

CONSULTATION ON THE COMMISSION'S BROADBAND GUIDELINES ON THE APPLICATION OF EU STATE AID RULES TO PUBLIC FUNDING OF BROADBAND NETWORKS

COMMENTS BY TELECOM ITALIA

Telecom Italia welcomes the opportunity to express its views on the draft “Community Guidelines for the application of State aid rules in relation to rapid deployment of broadband networks”. Telecom Italia is particularly pleased that the Commission has decided to deal with these issues in such a timely manner.

In the following, we will state some considerations on the document put to public consultation, trying to follow as much as possible the order of the document itself.

All comments in the present document, if not explicitly mentioned, are made with specific reference to the issue of Next Generation Access Networks.

The context – General remarks

The development of NGA networks represents a new phase of investment of the telecommunications industry; the aim is to support the development of new services and to strengthen the position of the European Community in the knowledge economy.

To reach these objectives, it is essential that the deployment of NGA networks is done in a reasonable time-frame, reducing as much as possible the areas of exclusion from these services, as they are essential for the development of the whole economy.

In fact, whilst we are debating exclusions from NGA Networks and services, we are still dealing with exclusions from the basic broadband network and services, since in no Member State a complete coverage of basic broadband networks has been achieved, despite the fact that incremental costs for the deployment of basic broadband networks are lower than those of NGAN and incremental revenues are higher.

Telecom Italia considers that in order to reach this ambitious objective, it is necessary that all market players share (proportionally) the cost of this major investment, helped by public support, if and where necessary.

This is a unique opportunity to gather all market forces on a project that can have relevant welfare enhancing impacts on the whole economy, whilst achieving at the same time a more competitive market structure.

Clearly, to obtain a timely coverage with NGA networks, some public help can be needed in areas that may not be addressed by private investments, or may be addressed only in the long term. The experience in NGA development in Europe in the last five years holds lessons for the future: so far, NGA deployment has been slow and patchy, and profitability is low.

In addition, the level of private investment is closely related to the predictability of the regulatory environment which should not hinder an adequate return from investment in NGA over the lifetime of the assets. To this end, it is important that the forthcoming “Commission Recommendation on regulated access to Next Generation Access Networks” establishes a reasonable framework able to promote private investments while maintaining a competitive environment.

Telecom Italia also believes that the guidelines and the recommendation should be harmonised in order to achieve a consistent framework both from a competition and a regulatory point of view. In particular, Telecom Italia appreciates that the guidelines develop a competition framework for the assessment of State Aids essentially based on a geographic evaluation of competition. Accordingly, Telecom Italia invites the Commission to follow a similar geographic approach in shaping the future regulatory framework for the transition towards NGN.

We consider that the above should duly be taken into account in these guidelines, to provide a clear guidance on how the public sector may concur in funding the necessary investment to deploy NGAN without distorting competition.

Internationally, different answers have been given to this issue. In Asian economies the development of new infrastructures has been almost entirely done through public funds, while in the U.S.A this development has until now been undertaken under the sole responsibility of the private sector, through an approach that substantially forbears from regulation on these newly built assets.

Telecom Italia considers that Europe cannot follow any of these directions, since an exclusive public intervention in a private sector is not coherent with the European approach and, at the same time, competition is one of the essential pillars of the European Treaty.

This is the reason why Telecom Italia considers that the development of NGAN can only be achieved if the right balance is found between public intervention and regulation.

In addition to this, it is also necessary to consider that new networks require a new approach, including on the State Aid side, and not only a mere adaptation of the previous approach: for the first time from the opening of the market to competition, the issue does not rest with existing networks, but deals with the framework for investment in new infrastructures, that are different and separate from the existing ones.

Within this new perspective, we have to consider that the large majority of the European regions that are today considered “black” or “grey” from a basic broadband point of view, are “white” if we take a NGAN perspective, even in a time horizon of 5 years.

