Cable Europe Response to the Commission’s consultation on the Revision of the Community Guidelines for the application of State aid rules in relation to rapid deployment of broadband networks

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INTRODUCTION

Cable Europe would like to thank the Commission for giving us the opportunity to respond to this consultation on the Revision of the Community Guidelines for the application of State aid rules to rapid deployment of broadband networks.

We understand that the Commission is committed to review, and potentially revise these Guidelines within the three years of their publication, i.e. by 30 September 2012. We are concerned the Commission might be minded to amend the 2009 Guidelines on the basis that there have been few State Aid projects approved under the Guidelines. Cable Europe would reject such a suggestion. Given the short time between the publication of the Guidelines and the date of this review only one full year can be assessed, 2010, which coincides with the first year of the debt crisis. This should be borne in mind when considering the impact. In addition the success of the Guidelines should not be measured by the number of projects approved underneath them.

Indeed Cable Europe suggests that it is more important that any amendment to the Guidelines reiterates the fact that public funds should only be employed as a ‘last resort’ in circumstances in which it has been categorically proven that the market will not deliver the desired outcomes of its own accord.

Given the economic climate in which all Member States find themselves it is important that state funds are not used inappropriately, unnecessarily, or in a manner that distorts competition and undermines private investment. This is particularly important at this time of extreme pressure on public finances and also pressure on private investors.

Despite the economic conditions which Member States are experiencing, it is important to note that the cable industry has continued to grow during the period from 2009 onwards. At the end of 2010 about 24m households across Europe subscribed to broadband cable internet. A total of 112m households
are in technical footprint of European cable operators and can opt to subscribe to the TV, broadband and telephony packages offered by cable operators. This technical reach equals to 50% of households in the European Union.

Also, the implementation of DOCSIS 3.0 is currently in full swing across Europe and is proceeding much faster than cable operators expected just a year ago. By the end of 2013, almost all European Cable networks will be fully set to the DOCSIS 3.0 standard, enabling their homes to get access to 100-200 Mbps bandwidth and more. DOCSIS 3.0 enables cable operators to adapt to their customers’ ever-increasing need for additional bandwidth capacity. The accelerated rollout of DOCSIS 3.0 underlines the opportunity European cable operators have identified in becoming the lead provider of very high speed internet.

Experience has shown that investment by Cable operators has been the catalyst for investment by other operators – notably incumbents. Indeed, there is demonstrable evidence of Cable operators having pioneered the deployment of successive generations of internet access services, which has stimulated reactive investment by competing providers who have responded by investing in similar services and network upgrades.

Given the developments in Cable operators’ capabilities, and previous experience of counter-cyclic investment by competing providers, we have every expectation that the incumbents within the cable footprint will invest in equivalent upgrades to their networks with private money – indeed there is already significant evidence of this having commenced. Accordingly, there is no need for public funding in these areas, which cover 50% of households in the European Union.
Given the continuing network development by cable operators and the spur to competition that this is providing to incumbents, Cable Europe sees it as imperative that any review of the State Aid Guidelines should not undermine these investments. The fundamental provision that State Aid should be a feature of last resort in broadband markets should be retained. In our view any revision to the Guidelines should make clear that a full, comprehensive and transparent assessment of any prospective use of public funds to deploy broadband services is a mandatory prerequisite of any such intended application, be that as State aid, or via alternative instruments such as the Market Economic Investor Principle (MEIP) or Service of General Economic Interest (SGEI). Private and Public investments are completely different processes and private and public ownerships can therefore never be the same. The MEIP concept is an anomaly in the State Aid Guidelines. The notion of MEIP has only been applied once in the Amsterdam Citynet case in 2007 and therefore is not based on any thorough jurisprudence, economic analysis or public debate. One can also doubt whether a public body can ever act as a market investor, because the notion that a public body cannot go bankrupt is the evidence that the risk profile of a public body is always lower compared to a private company. The financial-economic position of a network operator that is funded by a public body is always better compared to a network operator that is funded by a private company. This is why a true level playing field based on the notion of MEIP can never be achieved. We therefore consider it necessary for the Commission to tighten the criteria against which a project’s conformity with the MEIP or qualification as a SGEI will be assessed, and to ensure that there is no scope for interpretation of, or deviation from these.

The Guidelines should in general set out that State funds should not be used for projects that overbuild equivalent existing networks, duplicate comparable solutions that already exist or are planned, or to intervene in competitive markets. Nor should the application of public funds be approved
in instances where there is an alleged demand that is not being met, but such demand is unproven, spurious or speculative.

Finally, Cable Europe believes that all EU policies relating to broadband should be aligned. The Digital Agenda for Europe set key targets for the next decade. To support the broadband strategy, three complementary measures were proposed by the Commission: the Broadband Communication, which outlines how to best encourage public and private investment in ultra high speed networks, the NGA Recommendation which intends to provide guidelines to regulators and legal certainty to operators to incentivize investment, and the radio spectrum policy programme which intends to ensure availability of spectrum for wireless broadband deployment.

