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## **TDC submission:**

# **Draft Community Guidelines for the application of State Aid rules in relation to rapid deployment of broadband networks**

### **Summary:**

TDC suggests the Commission to reconsider two elements of the draft Guidelines (Draft) which seem to have far-reaching and undesirable consequences for investment and competition

#### **1) Role of state aid and definition of 'underserved' areas**

The proposed definition may lead to wrong decisions regarding state aid in particular since it opens for approval of state aid in cases where an area de facto is well-provisioned not only by so-called 'basic broadband' but as well by NGA. It is worrying that the Draft seems to assume that proper implementation of regulatory provisions can be replaced by artificial state-supported infrastructure.

State-aid in areas already served by so-called 'basic' broadband will inevitably deprive any incentives to private investments in enhancing an existing broadband or deploying a 'proper' NGA due to the risk of being superseded by state aided alternatives.

#### **2) The potential impact on future regulatory decisions regarding broadband markets**

In spite of the Draft's declared intention not to set any precedence with regard to ex-ante regulatory measures the distinction between so-called 'basic' broadband and 'advanced' broadband which is not founded in an economic market analysis will also by its indirect reference to the Recommendation on relevant markets impact future decision on relevant markets. The Draft should not introduce this distinction unless substantiated by a revision of Recommendation as otherwise in the national market decisions this distinction may effectively pave the way for a regulatory exemption regarding access obligation of high-speed networks to the serious detriment of competition as well as to the principle of technology neutrality.

TDC<sup>2</sup> welcomes the overview given in the draft Guidelines (the Draft) of the general Community rules for state aid applied on broadband deployment, particularly with regard to NGA.

The overall objectives of the Draft are very laudable and should be welcomed insofar as they clarify the conditions for the use of state aid in order to provide broadband services and stimulate NGA investments which can:

- Bridge any (potential) digital divide
- Provide equal competitive conditions for all users regardless their location

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- Ensure competitive conditions for all Service Providers by the 'open access' requirements.

While all very positive nevertheless some directions in the draft may at the same time be counterproductive from an economical perspective inter alia due to the potential distortion of both competition and investment.

TDC is in this respect particularly concerned with the following two elements of the draft and we restrict our comments to these two:

### **1. Role of state aid and definition of 'underserved' areas**

The draft explains that state aid for broadband roll-out may be justified in so-called 'grey' areas because

- a) Broadband services qualify as SGEI and
- b) If a number of conditions are met for example 'openness' both in the tendering process and open access to the networks as well as technology neutrality.

Furthermore is a 'grey' area defined as an area not just being 'unserved' but it may be served already but by only one broadband network and accordingly the Draft assumes that by definition a market failure seems to exist as:

*..prices were not affordable compared to the same services offered in other more competitive areas or regions of the country. If in addition, there are only little prospects that third parties would build an alternative infrastructure, the funding of an alternative infrastructure could be an appropriate measure. This [state support] would remedy the absence of infrastructure competition and thus reduce the problems arising from the de facto monopoly position of the incumbent operator (para 40).*

This basic assumption in the definition of 'grey' areas that one ('basic') broadband network is insufficient and potentially may justify 'state aid' is further enhanced in the light of the Draft's NGA part:

*...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. (para 63)*

...

*an area should be considered to be 'NGA grey' where only one NGA network is in place or is being deployed in the coming five years and there are no plans by any operator to deploy a NGA network in the coming [5] years. (para 64)*

Leaving aside the problematic definition of NGA and the distinction between so-called 'basic' broadband and NGA which is discussed below then the definition of 'underserved' areas given in the above quotes and use of this definition as a justification for state aid raises a very fundamental question to the role of state aid.

In fact the Draft opens for a wide and general application of state aid to be used as an active tool in the correction of market failures not only in the case of provision of general services which would not be delivered otherwise (as in the case of 'unserved' areas) but also in instances where the services actually are delivered. The problem in this respect occurs where only one broadband network (typical DSL or coax) already is in place (a 'grey area') as it will by definition be provided by a dominant operator. This operator will presumably fall under the specific regulatory framework that should be applied exactly in order to remedy potential market failures, i.e. if the dominant operator for various reasons does not provide services comparable with service offerings requested by the market then SPs can gain access to the network and thus deliver the services (still leaving aside the NGA issue about possible need for high-speed services as this scenario will also apply in 'grey' areas with at least one NGA operator). However, the Draft assumes that the mandatory regulatory intervention may be insufficient or will not be applied since:

*...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 [market] problems (para 40) .*

The Draft fails fail to explain why it can be assumed to be likely or at least possible that the regulatory measures whose application by the NRA should be monitored by the Commission and by the ERG as well cannot work satisfactorily.

Contrary to the Draft TDC suggests the solution to 'grey areas' where by definition only one broadband (be it NGA or 'basic' ) is present shouldn't be to use state aid to introduce artificial competition but to ensure a proper imple-

mentation of the regulatory measures in order to allow competitive offerings for both residential and business customers.

It is extremely worrying that the Draft seems to assume that proper implementation of regulatory provisions can be replaced by artificial state-supported infrastructure.