The digital divide concept evolves with time. Today, digital divide relates to ensuring the connection to the network of a small percentage of citizens (between 5 and 15%, depending on the evolution of the countries). But if we want to measure exclusion on the basis of NGAN parameters, we have more than 98% of citizens that are presently excluded, and within 5 years this percentage should remain higher than 50%.

Therefore there is no close link between basic broadband coverage and NGAN coverage. Areas that, as of today, can be classified as “black” or “grey” for basic broadband, are presently “white” from a NGAN perspective, and will probably stay “white” for a long time.

In conclusion, digital divide is a dynamic concept: in a few years, basic broadband will no longer suffice if the EU wants to remain competitive. Thus, reducing or eliminating the “traditional” digital divide should not divert us from our overall aim to extend NGA rapidly extensively.

Moreover, in each country we will have different technologies used for the development of NGAN, from VDSL to FTTH, depending on the characteristics of the geographic area, its density and its pattern of demand.

For this reason the guidelines should provide general criteria that are technologically neutral, refraining from favouring any specific technical choice, since market players are much better placed to select the best technical solution to be adopted taking into account the specificity of the market addressed.

Telecom Italia considers that the draft guidelines, that are welcomed and appreciated in their overall approach, should take into account the complexity of the overall situation, the high uncertainty of the return on investments and the need for a more tailored approach.

Operators and governments would not invest billion of Euros in NGAs to provide the same services which can be delivered over legacy (copper based) networks. NGA deployment responds to different customer needs. NGA will enable the provision of new services and applications.

So, the compatibility of State measures supporting NGA deployment should be evaluated irrespective of the level of deployment of traditional broadband networks. The specificities and the importance to national economies of NGAs are such that the compatibility assessment of State measures aimed at promoting their deployment shall be judged on its own merits and not on the basis of the level of deployment and the state of competition of legacy networks.

Whereas the principles underlying the compatibility of NGA State measures shall be coherent with those established for legacy broadband networks, the actual rules and tests set to support the Commission decision process should not necessarily be the same.

Detailed remarks follow.

1. NGA Networks

1.1. Aim and scope of the State Aid

On the basis of current experience, some general considerations should be made to avoid misunderstandings on the funding of the development of NGA networks.

Two main cases may occur:

- the deployment of NGA networks is based on the completion and/or enlargement of networks that partially exist;
- the roll-out of NGA networks involves the creation of completely new infrastructures.

As State Aid can be applied to both cases, the guidelines should in principle include both.

Likewise, due to high investments, in the few territories where the roll-out of NGA network is initiating, to reduce the overall costs operators often share part of the network (or of the civil works). In this case, State support should be envisaged, such as by way of technical support.

Paragraph 56 of the guidelines deals with Public Authorities that may decide to undertake some civil works, clarifying that when these civil works are not “industry or sector specific” they fall outside the scope of Art 87 (1).

While we agree with this definition, it must be clear that in many cases civil works undertaken may be useful for some categories of public utilities and not for others because of their technical characteristics, or simply because making a multipurpose investment in ducts may not be necessary (for instance because water utilities may not need new ducts, while other public utilities may need them). In these cases, public intervention should not be forbidden *per se*, but should be analysed within the framework of Art. 87.

1.2. Guaranteeing the technological neutrality of NGAN definition

Paragraph 48 of the draft guidelines provides a definition of NGAN inconsistent with the principle of technological neutrality. Whatever the definition of NGAN which will be used, it must be independent of the technology to provide the service.

As a principle, we support a definition of NGAN based on the minimum downstream (25 Mbit/s) and upstream (2 Mbit/s) bandwidth provided to the end-user. All Access Networks that constantly support these minimum speeds can be defined as NGAN. This minimum amount of bandwidth (referred to the FTTCab architecture) must be provided from the customer premises to the transport network and must be available to all potential customers in a given area.

