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Com Hem response to the Commission's public consultation on the Draft Guidelines on state aid to broadband networks

*Com Hem AB ("**Com Hem**") has reviewed the Draft EU Guidelines for the application of state aid rules in relation to the rapid deployment of broadband networks ("**the Draft Guidelines**"), which has been published by the European Commission ("**the Commission**"). Com Hem hereby presents the following comments.*

1. Introduction

Com Hem is one of Sweden's leading providers of high-quality consumer services for TV, ultra-fast broadband and fixed telephony. Approximately 40 percent of the Swedish households are today connected to Com Hem's fiber-based cable network using the Docsis 3.0 standard, and Com Hem's broadband services with speeds of 200 Mbit/s are available to over 30 percent of Sweden's households. Thus, Com Hem alone makes a very significant contribution to the fulfillment of the Swedish Government's goal of a 40 percent 100 Mbit/s coverage by year 2015, and contributes to the achievement of the Commission's Digital Agenda goal of a 50 percent 100 Mbit/s coverage by year 2020.

Com Hem is also one of the most prominent infrastructure-based competitors to the Swedish incumbent Telia Sonera AB, and is continuously making significant investments in the development of innovative services as well as in the roll-out of ultra-fast broadband infrastructures. Com Hem is thereby contributing to infrastructure-based competition, which creates long-term prerequisites for high price pressure and rapid innovation on the markets for TV, broadband and telephony services.



2. Comments

2.1 General remarks

Com Hem welcomes the opportunity to comment on the Commission's Draft Guidelines. As a starting point, Com Hem would like to applaud the Commission's 2009 initiative to issue specific guidelines for the application of state aid rules in relation to the rapid deployment of broadband networks.

As is concluded in the Digital Agenda for Europe ("DAE")¹, the use of Information and Communication Technologies (ICT) will play a key role in the EU's efforts in reaching its ambitions set out in the Europe 2020 Strategy.² To foster the use as well as the provision of innovative and affordable digital media and electronic communication services thus becomes a strategic focus of all Member States.

As has been pointed out by the Commission on several occasions, the smart use of public funds and state aid for the roll-out of broadband networks is one of several ways for authorities and public bodies in the Member States to support the development of a digital, connected and competitive Europe.

However, public involvement and funding must be done with great care and after thorough consideration, as the liberalised telecoms markets of the EU are characterized by fierce competition between a multitude of infrastructures, operators, service providers and business models. Public involvement must not crowd out private investments, decrease competition, stifle innovation or lead to less consumer choice. Thus, the Guidelines have an important role to play in laying down the conditions under which state aid can be necessary and appropriate.

2.2 Com Hem's detailed comments

In this response, Com Hem focuses mainly on the proposed new paragraphs 77-79, and in part on draft paragraphs 54 and 48 to which draft paragraphs 77-79 refer.

In draft paragraph 77, the possibility of state aid in grey and black NGA areas to the roll-out of FTTH broadband networks is introduced, with the aim of reaching the objectives of the DAE. In draft paragraph 78, the Commission sets out the criteria for the assessment of aid granted to FTTH broadband network projects in grey and black NGA areas.

First, Com Hem would like to highlight and refer to the response submitted by Cable Europe, of which Com Hem is an active member, and to the legal opinion submitted by White & Case LLP on behalf of Cable Europe. Com Hem fully supports the comments and suggestions made therein.

In addition to referring to the comments submitted by Cable Europe and White & Case LLP, Com Hem would like to present the following remarks:

2.2.1 Draft paragraphs 77-79 represent a fundamental deviation from current principles

By opening up for the possibility of state aid in urban areas where several NGA networks already exist or are already being planned by private operators – i.e. in *black NGA areas* – the Commission fundamentally departs from current principles.

¹ A Digital Agenda for Europe, COM(2010) 245 final/2.

² Europe 2020 – A strategy for smart, sustainable and inclusive growth, COM(2010).



An essential first starting point for the current Guidelines is that state aid measures should focus on areas where affordable and competitive broadband services are not being provided, and as such contribute to diminish the differences between the “haves and have nots”, i.e. bridge the so called digital divide. This notion is e.g. presented in paragraph 4 of the current Guidelines:

“In particular, a well targeted State intervention in the broadband field can contribute to reducing the ‘digital divide’ that sets apart areas or regions within a country where affordable and competitive broadband services are on offer and areas where such services are not.”