All these policies suggest that public investment should not crowd out private investment and that public resources should only be targeted towards less densely populated areas. Cable Europe believes that in highly populated areas there is an adequate mix of technologies including cable which will help to achieve the Digital Agenda targets. The utilization of public funds in cable's European footprint is likely to be a damaging, distortive and inappropriate use of public funds. In remote areas however where such a mix of technologies including cable does not exist there may well be a good case to make for public support.

1. General questions

1.1. Have you been involved in projects of public funding for broadband deployment (for example, as aid recipient, access seeker, customer of the subsidised network, etc.)? If yes, please highlight what you consider to be the main achievements, challenges and issues which would be relevant in relation to the revision of the Guidelines. If you are familiar with more State aid Broadband projects, please highlight what you consider the main strengths and weaknesses of the different projects.

- Apart from very isolated cases, cable companies have to date not sought public funding for the roll out of broadband networks. However, a number of initiatives are underway in certain Member States whereby cable operators are contemplating participation in publicly funded projects. The extent to which cable operators might ultimately play a role in such projects will depend on the conditions applying to the availability and use of any subsidised network. The existence of a level playing field/equivalent opportunities will be a key factor in these decisions – and the absence of any advantage conferred on incumbent operators will be a critical requirement.

1.2. What is your assessment of the Commission's policy in the field of State aid to broadband in general? In your view, were the Guidelines able to achieve the Commission's policy objectives as detailed in section 2.2 of the consultation document? In your view, did the Guidelines strike the right balance between promoting investment in basic broadband and NGA networks and limiting the distortion of competition arising from public intervention?
We understand that, since the publication of the Guidelines, there have been notifications of broadband projects essentially for white areas where public investment is necessary and is not crowding out private investment. We applaud these developments.

What we are concerned about is that the Guidelines might be rewritten to encourage public investment in grey areas where one network might be already in place and delivering services, despite the fact that the existence of one network is likely to stimulate further competition.

Moreover, we are concerned at the potential attempts to apply public funds in black areas on the basis of a spurious differentiation of capability or service offering above and beyond the capabilities of the existing networks in those areas (for example, a claimed demand for ultra high speed (e.g. GBit/s) products, a perceived need to support services that require such high speeds or a desire to create a ‘flagship’ network with capabilities far in excess of proven demand).

From a general perspective, Cable Europe would like to highlight that a prerequisite for the success of the Guidelines is the attention to the Guidelines by public authorities and publicly-owned companies, i.e. private telecoms companies which are daughters of public companies. Simply stated, for the Guidelines to have their expected impact, they must be applied. Hence, the assessment of the occurrence or absence of state aid and the notification of state aid cases to the Commission by public authorities and publicly-owned companies is key. Cable Europe fears that there is a large number of “grey zone cases” – public investments which are not assessed at all from a state aid perspective (and which thus fall outside the application of the Guidelines), public investments which would be deemed state aid cases if they were comprehensively assessed but which are not analyzed in a proper manner (and which thus fall outside the application of the Guidelines) and public investments which are assessed as state aid cases but are not, for different reasons, notified to the Commission by the responsible public authority (and which thus also fall outside the application of the Guidelines). According to Cable Europe, it is of great importance that the Guidelines clarify how and by what party the absence of state aid must be demonstrated and substantiated.

Public investments by municipalities and regional governments in broadband projects in grey of black areas can for instance be observed in the Netherlands and in Sweden. Several Dutch municipalities and provinces have recently invested or considered investing in an NGA network, even though cable operators in the Netherlands have rolled out DOCSIS 3.0 to 97% of Dutch homes and the incumbent invests heavily in its own NGN. Public investments in these areas come with significant financial risks: both the municipalities of Amsterdam and Almere as well as several housing corporations saw large parts of their investments in an NGA go up in smoke. Public investment is sometimes concealed behind obscure procedures. One example can be found in the Dutch municipality of Heeze-Leende, where the local government guarantees a bank loan to a cooperation that will roll out an NGN, parallel to the existing DOCSIS 3.0 enabled cable network and parallel to plans by the incumbent to use private funds to upgrade the DSL-network to a FttH-network. If return on investment is below expectations and the cooperation fails to repay the lent money to the bank, the
municipality will in turn pay the bank and thereby earn ownership of the unprofitable NGN. There have also been cases where municipalities have organised and financed marketing campaigns, generating subscribers exclusively for the incumbent’s NGN. In Sweden, the Swedish municipalities have been very active on the broadband market since the early 1990s. Municipal involvement has been, and still is, realized in mainly two ways; as investments in urban broadband networks and as investments in in-building broadband networks. The urban broadband networks are normally owned and operated by municipal city network companies, while the in-building broadband networks are owned by municipal housing companies. Estimates from the Swedish Association of Local Authorities and Regions, the Swedish Urban Network Association and the Swedish Association of Public Housing Companies show that municipal investments in broadband networks have amounted to circa EUR 2,1 billion up to 2010. These investments have to a very significant degree been made, and still are being made, in ‘black areas’ – in urban areas and city centers where several fixed broadband networks, such as cable, xDSL and fibre-LAN, already exist. What should be highlighted is that none of the municipal investment projects have been notified to the Commission.