This definition may also encompass any wireless technology, provided that the performances offered to customers are comparable with those ensured by NGAN fixed offers in terms of capillarity, quality and bandwidth supported by fiber backhauling.

2. The distinction between white, grey and black areas for NGA networks

2.1. General remarks on the definition of white, grey and black areas

The proposed definitions of “White NGA Area”, “Grey NGA Area” and “Black NGA Areas” closely mirror the definition adopted for evaluating the compatibility of State measures to support the deployment of legacy broadband network. However, here, the criterion puts much more emphasis on forward-looking considerations.

This is why, even if we share the approach proposed by the Commission, we believe that more flexibility should be given to the evaluation timeframe. This specific issue will be dealt in more detail in the following point 2.2.

As for the definition of the area, as already argued Telecom Italia believes that there is no pre-defined connection between the traditional broadband areas and the NGA ones, and therefore the assessment for the evaluation of the “colour” of an NGN area should be made only by taking into account the specific situation of that area with respect to the prospective deployment of an ultra-broadband network, as defined in par. 1.2. above.

In particular, additional attention must be given to some special cases:

1. the presence of Wi-fi, Wi-Max, or other wireless solutions, is not *per se* a condition to identify an area as grey or black: wireless solutions should be considered as an NGN access only if they are able to provide a continuous access with minimum bandwidth to all customers, in every period of the day/year, as defined in par. 1.2. above;
2. the presence (or planned deployment) of NGN networks which are not open to other operators, i.e. when the roll out of the infrastructure is deemed to be exclusive, with no regulatory constraints that grant access to competitors. In this case, we believe that the area should not be considered as grey, but rather white as the (already low) incentives to invest in that specific area are completely nullified by the consideration that there is already a market pre-emption without the potentiality for competition in whatsoever form to take place. In our view, this situation does not constitute a grey area.

2.2. The time frame for assessing the “colour” of an area

As already mentioned, in order to evaluate whether an area should be defined as white, grey or black, the Commission proposes a forward-looking approach. Given the current state of NGA access throughout Europe, we share the Commission’s approach.

However, Telecom Italia does not share the idea of a single, pre-defined and fixed, period to identify areas of action, as proposed by the Commission in Paragraphs 63, 64, 65.

Firstly, at this moment, the global crisis of the economy makes it impossible for companies to develop credible long term business plans; hopefully, in a couple of years the growth of the economy can change this situation and lead to a renewed boost in investments.

Secondly, in a rapidly evolving world, a pre-defined fixed time-frame could be detrimental to a correct evaluation, as on the one hand, market failures that should be addressed by means of State Aid risk to be ignored, while on the other hand State Aids may address false market failures, thus creating an unacceptable crowding out effect on private investments in specific areas.

In addition, a predefined time-frame could give birth to a number of opportunistic behaviours by operators either to prevent State Aids in a specific area (declaring an inexistent “willingness to invest”) or to promote them (by lack of any declaration).

As a result of these considerations, we propose a multivariate approach based on the identification of two thresholds, rather than one, as well as a case by case approach for those areas that are between the two thresholds.

The suggested mechanism can be summarised as follows, for each area:

- a) If investments are foreseen in the next three years: there is no market failure and thus no need for State Aids.

- b) If investments are foreseen in a period between three to five years: evaluation will be made on a case-by-case basis. State Aids could be allowed in order to accelerate investments, according to a more detailed assessment established by the guidelines.
- c) If investments are foreseen over a longer than five years period: there is a market failure and State Aids are a necessary tool.

In conclusion, Telecom Italia welcomes the idea of a perspective evaluation in a certain time-frame, but believes that five years should be considered as a maximum threshold, and the main driver for the analysis should be the evaluation of whether there is a perspective market failure. We invite the Commission to further elaborate on this analysis, and to define rules that can allow the necessary flexibility, where required, for this complex issue.

