



**GENERAL DIRECTOR
FOR REGULATORY AFFAIRS**

HT 2009 - 32449

Maroussi, 26 June 2009
Ref.: 381942

To: Mr Cecilio MADERO VILLAREJO
Director
Markets and cases II
Information, Communication and Media
European Commission
B-1049 BRUXELLES

- 1 JUL 2009

Dear Mr Villarejo,

Following the recent publication of the Commissions state aid of the Community Guidelines on State aid and having followed your speech in Istanbul, during the recent ETNO Conference, I hereby take the opportunity to inform you on some issues which regard a Greek government project for FTTH networks as announced in public.

I remain always at your disposal for any additional information on the issue.

Sincerely yours,

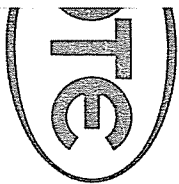
Konstantinos Ploumpis
General Director
for Regulatory Affairs

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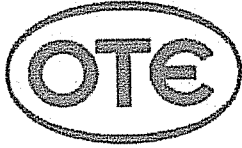


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**Draft letter to the Commission of the European Communities
Consultation on the draft Community Guidelines
for the application of State aid rules in relation to rapid deployment of
broadband networks**

The Greek Case and its specificities

June 2009



With its commitment to make investments, promote innovative solutions and services in the Greek market, OTE S.A. (Hellenic Telecommunications Organization), the incumbent telecommunications provider in Greece, welcomes EC's effort to provide Guidelines in applying the State aid rules of the Treaty to State measures that support the deployment of traditional broadband networks and also the roll-out of Next Generation Access Networks (NGA).

OTE wants to ensure that the state aid rules will not distort existing market competition and decisions based on market principles. In particular, OTE is concerned about the possible impact of the Greek government initiative on the company's plan to roll-out NGA networks in Greece. Being the first national wide plan in the EU for an FTTH technology and proposing a PPI scheme, the project could constitute a law case in a sensitive area with dynamic features.

More precisely, the Greek Ministry of Transport and Communication has announced an initiative to support a Fibre to the Home (FTTH) infrastructure network across Greece that would provide the capability to connect 2 million homes and enterprises in Athens, Thessalonica and 50 more cities throughout Greece. The network will be deployed within 7 years as "Open Access" network with model Optical Fibre, providing at least 100 Mbps per user. The project will be implemented through the Public and Private Sector Ventures and the government will fund a percentage of about 1/3 of the total investment (pending the approval of the European Commission). The complete required investment has been estimated to be in the region of € 2.1 billion.

OTE's main concern is that this initiative clearly comes in contradiction with the terms and conditions under which state aid for a active broadband network was given to Greece under decision 201/2006 of 4/6/2006. This decision approved the Operational Programme of Information Society S.A. Measure 4.2 "Financing of enterprises for the growth of broadband access in the regions of Greece" through which four alternative providers HOL, Forthnet, Tellas & Cyta are being financed to deploy broadband access networks in order to bridge the **digital divide into rural and underserved areas**. The project also covers the so called "grey areas", a term which is also found in the new Commission guidelines. Decision 201/206 applying guidelines for structural funds in Greece established in points 10, 17, 47,50 and 52 the nature of **digital gap** to be covered in Greece.

This precedent covers not only the definition of state aid compatibility with the general interest goals to be covered, but refers, as well, to the proportionality of the measure and the behaviour of private investors in a country with specific broadband access problems due to geographic and financial issues as mentioned in article 87par.3 (98/C 74/06 par. 3.5)

A close look to the applied mathematics of the project and the efficiency gains would reveal the following:

The materialization of this initiative, expected to be completed by the end 2009, will lead the local loop unbundlers to offer services in 2,051 ADSL points of presence in total of 2,201 points of presence of OTE's network, covering 96% of fixed network subscribers, while OTE's current ADSL network



deployment count to 1,359 ADSL points of presence covering 92,98% of fixed network subscribers. Measure 4.2 provides funding to approximately 1,855 PoPs. The incremental gains for rural and underserved areas are non-existent and the efficiency gains cannot be assessed in "grey areas" since regulation through retail minus and price controls over existing incumbent infrastructure is applied.

We therefore would like to draw the Commission's attention to the fact that the so-called "grey areas" have distracted the attention of the European policy objectives (penetration, better speeds) to alternative financing of OLO's through state aid for the construction of supplementary networks.

In Greece, at the end of 2008, more than 36% of broadband lines were provided nationwide through LLU, versus 20% in the end of 2007. If these calculations were to be restricted only in areas where alternative providers have collocated then the shares would change to 49.4% LLU, 46.1% OTE retail and 4.5% WBA. It is therefore infrastructure-based competition that drives the market and not state aid projects that have failed to deliver their goals and the goals of EU.

In that point we support the Commission's position for infrastructure-based competition based on market economy principles.

