

## New draft State Aid for Broadband Guidelines

[http://ec.europa.eu/competition/consultations/2012\\_broadband\\_guidelines/en.pdf](http://ec.europa.eu/competition/consultations/2012_broadband_guidelines/en.pdf)

**Commentary by Louise Lancaster and David Cullen**

**INCA asked two of our experts to consider on the new draft 'EU Guidelines for the application of state aid rules in relation to the rapid deployment of broadband networks'. These are their comments.**

In general, these new guidelines seem more logically constructed than the current ones, clearer, less confusing. There is plenty of new wording that can be read to have been written with the BDUK experience in mind and could well put a spanner in the works, unless all BDUK's approvals have been granted by the time these guidelines are applied. One can't help infer that the Commission are not impressed, though.

Consultation is until 1<sup>st</sup> September and the new guidelines will be applied from the first day following publication in the OJEU.

### **Objective of government intervention measures**

The European Commission is keen to encourage social cohesion, so the guidelines specify that "a balance has to be carefully struck between the wish to provide very high speed infrastructure in urban areas to enhance their competitiveness and the need to avoid that a new digital divide emerges in rural areas." (*This may make it more difficult for Urban Broadband Fund projects to gain approval.*)

### **Design of government intervention measures**

The Commission wants to avoid duplication and incoherence caused by a multiplicity of schemes at regional and municipal level and is therefore encouraging national framework schemes to ensure coherency and reduce admin burden on local authorities.

National Regulatory Authorities (e.g. Ofcom) should **support** local authorities with regard to State Aid schemes and **should be consulted** when target areas are being identified. Currently Ofcom are decidedly silent on support for local authorities.

It goes on, "NRAs should issue guidelines for local authorities which include recommendations on market analysis, wholesale access products and pricing". "National competition authorities may also provide useful advice in particular in relation to large framework schemes to help establish a level playing field for the bidding operators and to avoid that a disproportionately high share of state funds is earmarked to one operator, thereby strengthening its (possibly already dominant) market position".

### **Ensuring that distortion of competition is limited**

The scheme will need to provide a “step change” in terms of broadband availability, i.e. significant new investments and significant new capabilities. This would include upgrading basic broadband to FTTC or FTTC to ultra-fast.

“Although certain copper enhancing technologies (such as vectoring) could increase the capabilities of the existing networks, they may not require significant investments in new infrastructure, hence should not be eligible for State Aid”. This clause is particularly helpful to those INCA members focused on building FTTH networks.

“Due to their similar technical and topology constraints, constructing a wireless network in an area where a mobile network is already present is unlikely to provide significant new capacities.” Many INCA members are concerned that wireless services do not get a fair hearing in Brussels, something we plan to address, particularly in relation wireless as part of the coverage equation and the potential offered by LTE in terms of bandwidth.

“Where the aid beneficiary is already dominant on a market or may become dominant due to the State funded investment, the aid measure could weaken the competitive constraint that competitors can exert.” INCA members will cheer this paragraph. The Commission needs to propose measures that will help establish the level playing field that will encourage new investment into the sector.

### **Definition of “NGA” network**

They are still defining NGA networks as wired (not wireless), fibre-based or advanced upgraded cable networks. They will keep this under review as technology is constantly changing. FTTC is referred to as “interim NGA” – they accept that it is better than nothing but do not regard it as future-proof, merely an incremental upgrade. The definition and explanatory notes are still woolly and unsatisfactory. For example, most things are ultimately “fibre-based”. They also describe wireless as “shared” , overlooking that copper networks are also shared. INCA members will be keen to help the Commission create better definitions of what should and should not constitute an NGA service.

“Member States may freely decide what form their intervention takes... Member States might decide to finance so-called next generation networks i.e. backhaul networks which do not reach the end-user.... Public authorities may also decide to undertake just civil engineering works...” This is a breakthrough. It is exactly what many INCA members believe we should be aiming to do in the UK.

### **Competitive Tender Process**

They have beefed up the section on public procurement, adding a new sentence: “Member States shall ensure a sufficiently transparent process and a competitive outcome and shall use a dedicated central website at the national level to publish all on-going tender procedures on broadband State Aid measures.”

### **Use of Existing Infrastructure**

There is a new section which spells out what an incumbent who wishes to take part in a tender process should do: “Any operator which owns or controls infrastructure (irrespective of

whether it is actually used) in the target area and which wishes to participate in the tender, should fulfil the following conditions: (i) to inform the aid granting authority and the NRA about that infrastructure during the public consultation; (ii) to provide access to such infrastructure to all other potential bidders at the same terms and conditions as the operator uses them for its own tender; (iii) to provide all relevant information and access to other bidders at a point in time which would allow the latter to include such infrastructure in their bid. Member States should setup a national database on the availability of existing infrastructures that could be re-used for broadband roll-out.”

INCA members argue that BT and the UK do not appear to have followed this process, but of course the guidelines are not yet in force. However we will review projects as they develop to ensure that these terms are understood and as far as possible adhered to.

### **Wholesale Access**

New wording: the obligation to offer effective wholesale access is not contingent on any prior market review by the regulator. One could infer a reference to the restricted availability of PIA here.

New wording: “The type of wholesale access obligations imposed on a subsidised network should be aligned with the portfolio of access obligations laid down under the sectoral regulation. ” We take this to be a reference to the UK’s insistence that PIA and VULA are sufficient as UK regulation does not mandate dark fibre. However, it goes on to say: “In principle, subsidised companies should provide a wider range of wholesale access products than those mandated by NRAs under sectoral regulation since the aid beneficiary is using not just its own resources but taxpayers’ money to deploy its own infrastructure.” Three cheers!

### **Transparency**

New wording requiring the aid beneficiary to provide information on infrastructure deployed under a State Aid contract to a central register of broadband infrastructures or to the regulatory authority.

### **White, Grey and Black for NGA**

If there is basic broadband but no NGA, then this is a “**white NGA**” area and is eligible for State Aid.

If there is one NGA network present already, this is a “**grey NGA**” area, and the Commission will have to carry out detailed analysis before approving State Aid because of the risk of crowding out other investors. They will have particular regard to the points above about the tender process, use of existing infrastructure, wholesale access, etc. *In addition*, for both White NGA and Grey NGA areas, the following conditions would have to be fulfilled:

a) State Aid will *only* be granted for “passive and neutral” NGA infrastructures – “Where the network operator is a vertically integrated broadband operator, adequate safeguards must be put in place to prevent any conflict of interest, undue discrimination and any other hidden indirect advantages. The subsidised infrastructure must enable the provision of competitive and affordable services to end-users by competing operators and ensure equal treatment of content

providers.”

b) The subsidised network must offer access under fair and non-discriminatory conditions to all operators who request it and will provide them with the possibility of effective and full unbundling (WDM unbundling if necessary). Third party operators must have access to passive and not only active infrastructure. The access obligation should include the right to use ducts and poles, dark fibre or street cabinets. (*Note the “or”.*) Effective wholesale access should be granted for at least seven years and the right of access to ducts or poles should not be limited in time.

c) Publicly financed NGA networks must allow “open topology” (eg able to support point to point or point to multi-point, at the choice of the wholesale customer).

### **Aid for Ultra-Fast Broadband Networks**

Ultra-fast networks are envisaged as FTTP services providing at least 100 Mbps. State Aid may be approved if the requirements set out above are satisfied, if there is demand, if the new service offers a “step change”, i.e. enhanced technological characteristics, such as symmetric speeds, and if the subsidised network is operated as *wholesale only*.

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