- Cable Europe would also like to highlight, as a general comment and with reference to paragraph 4 of the Guidelines, that state aid measures aim at correcting market failures and/or at securing that affordable and competitive broadband services are on offer in all parts of the Member States. The ex ante regulation carried out by Member States’ NRAs in accordance with the EU regulatory framework for electronic communications has the same objectives. While national NRAs are vested with dedicated resources and competence and have pre-defined and harmonized regulatory tools at their disposal, the various public bodies normally engaged in investments on the broadband market, such as municipal energy and housing companies, often lack both insights in the broadband market and regulatory competence. In a system in which both NRAs and numerous public bodies engage in the correction of the same market failures on the basis of different market analyses, different methodologies, different competences and with different tools of correction, there is a great risk of regulatory failures, distortions of market mechanisms and mismanagement of public funds, all of which runs contrary to the objectives of both the Commission’s state aid policies and the EU regulatory framework for electronic communications. According to Cable Europe, there must be a greater coordination between state aid measures on the broadband market and the ex ante regulation carried out by Member States’ NRAs. It should be clarified in the Guidelines that state aid measures should only be used when ex ante regulation has not reached its desirable results, and that the responsibility for such an assessment must rest upon the NRAs. For the same reasons, the role of NRAs in state aid measures must be strengthened, not least in the assessments of the potential need for state aid measures and in the mapping and coverage analyses.

- Finally, Cable Europe believes it is important that the Guidelines clearly mention a caveat that public funds must be used in an appropriate way and therefore the spending clearly justified in order to avoid any distortive or wasteful use.
1.3. In your view, what are the main technological, market and regulatory developments in this field since 2009 that should be considered and should have an impact on the content of the revised Broadband Guidelines?

- Since 2009 and as explained in the introduction of this document, cable has evolved and upgraded its network. It now reaches 50% of the European households delivering between 10 and well over 100 Mbps. Cable invests heavily, with around 23% of its yearly revenues invested in CAPEX, compared to an average of 12% for the telecommunications industry in general. Using public funds in cable’s European footprint (where active competition is in the vast majority of cases present, or if not is very likely to materialise) would constitute an inappropriate, distortive and wasteful use of these funds.
- Mobile operators have entered the broadband market with competing offerings and innovative smart phones. In assessing whether an area is white, black or grey all types of broadband networks should be considered by the state aid Guidelines.
- Incumbent operators have continued to, or commenced the upgrade of their networks to support higher speeds (in many instances spurred on by the investments and upgrades undertaken by cable operators)
- The Global financial crisis followed by the debt crisis is limiting Member States to invest in broadband projects even where a case for State Aid could be established. Therefore the success of the Guidelines should not be measured solely by the number of projects that have been undertaken. In particular a perception that there has been a limited number of projects undertaken should not be seen as a reason for making the conditions for approval less restrictive.
- The Digital Agenda for Europe has been published together with its three complementary measures suggesting that public investment should not crowd out private investment but target less densely populated areas only.

2. **Subject of the aid**

The current version of the Broadband Guidelines distinguishes between basic broadband and NGA networks as subjects of State aid measures.

2.1. Do you consider that distinction is justified in light of current economic, technological and regulatory developments in this field?

- The gap between basic broadband and NGA is reduced. Given the Digital Agenda targets, more and more NGA broadband networks are expected to be rolled-out. However, it is also a statement of fact that the Digital Agenda targets are not exclusively concerned with NGA. Indeed, realising certain of those targets will likely require the application of public funds to the deployment of broadband capabilities that are ostensibly not regarded as NGA. We therefore consider that **no distinction should be made between basic broadband and NGA anymore**. One basic broadband or one NGA network should be considered as one network for the existence of any broadband state aid. Moreover all technologies can be used now to roll-out
broadband networks, being fixed, mobile or even satellite. So all networks should be considered when examining various broadband projects.

- The distinction between basic broadband networks and NGA broadband networks made in the current version of the Guidelines does not seem to fully correspond with other decisions made by the Commission as regards the different Internet access services offered on the Member States’ broadband markets. As an example, in Carphone Warehouse/Tiscali UK, a recent (2009) merger regulation decision, the Commission noted that it had distinguished in its previous decision making between three common forms of Internet access: (a) narrowband (dial-up service); (b) broadband (higher bandwidth services); and (c) dedicated access (leased lines). In Carphone Warehouse/Tiscali UK, the Commission found (in relation to the United Kingdom market) that there was one-way migration from narrowband to broadband, such that it was “not considered unlikely that narrowband will disappear completely over time”\(^2\). However, the Commission did not distinguish a fourth, separate, NGA-based and very high-speed form of broadband Internet access. Since the Commission defines only one, single broadband form of internet access in its decision-making, it seems suitable that also the Guidelines adhere to this definition.

- Therefore basic Broadband and NGA networks should fulfil the same conditions to be the object of some measure compatible with state aid rules.