The Greek initiative is alarming since it covers densely populated areas, areas that an efficient operator would target to deploy NGA networks based on current ADSL penetration. Taking into consideration that in Greece there are no cable networks, while broadband competition is mainly based on providing access to LLU, based on the state aid rules as defined in the draft Guidelines, these highly attractive business-wise areas can be considered as NGA white or grey. OTE is puzzled with the sequence of EU public policy goals (i2010, European recovery plan, MEIP) in setting the pace for broadband access networks and clearly understand that the Greek initiative wouldn't satisfy the criteria set by decision 201/206 which specifically excluded Athens and Thessalonica for state aid funding due to market economy interest.

It must be noted that competition can be effective even if there is no alternative access infrastructure through appropriate regulatory measures targeted for the development of facilities-based competition. It is certain that state aid in high density areas (as demonstrated above from previous application of the EU regional assessment in Greek reality) will distort market competition and will discourage the incentives for investment in NGA networks and it is these areas that the Greek government initiative is planning to cover.

Such a state-aid project undermines also OTE efforts to provide Greek citizens with modern broadband and to further close the remaining white spots for which the Greek state applies for additional aid.

Therefore OTE would welcome clear State Aid rules that would not discourage investments and affect market principles. Based on the above, OTE would like to raise some critical concerns on the application of draft Community Guidelines for the application of State aid rules in relation to the Greek project. In particular:



"NGA divide": The EC uses the term "NGA divide" in order to justify the necessity of State measures without defining the content of this term. In the so-called "first-generation" roll-out of basic traditional networks there were and still are evidences of the existence of a digital divide, since there are areas without broadband coverage. On the contrary, the term "NGA divide" refers to a situation where there *could be* areas with extensive NGA coverage and others without such coverage. Although this situation might be the case in the future, OTE views that in this stage of market development it is hypothetical, as the roll-out of NGA networks is in a very early stage in most of the European countries or furthermore there might be whole countries without NGA networks. In other words the term 'NGA divide' isn't, at least today, understood outside the scope of digital divide and therefore existing broadband goals of social cohesion. In the future, State aid could be justified as a measure of last resort also for NGA roll-out, in exceptional cases where there is and will be in the future no business case for at least one private operator ("NGA white areas").

Moreover this new notion creates great uncertainty since the announced guidelines do not define the relationship between the social goals of "access to information society" or "digital divide" as targets of the structural fund policy¹ and the economic rationale of any new state aid intervention which uses the MEIP principle. The state aid economic rationale is not a structural policy but more a preventing rationale for not distorting competition by advantages given by public authorities in applying these policies and setting their goals. The European Court of Justice has consistently held that measures of State intervention are not characterized by reference to their causes or aims but are defined in relation to their effects². Change of goals in structural policy and regional policy rationale would create a two-headed state intervention (structural policy-NGA policy) and subsequently market distortion, especially for big market investors in the sector, which would be crowded out if states can change their goals based on artificial notions such as "NGA divide". MEIP principle could be assessed on a case by case basis, as successfully done by the Commission, since broadband markets are dynamic and present technology agnostic characteristics such as use of multiple access technologies. The Greek project is based on FTTH technology thereby violating the rule of technological neutrality and thereby specifically excluding for funding integrated operators who would like to propose multiple access platforms to cover the digital gap in Greece, as defined in point 17 of decision 201/2006. From that point of view the "NGA divide" term, applied in the Greek conditions would automatically lead into characterizing the whole country as a white area, thereby distorting the market economy dynamics of investor willing to invest. We would at that point be very much disoriented between two notions that lead to state intervention with different goals, thereby leaving no room for market economy and essentially distorting competition since we would have to compete against the State in the form of either MEIP or pure state policy goals with the burden of the legacy regulation on the older broadband networks.

¹ See Commission Guidelines on criteria and modalities of implementation of structural funds for electronic communications SEC 2003 (895)

² See case 173/73 Italy versus Commission [1974] ECR 709, par 27, case C-480/98 Spain versus Commission [2000] ECR I -8717, par.16



The Greek government project, as it is known at this stage, prescribes that the state will pay the 33% of the necessary investment of a passive network and that in return will acquire the network after 30 years. As no private investor would enter such an agreement, the 30 year period being too long for private shareholders, the project is not compatible with MEIP. Moreover, the fact that the project will be initiated by legislation involving third parties, e.g. municipalities, underlines the exercise of public authority power by the state which is contrary to MEIP.

Definition of "Grey NGA areas": "Grey NGA areas" are defined as areas where one private investor has already deployed a NGA network or may be in a process of deploying it in the next five years and there are no plans by any private investor to deploy a second NGA network in the coming five years. EC suggests that in assessing whether other network investors could deploy additional NGA network in a given area, account should be taken of any existing regulatory or legislative measures that may have lowered barriers for such network deployments (access to ducts, sharing of infrastructures etc). OTE believes that a very detailed analysis is needed to assess the impact of using State aid to fund a duplication of infrastructure, in particular when taking into account that State intervention in this form will distort competitive conditions in the market and consequently stifle incentives for investment. Such an analysis should recognize the fact that the risks of investing in next generation access networks are particularly high, especially when taking into consideration that there is still uncertainty on the demand for the very high bandwidth services, the price consumers are willing to pay, the technologies that can be used to deliver these services and the competition from existing broadband networks (ADSL 2+, etc.). Undoubtedly, the deployment of a competing infrastructure can amplify the risks for the first-mover in particular if at the same time public funding reduces the level of risk for the competing infrastructure. The Commission acknowledges that State intervention in "Grey NGA areas" risks crowding out existing investors and distorting competition and concludes that a more detailed analysis is needed.

