



***EU GUIDELINES FOR THE APPLICATION OF STATE AID RULES IN
RELATION TO THE RAPID DEPLOYMENT OF
BROADBAND NETWORKS***

*Melita PLC 's comments on the draft guidelines
issued by the European Commission*

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1 Introduction

Melita plc (“Melita”) welcomes the opportunity to provide its response to the Commission’s consultation on the Draft EU Guidelines for the application of State aid rules in relation to the rapid deployment of broadband networks (the “Draft Guidelines”¹).

Melita is a diversified telecommunications provider offering home entertainment and telecommunications services to consumer and business customers throughout the Republic of Malta. The Melita group of companies offer IP based digital cable TV, broadband Internet, fixed-line telephony, and mobile voice and data services.

As one of the main providers of next generation access (“NGA”) services in Malta, Melita fully supports the benefits of very high speed broadband deployment to promote social inclusion and competitiveness within the EU and in particular supports the EU targets set out in the Digital Agenda.²

Even today, Melita’s infrastructure - which supplies a 99.9 per cent coverage of Malta - provides its customers with EuroDOCSIS 3.0 compliant customer premises equipment which is **capable of supporting a downstream bandwidth of more than 350Mbps and an upstream of over 100Mbps**. Melita envisages that it will not only meet the Digital Agenda targets but that it will exceed them ahead of the set dates. Melita considers itself therefore to provide and certainly to be capable of providing ultra-fast broadband in the sense of the Draft Guidelines.

The proposed revision to the Broadband Guidelines assumes an increased relevance to the Maltese scenario where the Malta Government has in February of this year published a Call for Expressions of Interest for the building of a nationwide fibre to the home network in Malta. This project is intended to benefit from State aid in the form of financial support. The Call itself confirms that *“Cable operator Melita’s 100Mbit/s broadband is already available throughout Malta and Gozo.”*³

Melita is of the view that the State aid scheme proposed by the Maltese Government is not compatible with the Treaty on the Functioning of the European Union (“TFEU”). In particular, Melita believes that the measures proposed fail the black area test set out in paragraph 76 of the present Broadband Guidelines because the relevant market

¹ The current EU Guidelines for the application of State aid are hereafter referred to as the “Broadband Guidelines”

² A Digital Agenda for Europe, COM/2010/0245

³ Ministry for Infrastructure Transport and Communication (MITC), Call for Expressions of Interest - Building a Fibre to the Home Network in Malta, 14th February 2012 , Pt 2.1.2, p. 3

constitutes a black area due to there being two or more NGA network providers present in the market.

Even if the market were to be considered a grey area, Melita is of the view that the proposed measures likewise fail the additional conditions set out in paragraphs 74, 75 and 78 of the present Broadband Guidelines since there is no evidence of consumer detriment, the market is effectively competitive, there are limited entry barriers particularly for the incumbent and there is no evidence of private sector inertia.

The Draft Guidelines risk changing the current regulatory circumstances significantly. As explained further hereunder, by creating a new third tier of ultra-fast NGA networks and by potentially excluding Melita's cable networks from such tier, the Draft Guidelines are implicitly permitting State aid in a black area for the roll-out of a network infrastructure with similar functionality and delivering similar speeds to Melita's network. This breaches the technology neutrality principle and will lead to an unacceptable distortion of competition and the crowding out of private investors in a manner contrary to the relevant TFEU provisions.

2 Concerns relating to the new Ultra-Fast Tier

The present Broadband Guidelines distinguish between two tiers of broadband service networks – basic networks and NGA networks. The former includes all platforms that provide broadband such as ADSL, cable, mobile and wireless solutions. The latter on the other hand are limited to wired access networks capable of delivering broadband with enhanced characteristics (such as higher throughput) as compared to those provided over existing copper networks. The present Broadband Guidelines specify that at the current stage of the market, wired fibre based or advanced upgraded cable networks are the only technologies that are able to deliver services at such high speeds and to support advanced digital converged services.

The Draft Guidelines add an additional third tier by subdividing NGA networks into interim NGA networks and ultra-fast (or future-proof) NGA networks. According to the Guidelines, such ultra-fast networks may only consist of networks that reach the end user premises with fibre networks, in other words fibre to the home or fibre to the premises networks.⁴

Melita is of the strong opinion that the Commission should consider removing this new tier for the following reasons:

2.1 *The Ultra-Fast Tier is in Breach of the Principle of Technology Neutrality*

The current distinction between basic and NGA networks in the present Guidelines may refer to technology (i.e. wired as against wireless) however it is a distinction which ultimately is based on the potential level of speeds attainable by such technologies. The reason why wireless technologies are not included is not simply because they are wireless, but because they are not *“able to deliver services at very high speeds and support a multitude of advanced digital converged services.”*⁵ Likewise, services over copper are excluded because they are not considered capable of delivering broadband access with enhanced characteristics such as higher throughput.⁶

The distinction between the present two tiers is dependant therefore on the potential speeds achievable. The present Broadband Guidelines merely note that, at the time of drafting, only wired technologies were capable of achieving such speeds.