A second – and as essential – starting point is that state aid measures should *not* be used in areas where affordable and competitive broadband services are already being provided by a multitude of operators which compete with each other. This notion is e.g. presented in paragraph 5 of the current Guidelines:

“If State aid for broadband were to be used in areas where market operators would normally choose to invest or have already invested, this could affect investments already made by broadband operators on market terms and might significantly undermine the incentives of market operators to invest in broadband in the first place. In such cases, State aid to broadband might become counterproductive to the objective pursued.”

Thus, a core principle of the State aid rules has hitherto been that state aid should focus on areas where commercial prerequisites are insufficient and be avoided in areas where competition works and market actors provide a multitude of both infrastructures and services. A black area – either basic or NGA – is the archetype of the latter situation.

What must be emphasized is that it is widely accepted that noncompliance with this core principle is associated with severe risks. As regards state aid to *basic black areas*, paragraph 43 of the current Guidelines firmly states that “(...) State support for the funding of the construction of an additional broadband network will, in principle, lead to an unacceptable distortion of competition, and the crowding out of private investors.” As regards state aid to *black NGA areas*, paragraph 73 of the current Guidelines states that such aid “(...) is likely to seriously distort competition and is incompatible with the State aid rules”.

Hence, it is clear that state aid according to the proposed new paragraphs – which in effect could be directed at *black NGA areas* - would most certainly lead to serious distortions of competition. Such state aid is – as is pointed out in the current Guidelines – incompatible with the state aid rules.

Even if such state aid in fact could be deemed as acceptable – which seems to be the proposition in the Commission’s proposed paragraph 77-79 – such an acceptance, which, as noted above, would represent a fundamental deviation from a core principle, should reasonably be relevant only under exceptional circumstances.

However, according to Com Hem, the Commission has not proven that such exceptional circumstances are, or could be expected to be, at hand (see below).

2.2.2 The fundamental deviation is unnecessary and run contrary to the DAE

As is explained in the draft paragraphs 77-79 (with reference to draft paragraph 53), the objective of the proposed state aid to grey and black NGA areas is to achieve the DAE targets. The proposed means to achieve the goal is to support the roll-out of fibre networks which reach the end user premises. In essence, this implies state aid to the roll-out of FTTH.



However, it is not necessary to roll-out FTTH to reach the DAE targets.

The DAE targets are twofold: (i) by 2020, broadband coverage at 30 Mbit/s or more should be available for 100 percent of EU citizens; (ii) by 2020, 50 percent of European households should have subscriptions above 100 Mbit/s.³

As has been explained in the Commission's Broadband Communication, the 30 Mbit/s target can be met by several wireless and wireline infrastructures, such as VDSL, satellite and LTE. Also the 100 Mbit/s target can be met, again with reference to the Commission's Broadband Communication, by several technologies, such as cable (with Docsis 3.0 standard) and FTTH.⁴

As has been noted above, Com Hem can today provide more than 30 percent of the Swedish households with 200 Mbit/s broadband services over its cable network. In addition, it should be noted that LANs, an infrastructure which is becoming increasingly common e.g. in Sweden and which combines a fiber-based access infrastructure to the building (or to the vicinity of the building) with a copper in-building wiring (i.e. FTTB or FTTC), also can provide access services with speeds above 100 Mbit/s.

As such, both Docsis 3.0-enabled cable networks and LANs are indeed ultra-fast broadband networks. More, both cable networks and LANs can, *inter alia* by implementing upgrades of active equipment or by reallocating spectrum, increase both down- and upload speeds and are as such very well positioned to meet any foreseeable increases in capacity demand.

To conclude, the roll-out of FTTH is not a prerequisite for the fulfillment of the DAE targets. Several other technologies, such as cable and LAN, are already today delivering ultra-fast speeds which by far exceed the DAE targets. More, both cable networks and LANs are very well positioned to further increase both down- and upload speeds to embrace any foreseeable development of consumer demand.

Thus, the proposed inclusion of paragraphs 77-79, 54 and 48 in the draft Guidelines, which represent a fundamental deviation from a core principle and which is associated with severe and well-known risks, is unnecessary and run contrary to the DAE.

2.2.3 Draft paragraph 77 does not meet the compatibility criteria of the TFEU

As is pointed out in the legal opinion of White & Case LLP, the new paragraphs of the draft Guidelines must adhere to the Treaty on the Functioning of the European Union ("TFEU"). However, paragraph 77 does not seem to meet any of the steps of the compatibility test as set out in paragraph 35 in the current Guidelines.

As regards meeting a *well-defined objective of common interest*, one can conclude that state aid to a black NGA area never can be regarded as a correction of a *market failure*, since a market failure by definition cannot occur in a black NGA area (see *inter alia* paragraph 43 of the current Guidelines). Neither can state aid to a black – or a grey – NGA area be regarded as a tool to achieve *equity objectives*, since consumers and companies in grey and black NGA areas are not lacking access to essential means of communication and participation in society – rather the contrary (see *inter alia* paragraph 39 of the current Guidelines).