According to article 87 jurisprudence any State aid scheme which is considered compatible with the Treaty must improve the way the economic activity is carried out. In determining that, a qualitative and not a quantitative approach should be followed according to the ECJ³. If a state aid scheme conducting in industrial models of perpetual bottlenecks is introduced then that scheme should not be financed due to the fact that it introduces new monopolies in the place of old ones and undermines the liberalization of the sector for the last twenty years.

Greece has geographical specificities, as defined in decision 201/2006 which demand for multi-access schemes in order to narrow the digital gap and therefore integrated solutions of different technologies and not static solidified technologies such as FTTH. In that case monopoly is introduced through the back door. The Greek scheme provides for exclusive rights of way, free of charge for the government project based on some notion of public interest which isn't understood under the

³ See case 47/69 France versus. Commission p.487 par.23



Amsterdam Citynet case law. This advantage would remain non replicable by any other private investor which will have to deal with hundreds of local authorities asking for rights of way in all ranges of prices.

In our view, it would be more appropriate to explicitly state that in such areas(grey areas) State aid is in principle undesirable and cannot be justified and could only be given indirectly in order to lower costs to any interested party for the use of public property exclusively.

In addition, State aid can be used when there are no less distortive measures available (including ex-ante regulation) to reach the same goals. In this context, State aid should not be used as a mean to tackle with competition problems especially when there are already regulatory measures imposed on the market and there are not clear evidences that these measures have failed. Historic evidence of regulation should be taken into consideration regarding the economic analysis of prospective competition not only regarding the pricing levels of existing broadband services but the profitability and risk parameters of market investors investing in new and emerging markets.

Analysis of 'Grey NGA Areas': In paragraph 70 the Guidelines state with regard to "Grey NGA areas" that the Commission will in particular assess whether:

- the overall market conditions are not adequate, by looking, inter alia, into the level of current NGA broadband prices, the type of services offered to residential and business users and the conditions attached thereto and whether there exists, or is likely to appear, demand for new services that cannot be met by the existing NGA network;
- effective network access is not offered to third parties or access conditions (regulated and unregulated access) are not conducive to effective competition; overall entry barriers preclude potential entry by other NGA network investors;
- the NGA network already in place was built on the basis of a privileged use/access to ducts not accessible by or shared with other network operators,
- any measures taken and/or remedies imposed by the competent national regulatory or competition authority with regard to the existing network provider are not able to overcome such problems.

OTE considers that it is questionable how the Commission will be able to assess the aforementioned criteria in areas where NGA networks are announced to be deployed. Such cases according to the definition are characterized as "Grey NGA areas", but broadband prices or services might be still unknown. Furthermore, in this case, it cannot be assessed either the level of competition (i.e. entry barriers, effective network access) or the failure of regulatory measures to overcome competition problems.

The Greek project with its envergure will have to be assessed using the MEIP principles. National plans funded by governments cover national goals of structural nature. An FTTH business plan with 30 years of expected NPV positive couldn't be matched by anybody willing to invest based on



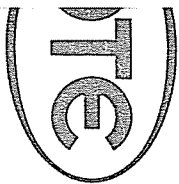
multi access, multi technology scheme and therefore is leading to access monopolies. It is thus also leading to the dismantlement of vertical integrated multi access companies with no real appraisal of effectivity gains for the consumer.

Moreover, the analysis as presented assumes that effective competition in the retail market exists only if there are competing wired infrastructures. Technology wise, the supply of very high speed broadband will be based on a range of different technologies, including fibre, satellite, cable, fixed wireless and mobile wireless. Each technology has its own benefits and costs. The best placed technology will vary depending on factors such as location, customer density, usage and demand for mobility and the technology choice must be left to the market. Technological simplifications could make policy makers reach erroneous conclusions. The Greek project, specifically opting for FTTH technology is not only violating the principle of technological neutrality but also imposing a new state monopoly of fibre (taking into consideration that state projects of national coverage create incontestable markets through barriers to entry) contrary to the efficient use of different technologies. This project is also supplemented with some form of additional state aid demand stimulation which we haven't been able to understand. In that case, prize squeeze cases in Greece will have to differ from the rest of Europe since any state aid to retail segments will have to be assessed accordingly to any competitor trying to achieve market penetration through subsidised prices with the use of multi-access, variable cost technologies.

Bearing the above in mind, we would like to thank you for listening to our propositions and reassure you that we are always at your disposal in case any further information is needed. We wish at that point to underline that any information we have on the Greek Government project is taken from public announcements without any concrete proposal on our hands.

A handwritten signature in black ink, appearing to read 'Konstantinos Ploumpis', is written over a circular stamp or seal.

Konstantinos Ploumpis
General Director
for Regulatory Affairs



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