2.2. Would you consider it useful to devote specific sections of the Guidelines to the rules and conditions applying to the use of public funding to subsidize specific infrastructure elements (for instance, ducts, dark fibre, backhaul networks, etc.) or to other activities related to broadband network roll-out (such as civil engineering costs, upgrade of in-house cabling, etc.)?

- We do not consider it necessary to devote specific sections of the Guidelines to the rules and conditions applying to the use of public funding to subsidize specific infrastructure elements or to other activities related to broadband network roll-out. Such an approach would, in our view, be restrictive and would reduce the ability to tailor the structure of any application of public money to reflect individual situations. Moreover, prescribing ‘rules’ to specific aspects would run the risk of disincentivising, or reducing the prospect of, private investment. Each prospective application of public funds should therefore continue to be considered on a case-by-case basis, with applicable elements or activities dictated by the specific circumstances.

In line with the NGA Recommendation, the Broadband Guidelines define very high speed, Next Generation Access (“NGA”) networks in paragraph 53 as follows: "NGA networks 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 existing copper networks."

2.3. Do you think that this definition is still adequate? In other words, at this stage of technological and market development, besides fixed, mainly fibre based
networks, would you consider any other broadband technologies as falling into the definition of NGA networks? Please provide detailed justification and examples of commercial utilization to motivate your answer.

- See comment to point 2.1. We do not see the need to define NGA in the Guidelines as these should be written in general terms i.e. address broadband in general, which would include a wide range of technologies such as fixed including cable, mobile including 3G and LTE (currently being deployed in Germany, Finland and Sweden) as well as satellite (Avanti’s first satellite, called HYLAS 1, was launched on 26 November 2010 and is the first superfast broadband satellite launched in Europe).

2.4. In your opinion, shall the Commission change the current qualitative definition of NGA (i.e. mainly fibre based solutions) to a more quantitative one (for instance by setting explicit thresholds for download/upload speeds or defining any other technology criteria)? Please motivate your answer.

- As mentioned above, we do not see the need to define NGA in these Guidelines as these should be written in general terms considering all types of broadband projects including mobile, satellite, fibre etc. The boundaries between technologies and their capabilities have blurred (and will continue to obfuscate as technology evolves and developments occur). Thus an explicit distinction between NGA solutions and legacy applications, be that on a qualitative or quantitative basis would not be appropriate and, given the pace of technology advancement, could in any event prove to be out of date in a very short space of time. Moreover, it could also lead to distortions in the market, as investment decisions relating to the deployment of broadband networks could be influenced by the extent to which those networks would fall in to a particular category.

- As we have also highlighted, the Digital Agenda targets are not exclusively concerned with NGA. Indeed, realising certain of those targets will likely require the application of public funds to the deployment of broadband capabilities that are ostensibly not regarded as NGA. An explicit distinction within the State aid Guidelines based on capability would therefore be inconsistent with the targets and may negatively impact on the achievement of them.

- Notwithstanding this view, if a definition is nevertheless to be maintained, then we consider that it should be aligned to other European instruments defining NGA networks such as the NGA Recommendation where no quantitative criteria are being set. Setting quantitative thresholds is not necessary and runs the risk of being inaccurate, misleading or not sufficiently forward-looking with regard to the technology to be deployed.

3. Areas of public intervention

The Broadband Guidelines identify so-called "white", "grey" and "black" areas depending on whether there are already adequate private infrastructures in place.

3.1. According to your experience with State aid broadband schemes, would you consider other criteria (for instance download/upload speeds or other
technology, regulatory or market criteria) as relevant to identify areas with non-
adequate broadband coverage? Do you consider an adequate criterion that if a
minimum (download) speed of 2 Mbps is not available at affordable prices, the
area shall be considered as "white area"?

The Guidelines distinguish between different types of "white NGA areas" -
depending on the existing basic broadband infrastructures in place (white
NGA/basic white in paragraph 79, white NGA/basic grey in paragraph 73 and
white NGA/basic black in section 3.4.4. of the Guidelines) to ensure that
distortions of competition are limited.

- Black and grey areas are much wider than usually perceived. They do not
stay stable. The composition of different areas might change very quickly. It
might therefore be a risky way of defining areas for public intervention. So,
**current criteria are not satisfactory and need to be changed.** We
would consider it necessary to base definitions on something on which a
rational debate can take place as well as facts which allow discussions from
both parties. We would welcome further discussion with the Commission on
that point.

- Furthermore, as no distinction should be made between broadband and NGA
anymore, no sub categories should be made either.

The Guidelines request that the investment plans of private operators in the next
3 years shall be taken into account when defining the target areas for public
intervention (see footnote 31).

3.2. Do you consider that the defined 3 years period is still an adequate time horizon?
In your view, what proofs private operators can put forward to demonstrate their
investment plans in a certain area?

