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Dear Greffe,

Draft Guidelines for Application of State Aid in Relation to Rapid Deployment of Broadband Networks

My authorities welcome the opportunity to comment on the draft guidelines for the application of State aid in relation to rapid deployment of broadband networks. They agree that broadband connectivity is a significant issue in the economic development of all parts of the economy and to enhance social cohesion.

They support the Commission move to develop clear guidelines for the assessment of broadband notifications and the approach you have taken in codifying and expanding the principles developed in case practice.

They also support the application of different assessment criteria for different levels of existing, or planned, broadband provision and consider that the use of the white, grey and black method of categorisation provides a useful assessment mechanism. However they take the view that this categorisation may be difficult to apply where a notification covers an area with a mixture of white, grey and black provision. It would therefore be useful to have the Commission's views on support in mixed areas or preferably an acknowledgement that guidelines will be applied flexibly in order to take account the specific circumstances of each notification.

My authorities take the view that the precise definition of NGA in paragraph 48 of the paper is impractical and will prove to be too restrictive. We support the statement in paragraph 5 of the paper that the primary objective of State aid control in the field of broadband is to ensure that "State aid measures will result in a high level of broadband coverage and penetration, or in a more timely manner, than would occur without the aid and to ensure that the positive effects outweigh the negative effects in terms of distortion of competition". We therefore consider that any definition of NGA according to the speed should be included only as an example and that each notification should be considered on its merits according to the objective in paragraph



5. Further comments on the issues arising from the NGA definition in paragraph 48 are included in the details comments below.

My authorities also note that the draft guidelines are restricted to supply side funding and ask you consider the inclusion of guidance on demand side support.

Paragraphs 36/45

These paragraphs apply to support for basic broadband and NGA in white areas and include a reference to market plans in "the near future". The term "the near future" is defined in relation to NGA measures in paragraph 63 as being 5 years but there does not appear to a corresponding reference in relation to the timescale for basic broadband.

We also have concerns that the proposed 5 year timescale is too long, that it will be difficult to obtain evidence of company plans for a five year period and ask that you consider a 2/3 year period.

Paragraph 37

If the definition of NGA remains at 40 Mbps then this section needs to be amended in order to deal with interventions into basic black areas which fall below that level of service but which provide an uplift to an existing provision which does not meet demand and which cannot be provided by the market. See comments for paragraph 48

Paragraph 45c. Best Economic Offer.

We have concerns that a requirement to demonstrate acceptance of the "best economic offer" may not give sufficient weight to criteria such as the technical solution and future proofing. We propose using the term "most economically advantageous tender" which is used the procurement directives and is well defined. If the current wording is retained we propose that the word "similar" be replaced with "identical".

It would also be useful have clarification on the type of information that will be necessary to demonstrate a reduction in information asymmetry.

45e Use of Existing Infrastructure

An open tender procedure will serve to encourage bidders with recourse to existing infrastructure. However it is considered too prescriptive at the tender stage to suggest that bidders without recourse to infrastructure should request access from infrastructure owners. This condition would result in a reduction of bids and a reduction in the options available to funding authorities.



This paragraph is linked to 45b and if retained should be combined with it.

45f Wholesale access.

We agree with the requirement to provide access but it is unclear why a period of 7 years is suggested. If the wholesale access is required in order to reduce the impact on competitors it is unclear why that impact will disappear after 7 years? It would leave the beneficiary free to determine access at the end of the period.

Paragraph 47

The definition of NGA networks is narrowly defined although the reasons for excluding satellite and mobile networks are explained in footnote 44. However as a result there appears to be a conflict with approach in 45d which applies to both basic and NGA notifications and where there is a requirement to demonstrate that measures are technology neutral. If NGA is considered to have different technology neutrality issues to basic broadband then this should be set out in section 3 which details the NGA assessment process.

Paragraph 48

The definition of NGA is considered to be too restrictive. NGA definition is a key issue because the subsequent criteria for the assessment of NGA measures from paragraphs 66 onwards are predicated on the difference between NGA and a basic service.

The split between what constitutes basic broadband and NGA is arbitrary and will not be appropriate in all circumstances. It would be better if the speeds shown were provided only as an example, as NGA should be about service delivery capability rather than specific technical characteristics or speed levels. As it stands the definition would make it difficult to include technological solutions with speeds below 40 Mbps that could nevertheless deliver services that consumers and businesses need and that are not likely to be delivered by the market alone. See comments on Paragraph 37 above.

