



Comments from NLkabel on the draft broadband guidelines of the European Commission

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General

NLkabel, the Dutch association of cable operators, welcomes the opportunity to comment on the Commission's draft guidelines for the application of state aid rules in relation to the rapid development of broadband networks ('the draft Broadband Guidelines').

As a general remark, NLkabel supports the initiative from the Commission to give further clarification as to the circumstances under which state aid relating to the development of broadband networks is allowed. Absolute legal certainty for all stakeholders involved is required given the potentially very significant distortive effects to competition resulting from unlawful state aid.

NLkabel wishes to draw the attention of the Commission to the following points, which in its view should be included in the Broadband Guidelines.

Factual background in the Netherlands

On an European scale, the Netherlands is a frontrunner in the development of broadband networks. Two parallel high speed networks have been deployed and are permanently upgraded covering the entire country. Cable operators using Docsis 3.0 are currently providing customers with internet speed up to 120 Mbps. Due to the current out roll of Docsis 3.0 (also known as 'Eurodocsis'), by several cable suppliers, incumbent telco operator KPN is forced to provide customers with a solid alternative¹.

¹ According to the British financial consultancy agency Fitch Ratings.

Recently KPN announced its joint venture with FTTH provider Reggefiber as part of its programme to replace its existing xDSL network and migrate to an NGA network.

Nevertheless, a number of local and regional authorities in the Netherlands are still contemplating state aid measures, allegedly to promote FTTH investments. The province of Limburg recently announced major investments in fibre networks (80 to 100 million Euros). The intended investments of the province of Limburg seems to be part of a trend in which decentral governments perceive a necessity to invest in fibre projects and are tempted to use the proceeds of the sale of major energy companies (Essent, Nuon) for broadband projects. Among others the municipalities of Rotterdam (Lloydkwartier and Nesselande), the Hague, Almere and Eindhoven (OnsNet)² initiated subsidised projects. The province of Friesland and a region of Gelderland (Achterhoek) are considering major government projects as well. NLkabel is concerned about this trend. These concerns are reinforced by the fact that as a result of significant private investments by cable operators these regions are covered by NGA networks already and that the KPN controlled joint venture Reggefiber is manoeuvring to be the main beneficiary of these government sponsored projects.

Test related to conformity with market terms of a public investment should be applied strictly in case of participation of private investors

In paragraph 19 of the draft Broadband Guidelines, reference is made to the *Amsterdam* decision of the Commission and the rule contained in that decision that conformity of a public investment with market terms has to be demonstrated thoroughly and comprehensively, either by means of a significant participation of private investors or the existence of a sound business plan showing an adequate return on investment.

NLkabel considers it important that it is made clear from the outset that the existence of a sound business plan is under any circumstances a condition, also in case a significant participation of private investors takes place. These requirements are cumulative and not alternative.

² Many of the municipalities are united in the so called 'Stedenlink-netwerk'.

Secondly, NLkabel wishes to stress that this test should be applied strictly in practice. In particular, when applying this test, the very participation of private investors should form a reason for the Commission and national authorities to thoroughly scrutinise the role of the state in the investment concerned and the relationship between the participation of the state and the participation of the private investors.

In the view of NLkabel it cannot be assumed that the state invests on market terms on the basis of the mere fact that private investors participate on the same terms and conditions as the public investor. The fact that private investors invest on the same terms and conditions should merely form a necessary but not a sufficient condition for the absence of state aid. In the view of NLkabel, state aid can only be excluded to the requisite standard if there is compelling and contemporaneous evidence that private investors would also have invested on the same terms and conditions without participation of the state.

The question to be answered positively in order to establish absence of state aid therefore is whether the private investors would have invested on the same terms and conditions if the participation of the state would have been taken over by another private investor.

Any statement of private investors concerned that they would indeed do so, should be supported as much as possible by contemporaneous evidence. In this regard, the Commission should in the view of NLkabel not be reluctant to make use of its investigative powers.

Finally, the Broadband Guidelines should stress that a proper allocation of losses and the monitoring of that allocation should be part of the assessment in case private investors participate in projects. This condition was clearly spelled out in the *Citynet* case but the Commission failed to properly monitor this condition after the measure was approved.

Calculating rate of return

NLkabel would welcome further guidance in the Broadband Guidelines on the ways to calculate the adequate rate of return on investment in the context of the market economy investor principle. In particular, there are examples of lack of clarity with

regard to investments in fibre networks which in the view of some investors form part of broader investments, for example in the context of housing corporations.

In the view of NLkabel, it should be clear that for the purpose of calculating the rate of return for investments in such fibre networks, the relevant fibre activities should be separated and assessed in isolation of other – allegedly accompanying – investments. As a result, by way of example, the rate of return for an investment in a fibre network by a housing corporation should be assessed according to the required return for broadband projects and not for real estate projects.

In addition, adequate transparency should be required in relation to both the business plan and the cash flows involved.

NGA networks and the specific case of existing black areas

In paragraph 72 of the draft Broadband Guidelines it is assumed that in traditional black areas existing network operators have the incentive to upgrade their traditional broadband networks to very fast NGA networks and that in such areas no further state intervention should in principle be necessary.

However, from paragraph 73, it follows that this may be different if a Member State can show that existing basic broadband operators do not plan to invest in NGA networks in the coming 5 years. The draft Broadband Guidelines in this regard refer to evidence that “the historical pattern of the investments made by the existing network investors over the last years in upgrading their broadband infrastructures to provide higher speeds in response to users’ demands was not satisfactory”.

In the view of NLkabel, the language used in paragraph 73 leaves too much discretion to a Member State to determine when existing operators do not respond to users’ demands in a satisfactory manner – contrary to the *Appingedam* decision of the Commission.

Given the established and firm rule that state intervention is not justified in black areas, any exception to this rule should be applied restrictively. This implies that only if a Member State can show that in a traditional black area there is clear consumer demand for specific broadband services which cannot be satisfied by the existing services and without investments in NGA networks, an exception may be justified

provided all other conditions are met. Such would in the view of NLkabel only be the case if the services offered through the existing cable networks form part of a market which, based on competition law principles, can be regarded as a market separate from the market on which services through NGA networks are offered.

State aid should not be available to incumbent telecommunication companies investing in NGA networks

NLkabel wishes to draw the attention of the Commission to the situation that incumbent telecommunication companies invest in the development of NGA networks.

In the view of NLkabel, it should be made clear in the Broadband Guidelines that broadband projects in which national incumbent telecommunication companies are participating, are not eligible for state aid.

Granting state aid in the context of such broadband projects would clearly undermine the incentives of incumbent DSL-operators to upgrade their networks. In accordance with the objectives of the Community regulatory framework for markets for electronic communications networks and services, also incumbent telecommunication companies should keep their incentives to invest in their infrastructures with a view to increase infrastructure competition.

Consequences of violation of stand-still obligation

In view of the specificities of the broadband sector and the potentially very significant distortive effects to competition of networks being rolled-out through unlawful state aid, NLkabel is of the opinion that it is important for all stakeholders involved that further guidance is provided with regard to the consequences of a violation of the stand-still obligation.

In particular, significant problems and uncertainty can arise in case of an establishment of a violation of the stand-still obligation while the relevant broadband network has – partially or entirely – already been rolled-out and is being operated. In such a situation, urgent measures are required to avoid further damage to competition in the market and to ensure that all operators operate on a level playing field as soon as possible.