⁴ Draft Guidelines, paragraphs 54 and 77 and footnote 59

⁵ See paragraph 53 of the Draft Guidelines. See also paragraphs 53 and 54 of the present Broadband Guidelines.

⁶ Ibid.

Differentiating networks based on speed for the services of the Broadband Guidelines for the purposes of the balancing test is justified in view of the objectives of the State aid. The targets set out by the Digital Agenda themselves are measured in terms of speed with one of the main objectives being that by 2020 fifty per cent of European households should have subscriptions above 100Mbps. It is therefore logical that in determining whether State aid is justified in terms of such objectives consideration is made to whether the network is capable of achieving such speeds.

The new tier being proposed by the Draft Guidelines however is not one based on or in any way related to speed. On the contrary, the main characteristic of the new Ultra-Fast tier is that it extends fibre till the customer premises.⁷ The Draft Guidelines clearly indicate that only fibre networks may fall within this new category.⁸

It is Melita's view that by excluding other technologies, such as cable, without any consideration as to whether such other technologies are capable of similar functionalities is in breach of the principle of technology neutrality.

Analysys Mason, in a study for the Commission entitled 'Guide to Broadband Investment – September 2011', states in this respect that "*a Managing Authority must specify its network requirements in a technology neutral way. For example, a Managing Authority may specify that a broadband network must provide connections at a certain speed, and be able to be upgraded to some higher speed over time, but it must not specify which technology is issued to deliver that speed*".⁹

Not only do the Draft Guidelines create a new tier specifically for a particular technology, it does so without specifying clearly the additional functionality that is expected of the particular technology (there is no reference to what speeds are considered to be 'ultra-fast' and no definition of "enhanced connectivity") and more importantly there is no justification as to why such additional functionality, if any, is required to satisfy the Digital Agenda objectives of the State aid.

The Digital Agenda in fact defines ultra-fast as "ultra fast internet connections above 100 Mbps"¹⁰ As stated above, this is the speed to be reached by 50 per cent of European households by the year 2020. Melita submits that it is nonsensical to exclude a technology such as cable from the new tier when even today Melita offers its customers speeds of 100 Mbps. It is certainly inconsistent to define a technology as not being "future proof" when at the same time it is already capable of reaching

⁷ See Draft Guidelines, paragraph 54

⁸ Draft Guidelines, paragraphs 54 and 77 and footnote 59

⁹ Analysis Mason, 'Guide to Broadband Investment', para 4.1.2

¹⁰ A Digital Agenda for Europe, COM/2010/0245, pt. 2.4.0, p.19

targets set for 2020 and has the current capacity (subject to demand by consumers) to triple such speeds.

This creation of a new tier for a specific technology in breach of the technology neutrality principle will have the effect of significantly distorting the market. This will undermine the private investment in Melita's infrastructure as well as planned future investment and will have serious detrimental effects on competition in the market.

2.2 The Ultra-Fast Tier is Not Aimed at an Objective of Common Interest

In accordance with general principles of State aid, an aid measure is to be aimed at a well-defined objective of common interest. The wording of the Draft Guidelines indicates that the objective of common interest is being taken to be the achievement of the Digital Agenda targets.

As stated above, the Digital Agenda targets are related to speed. By 2020 therefore 100 percent of EU Citizens should enjoy a broadband coverage of 30Mbps and 50% of households should have subscriptions of over 100 Mbps.

Melita therefore queries what the objective of common interest for the new tier is when both "interim NGAs" and "ultra-fast NGAs" are capable of reaching such speeds and satisfying such objectives.

2.3 The Ultra-Fast Tier does Not Provide an Incentive Effect

Melita is of the view that due to competitive forces in the market, NGA operators will have an incentive and will continue to undertake private investment in their infrastructures to ensure "ultra-fast" speeds even in default of public funding simply to remain competitive.

As a result, rather than trigger a change in investment decisions of such operators to invest in "ultra-fast" NGA networks, the new tier would merely serve to alleviate a proportion of the expenses in a new network

In Malta, following Melita's offering of NGA services and in particular as a result of its 100Mbps product that is today available to the market, other operators including the incumbent have publicly declared on numerous occasions that they have earmarked

more than EUR 100 million over the next three years to rollout fibre to the home infrastructure .¹¹

With increased demand from consumers for broadband speed and in view of Melita's current NGA service offerings, other operators including the incumbent will continue to invest further to upgrade their networks to support faster and higher quality broadband services. Melita's investment in its NGA infrastructure certainly places significant competitive pressure on other operators, particularly on the incumbent to invest in its own NGA infrastructure in order as to 'keep up' with Melita.

Melita is of the view that the new tier which seems to be specifically aimed at justifying state aid for fibre-to-the-premises roll outs, is contrary to general State aid practice as it does not provide any incentive effect since, in a market where upgraded cable network services are being offered, operators have an incentive to invest in fibre to the premises networks even in default of public funding.