3. The specific case of existing (basic broadband) black areas: some further safeguards

The Commission, in the case of NGA State aid in basic broadband black areas, proposes to introduce a series of further safeguards to limit distortion of competition. These additional safeguards range from open access obligation to passive and active infrastructure, network architecture discrimination (the guidelines favour point to point or multi-fibre architectures), *a priori* exclusion of State aid grant to cover last mile access segment. The latter safeguard appears to be a contradiction in terms since the Commission seems to ban State aid granted to replace the copper loop which is the essential feature (representing 80% of total financial disbursement) of the NGAs.

Telecom Italia believes that the proposed additional safeguards for NGA State aid in basic broadband black areas are not proportional to the pursued aim, i.e. avoiding distortion of competition in the provision of traditional broadband services. The costs for the deployment of an NGA network can be very high also in broadband black areas, and thus the proposed additional constraints on the NGA state aid measures may unduly reduce investments incentives. In fact, the decision whether to upgrade the existing broadband access to a NGN access is mainly driven by the expected returns on investment, and these evaluations (for any given area) are independent from the presence of competition in the traditional broadband.

Accordingly, the following comments and amendments are proposed:

3.1. Avoiding obligations mandating access network topology and architecture

The third bullet of § 74 suggests that, only in the case of fibre-based networks, "...the network benefitting from State Aid should support to the extent that this is feasible a point-to-point, "multiple fibre" architecture or an architecture that can be unbundled. Such architecture can support all different types of network access that operators may seek, and offer end-users the whole range of services that a fibre network can support. ..."

Firstly, we consider that this restriction is not technologically neutral, insofar as it does not apply to other technologies that may benefit from State Aid, therefore disadvantaging fibre-based networks compared to networks based on other technologies.

Secondly, we suggest that no specific network topology or architectural solution should be mandated or encouraged by NRAs.

The specific choice of technology by an operator willing to serve a specific area or customer segment will be influenced by expected demand, its concentration, duct space availability, and

network topology (such as the number of street cabinets, local loop length, etc). These factors will vary among Member States and among different areas within each country, and may make a certain technology or architecture more efficient in some, but not in others. Indeed, this is already apparent right now: existing broadband services (such as teleconferencing, telepresence, IP-TV, video, gaming, etc.) are being delivered via different types of networks, copper-based DSL, cable systems, broadband wireless, and mobile. In some geographical zones market forces have already resulted in the deployment of alternative broadband networks.

In order to achieve the ambitious target of getting everybody connected to broadband services as soon as possible, the guidelines should recognize that a variety of technologies can and will be used. It should be stressed that technological choice is a key competitive parameter, and there are certainly no one-size-fits-all solutions.

Thus, as also already stated here-above, the guidelines should define NGA networks in a technologically-neutral way, recognising that they may be based on a variety technologies, fixed and/or wireless. The guidelines should be based on the view that the market knows best where and when to adopt each technology, and should refrain from favouring – e.g. – FTTH P2P over G-PON or FTTC technologies, nor should it favour multi-fibre over other types of approaches, such as sharing mono-fibre or co-operative network roll-out based on a single network. All such solutions have their respective pros and cons which should be evaluated and decided on solely by the market.

We consider that a general approach should be followed and that the guidelines should indicate a general objective, i.e. that whatever network should benefit from State Aid, the technical solution implemented must guarantee that it is possible to have competition among different market players in order to provide services to end users, preferably based on network competition.

3.2. General conditions to limit distortions of competition - Proposal for amendments

3.2.1. Open tender process

In the case of State Aid for broadband projects, the open tender approach should be managed by Local Authorities; in the case of the NGA networks that are of strategic importance for the development of the Countries, the open tenders should be managed by the Central Authorities to ensure a balanced development.

3.2.2. Claw – back mechanism to avoid over-compensation

There is no uniformity in the application of the claw-back mechanism; it would be therefore appropriate to define a specific methodology, for the repayment of over-compensation, to be applied to all projects to ensure the same conditions and a transparent process.