³ A Digital Agenda for Europe, COM(2010) 245 final/2, p. 40.

⁴ Communication from the Commission, European Broadband: investing in digitally driven growth, COM(2010) 472 final, p. 5.



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As regards state aid to a grey NGA area, the current Guidelines states (see paragraph 75) that remedying a lack of affordable or adequate services which would satisfy the needs of citizens or business users could constitute a common interest, provided that there are no less distortive measures available to reach the same goals. However, no facts or data have been provided by the Commission showing that fibre to the end users' premises (FTTH) corresponds with the general needs of citizens or business users. Thus, rolling-out FTTH in a grey NGA area would not meet a well-defined objective of common interest.

As regards *appropriateness*, one can conclude that a lack of FTTH in grey or black NGA areas, which most likely are well-functioning markets (black NGA areas are by definition well-functioning), probably could be explained – to a large extent – by a lack of demand for FTTH. Hence, even if the roll-out of FTTH would be an objective of common interest (which it is not), the current Guidelines states that demand-side measures in favor of FTTH indeed should be tried prior to state aid measures (see paragraph 49).

As regards *proportionality*, one can conclude that state aid to FTTH roll-out in grey and black NGA areas would not meet the requirement for technology neutrality (see paragraph 51.d and paragraph 71 of the current Guidelines). State aid to FTTH is intrinsically technology specific, since FTTH is a specific network architecture using a specific material.

To sum up, paragraph 77 does not meet the compatibility criteria of the TFEU and the current Guidelines.

2.2.4 Draft paragraph 78 is inconsistent with the present Guidelines

In draft paragraph 78, the Commission proposes that an authority granting state aid according to paragraph 77 must demonstrate that there is an expected demand for the quality improvements delivered by the aided network, i.e. the FTTH. However, if there is an expected demand of certain goods and services on a highly competitive and well-functioning market, which by definition is illustrative of a black NGA area, then it can be expected that the market actors in a timely fashion will deliver what is expected to be demanded by the consumers.

Hence, it seems illogical that an easily demonstrated yet still unfulfilled demand could exist on a highly competitive and well-functioning market.

2.3 Suggestions

- Com Hem proposes that paragraphs 77-79 are deleted.
- Com Hem proposes that paragraph 54, to which paragraph 77-79 refers, is deleted.
- Com Hem proposes, if the Commission is considering to keep the paragraphs noted above, the following amendments (in bold italics) with the aim of increasing the adherence of the draft Guidelines to the TFEU and of adapting the draft Guidelines to the demand-side features and the technological state of play of the market, in particular as regards the present and possible capabilities of existing infrastructures, such as fibre-based cable networks, as well as the foreseeable development of consumer demand:



- In draft paragraph 77:

“In light of the Digital Agenda objectives, in particular achieving 50% penetration to internet connections above 100 Mbps, public intervention would still be possible in areas where existing or planned NGA networks do not ~~reach the end user premises with fibre networks~~ **present enhanced technological characteristics as specified in paragraph 54.**”
- In draft paragraph 78 (a):

“the new infrastructure would have significant enhanced technological characteristics compared to existing networks ~~(for instance through symmetric speeds), thereby making it future-proof~~ **(see paragraph 54)**”
- In draft paragraph 54:

“(…) However, while connection speed is one important characteristic of NGA networks, at the same time it is not the only one. Apart from a certain download speed, future-proof NGA networks – which are more adequate for urban areas - are understood to have at least also the following characteristics: (i) provide enhanced connectivity (ii) provide the possibility of ~~symmetric~~ **enhanced upload** speeds and (iii) represent a sustainable and non-temporary technological advancement ~~by extending fibre until the customer premises~~ (iv) supports infrastructure-based competition.”
- In draft footnote 63:

“NGA networks will have the speed and capacity to deliver in the future high definition content, **and** support on demand bandwidth hungry applications ~~as well as bringing to business affordable symmetrical broadband connections.~~ **Already today, FTTH, HFC cable networks and LAN provide these enhanced characteristics.**”
- In draft paragraph 48:

“(…) A "step change" can be demonstrated if as the result of the public intervention (1) the selected bidder makes significant new investments in the broadband network and (2) the subsidised infrastructure brings significant new capabilities to the market in terms of broadband service availability and capacity **and which avoids overbuild of existing infrastructure whatever the technicality and topology used.**”

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