- The arguments supporting a short timeline are not wholly consistent with the
commercial realities of a private operators’ market and with business
developments currently witnessed. The question should therefore not be how
much time is required to deploy an NGA network in a town or city in terms
of its technical feasibility, but rather **whether** - by taking into account
factors such as population density, existence of an operator in a region,
demand forecasts, the existence of NGA networks in areas with similar
characteristics etc. - it is likely that an operator will undertake an NGA
deployment. For instance, in new urban developments within highly
populated areas such as Madrid, London or Amsterdam, the fixed PSTN
incumbent operator is probably prepared to deploy an NGA network within a
period of less than 5 years. Likewise, in densely populated areas where cable
has already deployed hybrid coaxial-fibre networks, EuroDOCSIS 3.0
upgrade to an NGA network takes a relatively short time to be undertaken.
On the other hand, if the area considered is a whole city or municipality, a
period of 5 and even 7 years would be more in accordance with both the
technical and market realities currently being witnessed (even in the
absence of any economic recession).
4. General compatibility criteria

The Guidelines list the general compatibility criteria in paragraph 51 that all State aid broadband measures have to comply with.

4.1. In your experience, have these conditions reached their objective to foster investments, preserve private incentives to invest and to support effective competition on the subsidized networks?

- As is expressed in the general comments to point 1.2, Cable Europe has serious doubts as regards the compatibility between the suggested practice of separate market analyses and mapping exercises conducted by various donors of state aid and the supervision and market analyses conducted by NRAs. In practice, the donors of state aid are most often local authorities and municipal companies, which lack the competence to conduct the suggested mapping exercises and the analyses of competitive conditions. Cable Europe stresses that the assessment of market conditions and of the adequacy of already taken regulatory measures must be done by competent parties, such as the NRA, not least to avoid non-harmonized measures and regulatory failures. Hence, it should be added to the guidelines that NRAs must control, audit and approve, if not conduct, the mapping exercises and the analyses of competitive conditions that should precede the decision to grant state aid. Again, Cable Europe highlights that market failures and the availability of affordable broadband services are subject to regulatory measures taken by the NRAs in accordance with the EU regulatory framework for electronic communications. It should therefore be added to the Guidelines that state aid measures could be considered as appropriate policy instrument only after ex ante regulation has been assessed as inadequate by the NRA.

In paragraph 51(e), the Guidelines encourage Member States to use existing infrastructure to avoid duplication of resources and to reduce the aid amount but without giving an undue advantage to the existing incumbents (who typically have significant existing infrastructure in place).

4.2. Do you have experience or examples on the implementation of such condition? In your opinion, how should such condition be implemented in practice to be effective in achieving its objective? Under what circumstances do you consider that access to the incumbent’s infrastructure in line with the applicable regulatory framework is a sufficient safeguard?

- Why would the deployment of an entirely parallel network with public funds (with imposed access) be more valuable from a consumer’s perspective than just imposing access on the incumbent’s network? It seems difficult to identify a situation where there is only one incumbent network and the effective regulated access – be it in the form of access to ducts or wholesale bitstream access – is not sufficient to guarantee the provision of competitive broadband services to users. If the deployment of a second network is not
economically attractive to an alternative operator, why should it be more valuable for consumers to have their government deploy an entirely new network which implies higher costs that are to be financed with consumers’ taxes? Cable Europe therefore considers that access regulation on the incumbent’s network should indeed be the first option used to guarantee competition, and the failure of such competition to materialize will have to be assessed by NRAs in close cooperation with the Commission.

- Paragraph 51 (e) is to be linked to paragraphs 38-39. According to the Commission, one of the objectives of a State aid is to respond to a market failure arising from the lack of investment due to the economics of density. Cable Europe considers, however, that whereas economics of density represent clear barriers to entry, they do not necessarily justify the per se duplication of networks as the appropriate policy response. In applying State aid as a tool to remedy market failure, we consider that this should be confined to market failures resulting from an inability of the market to satisfy demand, or some other proven need, of its own accord. If the market failure concerns, for example, lack of competition or high pricing, the tools to address such issues already exist in the form of the EU Telecoms Regulatory Framework or general competition law. It is not appropriate to address these types of failure via the application of public funds.
- This is also acknowledged in paragraph 44 which states that: ...in areas where only one broadband network is present, by definition, subsidies for the construction of an alternative network can distort market dynamics.
- Cable’s role in the market is also to be the main contender to dominant incumbents. Policy makers should therefore safeguard the key role of infrastructure based competition, key driver in growing penetration, by creating a genuine and level playing field as well as not crowding out private investment and allowing public funding in less densely populated areas only. To the extent that they have not done so already, we are convinced indeed that the incumbents in our footprint will invest with private money.

6. The role of the National Regulatory Authorities ("NRAs")

The Guidelines foresee an important role of the NRAs in helping granting authorities to set the wholesale access conditions. According to paragraph 79, "in setting the conditions for wholesale network access, Member States should consult the relevant NRA. NRAs are expected in the future to continue either to regulate ex ante or to monitor very closely the competitive conditions of the overall broadband market and impose where appropriate the necessary remedies provided by the applicable regulatory framework. Thus, by requiring that access conditions should be approved or set by the NRA under the applicable Community rules, Member States will ensure that, if not uniform, at least very similar access conditions will apply throughout all broadband markets identified by the NRA concerned."