Regarding NGA the Draft goes on saying that the use of state aid may be (even more) acceptable for NGA broadband deployment in area 'grey' areas, i.e. areas where again by definition already one NGA is present, and of course in 'white' NGA areas. This raises two sub-issues:

- **Definition of NGA**

NGA appears at the first to be defined by the Draft in very clear manner:

*..a NGA network is further defined as involving: (i) laying fibre to existing street cabinets offering the prospects of downstream bandwidths of a minimum of 40 Mbps and 15 Mbps upstream (compared with today's downstream speeds of a maximum of 8 and 24 Mbps for ADSL and ADSL2+ access technologies, respectively); (ii) upgrading current cable networks to deliver speeds up to and beyond 50 Mbps against the previous maximum speed of 20 Mbps, using the new 'DOCSIS 3.0' cable modem standard, or (iii) connecting newly built homes and offices with fibre connections offering services up to 100 Mbps and beyond (para 48) .*

Thereby the Draft distinguishes NGA from so-called 'basic' or 'first generation' broadband which accordingly must be xDSL based broadband, any wireless broadband as well as coax broadband if not upgraded to DOCSIS 3.0

This definition raises some questions besides the possible impact on the definition of the market for broadband which will be discussed below e.g.:

- Why is a speed threshold of 40Mb applied as NGA qualifier for DSL but with regard to coax only of 20Mb?  
Alone for the reason of technology neutrality and consistency at least the same speed limit should apply regardless the underlying technology platform.

- And more fundamentally: Does a speed limit make sense at all?  
While a speed threshold at first glance may add clarity the Commission's draft NGA Recommendation<sup>3</sup> (cf. Glossary) deliberately abstains from setting such specific speed thresholds:

*"Next Generation Access networks" (NGA) are wired access networks which consist wholly or in part of optical elements and which are capable of delivering broadband access services with enhanced characteristics (such as higher throughput) as compared to those provided over already existing copper networks.*

Such thresholds make little sense in reality as the effective speed is determined by a number of factors which may make a specific capacity less relevant – an approach in line e.g. with the considerations of the Universal Directive<sup>4</sup>.

- A 'basic' broadband service based on DSL is said to reach max. 24 Mb but what is then the definition of broadband networks providing capacity between the 24 Mb and the 40 Mb?  
This 'undefined' gap appears to underline the lack of durability of the proposed distinction and thresholds.
- Is the NGA definition also besides the speed thresholds in line with the principle of technology neutrality?  
While VDSL appears ('*fibre to street cabinets*') to be included in the Draft's NGA definition at the same time the Draft speaks about NGA as being characterised by '*a wholly different network architecture*' (para 61) which together with the exclusion of any wireless options appears to underpin the impression that NGA is associated primarily with FTTH (+DOCSIS 3.0 coax) which is not in line with the principle of technology neutrality

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<sup>3</sup> Draft COMMISSION RECOMMENDATION of [...] on the regulated access to Next Generation Access Networks (NGA), April 09

<sup>4</sup> Although employed in a different context the considerations of the Directive 2002/22/EC Whereas 8 may also have general applicability of value in the present context:

*'The speed of Internet access experienced by a given user may depend on a number of factors including the provider(s) of Internet connectivity as well as the given application for which a connection is being used....For this reason it is not appropriate to mandate a specific data or bit rate at Community level.'*

The proposed definition of NGA may lead to wrong decisions regarding state aid in particular since it opens for approval of state aid in cases where an area de facto is well-provisioned by so-called 'basic broadband' although this may fall below the proposed speed thresholds.

- **Impact on investment**

The Draft states that approval of state aid may happen even in 'black' but indeed in 'grey' or white areas' in order to correct market failures as indicated by insufficient provision of broadband services.

*...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. In the same vein, an area should be considered to be 'NGA grey' where only one NGA network is in place or is being deployed in the coming five years and there are no plans by any operator to deploy a NGA network in the coming 5 years (para 63)*

However, assuming that the objective is not just the roll-out of fibre for the sake of fibre, the implication is that in 'grey' (or for NGA also 'white') area cases where the operator already present cannot identify a customer demand that justifies provision of high(er) speed services then by combing the Draft's NGA definition with the Draft's position on 'grey' or 'white' (NGA) areas another party can by state aid enter the market irrespective of demand or presence of any sound business case to deploy a broadband network effectively offering overcapacity.

Regarding access to the existing broadband network it should still be kept in mind that even if only broadband network is present it will as mentioned above be provided by a dominant operator. Accordingly the appropriate regulatory access obligations on this existing network will enable an SP to get access if a market demand exists.

The further implication of the NGA definition and the Draft's position on 'underserved' areas is that this will inevitably deprive any incentives to private investments in enhancing an existing broadband (although not necessarily to comply with the NGA definition) or deploying a 'proper' NGA due to the risk of being superseded by state aided alternatives.

Finally the approach of the Draft highlights the problems related to the concept of infrastructure competition; as demonstrated by the WIK report<sup>5</sup> on the economies of duplicating infrastructure it makes little or no economical sense to build out 'NGA' networks in parallel in particular outside very densely populated areas or business areas.