2.4 The Ultra-Fast Tier creates Legal Uncertainty and Inconsistencies

Melita notes that some criticism has been levelled against the present Broadband Guidelines for a lack of clarity in the distinction between basic broadband networks and NGA networks. Rather than clarify such distinction, the Draft Guidelines further complicate matters and increase legal uncertainty by including a third tier of 'ultra-fast' networks.

This new tier is also inconsistent with the definition of NGA networks in the NGA Recommendation and more specifically is inconsistent with the Digital Agenda itself which, as stated above, defines ultra-fast as "*ultra fast internet connections above 100 Mbps.*"¹² WIK Consult in its Study on the Implementation of the Broadband Guidelines had for this reason cautioned against adopting a change in the definition of NGA networks.¹³ The new tier also conflicts with the market definition of the broadband access market which does not make such a distinction between fast and ultra-fast broadband.

Melita believes that the guaranteeing of legal certainty and elimination of regulatory inconsistencies provide yet another reason for removal of this new ultra-fast tier.

11 See in particular the Times of Malta, Thursday, March 22, 2012

12 A Digital Agenda for Europe, COM/2010/0245, pt. 2.4.0, p.19

13 WIK Consult, Study on the Implementation of the Broadband Guidelines, pt 3.1.4, p.111

2.5 The Impact of the New Tier in Malta

Already today, Melita provides a 100 Mbps NGA service to 99.9% of Maltese consumers. In addition, subject to demand by consumers, Melita's current network is currently capable of supporting a downstream bandwidth of more than 350Mbps and an upstream of over 100Mbps.

Over the past years, in reaction to Melita's service offerings, other operators including the incumbent have publicly declared that they have earmarked significant funds over the next three years for investment in new NGA infrastructure.¹⁴

Under the present Broadband Guidelines, Melita strongly believes that the market is thus a black area or, at the least, a grey area for the purposes of the Guidelines. In this respect, Melita is of the view that the State aid scheme proposed by the Maltese Government last February for the roll-out of a nationwide fibre to the home network is incompatible with the present Broadband Guidelines.

However, with the introduction of the new tier in the Draft Guidelines, since Melita's network seems not to qualify as an 'ultra-fast' NGA network, then public intervention seems to be still possible in terms of section 3.3.3 of the Draft Guidelines. This will effectively mean that State aid may be granted by the Malta Government to an operator in Malta in a black area where there is absolutely no market failure.

Melita believes that this is contrary to Article 107 TFEU and in particular risks seriously distorting competition in Malta and undermining the significant private investment that was made in Melita's infrastructure and in the recent upgrades to such infrastructure.

¹⁴ See in particular the Times of Malta, Thursday, March 22, 2012

3 Additional Comments

In addition to the concerns relating to the new 'ultra-fast' tier, Melita has some additional concerns highlighted below.

In the first instance, Melita is of the view that references to requirements of reciprocity should be removed and in particular references to reciprocity required by business should be removed. The Draft Guidelines state that their objective is the achievement of the Digital Agenda targets. This latter is concerned with broadband coverage for all consumers and does not set specific targets for business sectors. In this respect therefore the Draft Guidelines should not refer to State aid for the business sector as such aid would not fit in with its defined objective.

In addition, the reciprocity requirement itself is unclear as it does not specify the particular speed at which reciprocity is required. It is Melita's view that it is preferable to refer to high upload speeds rather than reciprocity as reciprocity may exist even at relatively low speeds.

Secondly, Melita is of the view that the requirement set out in paragraph 78 subparagraph (c) of the Draft Guidelines which specifies that "*the subsidised network will be operated as a wholesale only network*" is somewhat ambiguous. It is not clear whether this paragraph prohibits the retail arm of the network operator from utilising such network. It is also unclear whether this requirement is applicable also to related corporate entities (for example group companies) and whether this prohibition would apply if the network operator is only a part owner of the network.

Finally, in relation to the requirement for the Commission to take into account in its assessment of additional conditions set out in the said paragraph 78 "*whether major commercial investments in NGA have been undertaken in recent times*", Melita is of the view that it would be preferable if reference were made instead to a consideration of whether or not other NGA networks or services are present in the market. Ultimately, all NGA networks are the result of significant commercial investments in new or upgraded infrastructure and in its assessment of the balancing test the Commission should take any such networks into account.

4 Increased Transparency

Melita welcomes the measures taken in the Draft Guidelines to allow for the early publication of planned State aid projects. In particular, Melita favours the introduction of a requirement for a central webpage where all information on planned, on-going or implemented broadband projects receiving public funding is published. Melita believes this will certainly provide stakeholders with additional crucial information of the status of State aid projects.

At the same time, Melita considers it essential that interested parties that are of the view that specific proposed projects are contrary to the Guidelines are given sufficient information and tools to be able to intervene early in the procedure to submit its comments to the Commission on the particular project.