In several State aid cases, the NRAs undertook to solve disputes between the operator of the subsidized network and the access seekers, should any such dispute emerge.
6.2. Do you have experience with such procedure? How do you see the role of NRAs to solve disputes between the access seekers and the operator of the subsidized network?

- Cable Europe considers that **it is essential to strengthen the role of the NRAs to solve disputes between the access seekers and the operator of the subsidized network.**
- See comments to points 1.2 and 4.1. Moreover, Cable Europe notices that, in the Commission’s suggested procedure, the public authority that is presumably implementing a State Aid measure is also conducting the market analysis that is supposed to demonstrate the necessity of the same measure. It is inherent in such a procedure that the public authority involved has strong inducements to conduct a pessimistic analysis of likely future investment, thereby clearly justifying the need for its own involvement. To minimize the risk of biased market analyses occurring, it should be added to the Guidelines that the market analyses should be notified to and approved by the relevant national expert agencies, such as the relevant NRA and/or the NCA.

7. **Transparency of State aid measures**

According to the Commission's case practice in this field, granting authorities shall share all the important information of the schemes with stakeholders. Inter alia, they have to publish on a central webpage the mapping information on the target areas, the planned State aid measure, and all information shall remain public for minimum 1 month to allow all third parties to comment. The tender procedures for granting aid have to be conducted in line with the principles of EU Public Procurement Directives, respecting all conditions for transparency and non-discrimination.

7.1. Do you consider that the information made available in the described ways is adequate to ensure transparency? Do you have suggestions on how the transparency of State aid broadband schemes could be further improved? Can you provide examples of good practice when it comes to information provided on the State aid broadband measures in different stages of the procedure?

- Guidelines can play a key role in guiding public institutions in both their planning and implementation of broadband investments. As such, the Guidelines can constitute an important input into the business and investment plans of private broadband operators, including cable operators, and have a positive impact on both the speed and broadband roll-out. Also the State Aid website of DG Competition is very useful in this respect, as it contains a database of all state aid decisions that have been taken over the past years. But transparency should be enhanced. **Transparency in this procedure is key.** We support any measures that would improve transparency of State aid broadband schemes. With reference to the

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comments to points 1.2, 4.1 and 6.2 above, Cable Europe concludes that a
greater involvement of NRAs, and most importantly a procedure in which
market analyses preceding state aid measures would have to be audited and
approved by NRAs, would lead to greater transparency. For example, NRAs’
own broadband coverage assessments and/or reviews of other public bodies’
market analyses could be made available on their websites. In such a way,
the rationale and the factual basis for state aid measures would be easily
accessible for market actors and the public.

- Moreover, we consider that there should be greater requirements for
  transparency in the event that a Member State proposes to apply public
  funds under other, non-aid instruments – such as the Market Economy
  Investor Principle or Services of a General Economic Interest.

8. Other points

Several Member States requested vertical separation on the subsidised networks
(the wholesale operator of the network shall not engage in retail service
provision) to avoid risk of discrimination, support competition and push take-up
rates as a result of public intervention.

8.1. In your view, what would be the costs and the benefits of requesting this
condition? In what circumstances would you consider vertical separation to be
an effective remedy?

- As NRAs will control the need for access to the subsidized network, we
  consider that vertical separation is not necessary.

Some public authorities argue for a need of "strategic role" of the State in the
broadband sector to achieve their social and economic objectives. In most cases,
that is translated in the choice of retaining public ownership of the subsidised
broadband networks (mainly passive infrastructure elements, like ducts,
manholes, dark fibre) while the wholesale and retail operation of the networks is
tendered out to private operators.

8.2. In what circumstances would you consider that public ownership is justified?
What are in your view the advantages/disadvantages of public ownership of the
infrastructure?

- Cable Europe would like to point out that public ownership of broadband
  infrastructures is problematic in many regards. This is especially true for
telecommunication companies that are – for example in Germany and in
Sweden – established in private form, but wholly or partly owned by the
state, i. e. one ore several municipalities (city carriers). Moreover, close
links exist in many cases because of overlaps of identical personnel in
municipality and carrier supervisory functions, as well as in municipal
housing associations demanding telecommunications/broadband services.

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4 See examples of Commission decisions in cases of N407/2009 Optical fibre Catalonia (Xarxa Oberta),
Spain; N183/2009 RAIN project, Lithuania or N196/2010 EstWin project, Estonia.
These carriers set out to newly build and/or operate glass fibre networks in FttB/FtH technology, yet they do not deploy these networks in underserved, rural areas, but typically in metropolitan and high density inner-city areas, thereby adding a third, sometimes fourth infrastructure to the existing private networks. Given the presence of these networks, typically at least the incumbent and cable networks, these areas are almost always - or at least within the prospective timeframe of the Guidelines – “black” areas within the above definitions of black basic broadband as well as black NGA areas. From the perspective of private cable network operators, this special incarnation of state activity in the telecommunication sector is an inefficient use of public funds and at odds with the Guidelines and its objectives to foster competition that is distorted by public intervention as less as possible. Moreover, there is the imminent, hard to be controlled risk of cross-subsidization between municipal sibling companies, e. g. in the case of a preferred treatment on the wholesale level or with respect to easier access to infrastructure-related measures such as digging or deployment of ducts.