Accordingly it may neither be an efficient use of public funding nor welfare enhancing to invest state aid in such a duplication of infrastructure rather than to support the development and use of advanced services which will generate the sufficient demand for a commercially viable build-out of networks adapted to the meet demands of users.

## **2. The potential impact on future regulatory decisions regarding broadband markets**

The Draft introduces a distinction between so-called 'basic' broadband networks and 'advanced' broadband the latter being defined as discussed above by a speed threshold of >40 Mb.

This distinction relies on the assumption that these 'advanced networks' are required to meet the demand of consumers in the area in question.

However, while the Draft states that the distinction between 'basic' and 'advanced' broadband networks is made *'without prejudice to the imposition of ex-ante regulation'* (para 62) the Draft compares at the same time the distinction with the distinction between narrowband (dial-up) and broadband Internet services:

*If today the differences between an area where only narrowband internet is available (dial-up) and an area where broadband exists means that the former is a "white" area, likewise an area that lacks a next generation broadband infrastructure, but may still have one basic broadband infrastructure in place should also be considered a "white" area. (note 54)*

This latter distinction appears however in the Commission Market Recommendation<sup>6</sup> where it plays a significant role in order to define the relevant broadband markets.

<sup>5</sup> WIK-Consult Report Study for the European Competitive Telecommunication Association (ECTA) The Economics of Next Generation Access - Final Report. September 2008

<sup>6</sup> Explanatory memorandum SEC(2007) 1483 final p.29-30

Therefore and irrespective of the declared intention not to impact regulatory decisions the distinction between 'basic' and 'advanced' in the Draft appears to suggest a future regulatory definition of a separate high-speed broadband market characterised by a speed limit of >40Mb.

This 'hidden' market definition appears to be in contradiction with the Commissions findings regarding the use of speed limits as a criterion for market definitions e.g. in the *Opening of Phase II investigation regarding case ES/2008/080*:

*This indicates that the general trend to higher speeds may already be a reality in Spain and that limiting the market to speeds below 30 Mb/s is artificial<sup>7</sup>.*

Here the Commission clearly rejects the attempt to exempt certain types of broadband services for regulatory obligations based on unjustified assumptions about the claimed existence of a separate, clearly distinguishable 'high-speed' market.

The lack of evidence for the Draft's indirect establishment of a separate 'NGA' market which is short of the outcome of a proper market analysis is further emphasised when:

a) At the one hand the Draft as a justification for state aid refers to the actual demand for broadband capacity that is generated by presumably existing services:

*In white NGA areas where one basic broadband network already exist (traditional grey area), the grant of aid for NGA networks is subject to the demonstration by the Member State concerned (i) that the broadband services provided over the said networks are not sufficient to satisfy the needs of citizens and business users in the area in question (also taking into account their eventually planned upgrade), and that (ii) there are no less distortive means (including ex ante regulation) to reach the stated goals. (para 68 – our emphasis)*

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<sup>7</sup> In SG-Greffe 82008) D/206852 p. 8

b) But at the other hand the Draft recognises that the services which the state aided NGA services should enable consumers to benefit from are hypothetical:

*...it should be noted that novel products or services which are not substitutable from both demand and supply side perspectives may emerge and will require broadband speeds in excess of the upper physical limits of basic broadband infrastructure. (para 62- our emphasis)*

and it is not at all clear why an NGA as defined is required to provide these services. Again here as rightly noticed by the Commission in a number of comments on national market decisions the 'high-speed' broadband does not constitute a separate market.

In spite of the Draft's declared intention not to set any precedence with regard to ex-ante regulatory measures it is inevitable that the distinction made by the Draft and the reference to the Recommendation on relevant markets may impact future decision on relevant markets and thus the choice of remedies in a way that eventually in national market decisions could pave the way for acceptance of regulatory exemption of high-speed networks to the serious detriment of competition as well as to the principle of technology neutrality. Such a distinction should thus be founded on proper economical analysis and a revision of the Recommendation

### **Conclusions:**

TDC believes that the market accompanied by appropriate regulatory measures to safeguard competition where needed is best placed to ensure further development of the access networks and to select the most appropriate technologies. In many cases FTTH will be the appropriate technology but the choice should be left to the market and should not be driven by regulatory incentives or state aid which picks one technology at the expense of others. A particular concern arises when state aid appears to be accepted in areas where already services are provided and where state aid appears to play a dubious role as promoter of alternative infrastructure rather ensure the correct application of the regulatory provision in combination with the demand driven development of broadband services.

Furthermore the safeguarding of competition is put at risk when the draft Guidelines in reality opens for a circumvention of the Commission's eco-

nomical approach to market definitions by introducing artificial speeds limits that inevitable will impact future market decisions.

It will be of great importance both for future investment and for a proper competitive development that the Commission reconsiders the draft Guidelines on these critical elements.

In particular TDC will recall the need for a more realistic approach to the likeness or desirability in terms of overall economical efficiency of rolling out duplicating networks is necessary.