In line with the objectives set out in paragraph 5 we therefore propose that each measure should be assessed on its merits and may be considered compatible where it provides a significant uplift to the prevailing service and results in a higher level of coverage and penetration without adversely distorting competition.

My authorities are aware that DG Infosoc is developing a draft recommendation on regulated access to NGA networks and that this includes a more generic definition of NGA. For the purposes of clarity Commission definitions of NGA need to be as closely aligned as possible.

The UK Regulatory body (NRA) considers that the Commission should not distinguish between current and next generation technologies. There should be consistency with the precedents set in the recommendation on relevant product and



service markets (2007/879/EC) and associated explanatory memorandum, and in the Commission letters sent in response to national regulatory notifications, made under the EU electronic communications regulatory framework. Specifically, the Commission has stated in the explanatory memorandum that NRAs should analyse, on a case by case, the substitutability of services and in a number of notification response letters has concluded that it considers that FttC based services are substitutable with basic broadband services. This further suggests the need to assess aid notifications on the basis of the improvement that they make on existing services rather than on an arbitrary definition based on speed of service.

We nonetheless we agree that main focus for NGA support should be in white NGA areas and that measures in other areas should be subject to a more detailed assessment on the grounds that they may discourage private investment. Similarly the scenario envisaged in paragraphs 51/52 to support measures in economically disadvantaged urban areas may address cohesion objectives but may also risk discouraging investment by the market.

Paragraphs 63, 64 & 65

These paragraphs which define NGA white, grey and black areas respectively include a requirement to demonstrate whether networks will be operational in the next 5 years. It would be helpful to have further clarification on the type of the evidence necessary to demonstrate this. It also considered that it may be difficult to find evidence for a five period and suggest that a period of 2/3 years would be more realistic.

Paragraph 67

This paragraph specifically covers support for NGA in both white NGA and white basic areas but adds, in the final sentence, "or for areas where existing broadband operators consider it unprofitable to deploy NGA networks". It would be helpful to have clarification that this addition refers to economically disadvantaged areas as detailed in paragraphs 51/52. It may otherwise be interpreted as an option to support NGA in basic grey or black areas.

Paragraph 68

This paragraph states that measures to support NGA into grey basic area states will be subject to an assessment based on whether or not the current provider satisfies the needs of users. However there seems to be no requirement for measures to support NGA in a basic black area to satisfy this criteria. Paragraph 73 which covers support for NGA in a basic black area states only that MS must show

- that existing basic providers don't plan to invest in NGA in the next 5 years –
- that the pattern of past investment in introducing upgrades has not been



satisfactory

but perhaps there should also be a requirement to assess whether the current provision meets needs of users.

Paragraph 71

It is accepted that intervention in an area with existing NGA provision is likely to distort the market. However given the speed of technological developments in the sector the Commission may wish to consider the conditions under which there might be an acceptable market failure if supply did not meet demand and the market was unable to provide a solution without support.

Paragraphs 72/73

These paragraphs deal with white NGA into a black basic area and should follow paragraphs 67/68 which deal with white NGA into white and grey basic areas. Paragraphs 72/73 should therefore be moved to section 3.4.1 to follow paragraphs 67/68.

Paragraph 73.

It would be useful to have information on the kind of detail necessary to demonstrate an unsatisfactory historical pattern of investment.

Paragraph 74 1st bullet

As for para 45f we agree that wholesale access should be guaranteed but it is unclear why a period of 7 years is suggested.

Paragraph 74 2nd bullet

With regard to the reference that NRAs may impose third party access the UK NRA has pointed out that the current draft NGA paper on regulated access attempts to balance competition and investment by recommending that there should be less regulation of NGA markets, if certain conditions are met as a means to incentivise investment. They have asked that the Commission reconcile the seemingly different approaches in the two documents.

Paragraph 74 4th bullet.

The third sentence (starting "moreover") appears to cover a separate issue to the earlier part of the bullet. The 2nd part is about wholesale access and should be



included as a separate bullet point and should follow bullet point 1 which also covers wholesale access. In this section it is unclear how the requirement for wholesale access to a privately owned network "for a longer period of time i.e. 10 years" squares with the first bullet point in para 74 which states that access should be provided for 7 years.

The Treaty prohibits differentiation based on form of ownership and so the proposed differences in the treatment of publicly and privately owned infrastructure should be eliminated.

Yours sincerely,

A handwritten signature in blue ink that reads "Rebecca Ireland".

Rebecca Ireland

Policy Support Officer, Telecoms, Research, State Aid, Information Society