9. Non-aid measures: MEIP and SGEI

The Guidelines provide clarifications on broadband measures falling outside the scope of State aid rules, in particular when public funding for the roll-out of broadband is carried out at market terms ("MEIP" Section 2.2.1. of the Guidelines) and when Member States consider that the provision of a broadband network should be regarded as a service of a general economic interest ("SGEI" Section 2.2.2. of the Guidelines).

9.1. Do you have any experience with "MEIP" or SGEI" instruments used in European countries?

9.2. Do you consider that the current level of detail provided in the Guidelines on MEIP and SGEI is sufficient? Do you have any comment on the applicability of these provisions?

While we consider that the general intent of the Guidelines in relation to MEIP and SGEI is appropriate, we believe certain ambiguities exist. In order to achieve the underlying requirements to avoid an unwarranted application of State aid and/or an inappropriate use of public funds and the distortion of competition, we consider it necessary in particular for the Commission to tighten the criteria against which a project’s conformity with the MEIP or qualification as an SGEI will be assessed, and to ensure that there is no scope for interpretation of, or deviation from these.

MEIP:

- The MEIP doctrine is an anomaly in the State Aid framework. The notion of MEIP has only been applied once in the Amsterdam Citynet case in 2007 and therefore is not based on any thorough jurisprudence, economic analysis or public debate. One can also doubt whether a public body can ever act as a market investor, because the notion that a public body cannot go bankrupt is the evidence that the risk profile of a public body is always lower compared to a private company. The financial-economic position of a network operator that is funded by a public body is always better compared to a network
operator that is funded by a private company; there a true level playing field based on the notion of MEIP can never be achieved.

- The significant participation of private investors alongside a public body needs to be assessed under very strict grounds in determining their compatibility with State Aids rules. Moreover the provision of wholesale or retail broadband services by public bodies, either by themselves or alongside with private investors, needs to be assessed firstly from a market perspective in order to ascertain whether such provision is indistinguishable with that by a private undertaking absent state aids. Otherwise, as the Guidelines points out, the public intervention will constitute State Aid.

- To carry out that assessment the Commission applies the so called Market Economy Investor Principle test (MEIP test). In practical terms, the most important part of the MEIP assessment procedure should be the assessment of the public investor’s Business Plans. According to the Guidelines, the Business Plan should be sound and should show an adequate return on the investment. Cable Europe welcomes the fact that the Guidelines point out that the conformity of a public investment with commercial market terms should be "demonstrated thoroughly and comprehensively". This should be applicable to both public authorities and publicly owned city networks/publicly owned housing companies. However, in order to facilitate the procedure and to increase the certainty of its outcome, the Commission needs to further clarify:

  - **Review of Business Plans:** As is pointed out in the general comments to point 1.2, Cable Europe fears that several state aid measures are not notified to the Commission irrespective of inadequate, or even non-existent, business plans. There are also, which has been noted above, apparent incentives for granting authorities and companies to approve their own business plans and thus avoid the scrutiny of the Commission. Cable Europe suggests that any business plan presented as the basis for a public sector investment should be audited and accepted by a reputable independent audit company. In addition, a requirement could be added that the public investor should establish a regulatory Impact Assessment in order to be able to substantiate the robustness of the Business Plan.

  - **Lack of a Business Plan:** Although arguably implicit in the terms of the Guidelines, it would be preferred if it were set out expressly in the Guidelines that the lack of a Business Plan at the time of the investment is, as such, a sufficient basis to conclude that the MEIP has not been satisfied. Accordingly, the public sector investment would be deemed to involve the grant of State Aid and should be assessed accordingly.

  - **The burden of proof:** In the application of State Aid rules, it has always been problematic as to whether the complainant or the defendant should bear the burden of proving the soundness of the public authorities’ Business Plan. Therefore, it would be very helpful if the Commission would clarify that the burden of proof in principle always rests upon the public body, and that the decision to implement a broadband investment by any public body must be based upon a well documented
Business Plan that should also be easily accessible to the public.

- **Catalogue of requirements**: Another issue which arises in the application of the MEIP is the level of proof required to substantiate that the Business Plan is indeed sound and demonstrates that an adequate return on investment will be achieved (i.e., the meaning of the phrase "demonstrated thoroughly and comprehensively"). To increase legal certainty in this regard, the Commission should define a set of minimum standard requirements, based on financial criteria, which must be satisfied by the public body in order to demonstrate that its Business Plan satisfies the MEIP standards. Further, the Guidelines should define a set of requirements for the safeguarding of such an assessment.

