required to enter into a contract with the authority providing the aid. This seven year period will have the effect of requiring the contract arrangements to be in place during this time (for both any retail and wholesale requirements under the contract) and could have the effect of requiring the provision of all services beyond the period required by the contracting authority. Rather than setting a specific period, should the requirement focus on providing non-discriminatory access for the duration that the contracted entity itself uses the infrastructure?

It is also noted that the beneficiary may already have (or could be in the future found to have) Significant Market Power and be required to provide wholesale access. Any wholesale contractual arrangements between a contracting authority (providing the aid) and the aid recipient must be consistent with any regulatory obligations imposed by a National Regulatory Authority.

ENDS