For example, the Guidelines would be more effective if they were to set out the financial indicators that should be used to analyse the soundness of the Business Plan. Finally, a clause limiting the possibilities of the selling of the publicly funded network should also be added to the Guidelines, as this could also have an impact on the overall amount invested. Indeed, the funds provided should not be a disguised means of providing funds to another private operator as this could impact adversely on the competitive balance in the area and therefore raises the question of whether the funds are actually required. If selling on is to be permitted, it should only be on non-discriminatory and transparent grounds. Any attempt of selling on a State-subsidised asset should in principle be subject to advance public notification and should be open to all interested operators.

- **Calculating an adequate return on investment**: An important aspect of the analysis of the State measure’s compatibility with the MEIP is the assessment of the estimated return on investment. In several cases, it has been unclear on what basis the return on investment should be calculated, namely, whether the investment should be viewed as a broadband (in general, high risk) investment or as a real estate (in general, low risk) investment. The Commission’s Guidelines should further clarify the principles to be applied when calculating a reference return on investment, against which the applied return on investment estimate could be benchmarked (in this respect, the Guidelines should arguably contain a reference to the forthcoming EC Recommendation on NGA regulatory principles - as they will address this question - and also to future NRA regulatory practice in the application of that Recommendation, as the final "risk premium" for broadband projects has yet to be set by NRAs).

9.3. The Guidelines insist on a strict definition of what constitutes an SGEI in the liberalised telecom sector (universal and compulsory nature, open and neutral network, separation of wholesale and retail operations etc.). Have you
experienced special difficulties with the implementation of this type of measures?

9.4. Do you consider it adequate that for SGEIs all technologically possible access products are requested or would you consider that certain access remedies could under certain circumstances be deemed to be redundant (e.g. duct access and dark fibre access) and therefore there is no need to request them to ensure a sufficient level of competition? If yes, please explain in detail.

- Qualification of SGEI should be assessed in our view on transparent criteria and economic feasibility of broadband projects. Criteria should also be more detailed on the way SGEI qualification is motivated rather than the way it operates as it seems to be currently the case.

10. Final Remarks

You are invited to highlight and explain any other relevant points related to the Broadband Guidelines.

- Some further clarification needed:
  The Commission’s Guidelines require further elaboration in a number of key respects, including:
  - The grounds upon which the assessment of the compatibility of State Aid should be conducted. Particularly the conformity of a public sector investment with the Market Economy Investor Principle should be demonstrated thoroughly and comprehensively.
  - Those areas in which public investment would be considered as being inherently compatible with State Aid rules. In particular, the commercial realities underpinning private operators’ market and business developments should serve as the benchmark for such working presumptions.
  - How and on what grounds State Aid measures should be justified, especially regarding the fact that the lack of investment by the private sector should not be considered as providing, of itself, the justification for public intervention.
  - The requirements that need to be satisfied by the publicly funded infrastructure in order for it to be compatible with State Aid rules, particularly the proportionality of the measures to the results sought and how the relevant wholesale access obligation should apply.
  - A requirement that the demand, market failure or other perceived need that the application of public funds is intended to satisfy, is justifiable, credible, tangible and unequivocally proven

- Historical pattern of investments - Paragraph 78:
  - Cable Europe would like to highlight that the public authority conducting the analysis of historic investments has strong inducements to conduct a pessimistic analysis which clearly points to the need for its own involvement. Moreover, a number of factors relevant to such an analysis are unclear, including: the grounds upon which such an analysis should be conducted; the specific investment information required for the public authority to conduct its historical analysis; the relevant timeframe for analysis; and the method by which user satisfaction is to be estimated.
Even more importantly, the application of this principle presupposes that broadband deployment is a public good and that the State should take up the goal of deploying new networks if the private sector does not do so. Cable Europe does not consider this to be a sound working principle: a lack of investment by the private sector should not be in itself a justification for public intervention. For example, non-affordability at a given point in time should not per se be considered to constitute a market failure. It might be the case that operators have not invested sufficiently because they do not perceive consumer demand in the short term for advanced services to be supported in NGA networks or because they have expectations of change in economic or regulatory conditions. However, markets can evolve quite rapidly and operators, being reactive to market conditions, might decide to invest at a given moment in time to be able to satisfy new demand or to take advantage of economic/regulatory conditions. However, public investment based on an alleged lack of interest by private parties might distort this process by substituting market-driven decisions for administrative ones.

In Cable Europe’s view, the provision described above runs a high risk of leading to arbitrary evaluations of the worth of historic investments. Point 78 in the Guidelines should therefore be deleted.

**About Cable Europe**

Cable Europe is a trade association that groups all leading broadband cable TV operators and their national associations throughout Europe. The aim of Cable Europe is to promote and defend the industry's policies and business interests at European and international levels, and to foster cooperation among its members. The European cable TV industry services more than 102 million broadband, TV and telephony subscriptions throughout the EU 27.

The European Cable industry serves about 72m households and generates a turnover of €18.8bn. With ongoing high level investments into European networks, the European Cable industry has evolved as a key interlocutor in the debate on the future of the European entertainment and communication markets.

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