

The European Commission's hidden asymmetric Regulatory Approach in the Field of Broadband Infrastructure Funding

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I. Introduction

The contribution reviews the European Commission's approach to State aid control in the field of Broadband Infrastructure Funding. The Commission's current policy in this field is a demonstrative example for its inconsistent and asymmetric assessment of State measures when applying the State aid rules of the Treaty. The "Community Guidelines for the application of State aid rules in relation to rapid deployment of broadband networks" serve as a concrete demonstration model.

II. Publicly funded Broadband Infrastructure Investments – The Commission's Policy

There is no need to explain in detail why broadband services are of a tremendous importance to our economies and societies. In the era of globalisation, broadband networks have become a competitive tool for national as well as for regional economies, to the extent that a successful roll-out of broadband services is critically important for their

prosperity. Due to its impact on growth and innovation across all sectors and value chains of the economy, as well as on social and regional cohesion, broadband deployment is a key component of the European Commission's policy.¹

As economies are hit by the current financial and economic crisis, public investment is especially in the public's focus, also for broadband services. In fact, broadband networks are particularly in the spotlight since a technological shift has taken place, namely the roll-out of very high speed "Next Generation Access Networks" (NGA Networks). Lots of Member States are turning their attention towards support for these networks that may support a multitude of advanced digital converged services at very high speeds.

As a means to foster a quick recovery from the financial and economic crisis, the European Commission adopted a European Economic Recovery Plan in the end of 2008.² According to the Recovery Plan it is aimed to boost EU investment in defined strategic sectors, such as broadband, that can help support the economy in the short run and over a longer term create essential infrastructures for sustainable economic growth. In this context, the Commission decided to earmark € 1 billion to help rural areas get online, create new jobs and help businesses grow further.³

Due to additional federal funding available for broadband support within the framework of the German recovery packages⁴, German authorities notified a number of broadband schemes that were assessed by the European Commission and declared compatible with the EC Treaty.⁵ However, all Member States have to take care in every single case to channel public funds in line with the European State aid rules. The Commission aimed at clarifying the limits that Member States must respect when providing financial support for broadband infrastructure by publishing Draft "Community Guidelines for the application of State

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1 See "i2010 – A European Information Society for growth and employment", COM(2005) 229 final, 1 June 2005; "eEurope 2005: An Information Society for all", COM(2002) 263 final; "Bridging the Broadband gap", COM(2006) 129.

2 Communication from the Commission to the European Council, COM(2008) 800.

3 Press Release, 28 January 2009, IP/09/142.

4 For further details about the German recovery packages cf <http://www.konjunkturpaket.de/Webs/KP/DE/Homepage/home.html> (3.09.2009).

5 Commission Decision of 19 May 2009, K(2009) 4071, State aid N 153/2009 – Amendment of the State aid broadband scheme N 266/2008.

aid rules in relation to rapid deployment of broadband networks".⁶ After submission of this contribution, the Commission adopted its final version on 17th September 2009. The Guidelines summarise the Commission's policy in applying the State aid rules of the Treaty to State measures that support the deployment of traditional broadband networks and also address a number of new issues that pertain to the assessment of State measures aiming in particular to encourage and support the rapid and timely roll-out of NGA networks.⁷

As Director-General Lowe has emphasised, the Commission hopes that the Guidelines provide a clear and predictable framework for the stakeholders, by clarifying the role for public funding in the broadband sector.⁸ The Guidelines shall accelerate action by Member States and public authorities, so that they will not wait for the emergence of a "NGA digital divide" before intervening – as with basic broadband services.

However, apart from these good intentions the Commission does not explicitly put stress on the fact that these Draft Guidelines represent a crucial development in the Commission's general approach to State aid control of infrastructure funding.⁹

It is therefore the aim of the authors firstly, for the purpose of clarity to identify the new criteria and, further, to evaluate the Commission's policy, especially its compatibility with existing Community law and decision-making. Finally, the contribution closes with some key proposals for establishing a consistent and compatible system that is in line with the ambitious policy goals for future broadband networks in Europe and may serve as a clarification of the delicate relationship between privately and publicly funded broadband infrastructure investments.

II. The Draft Guidelines for Broadband Networks as an Illustration for the Commission's Policy

After a short introduction the first part of the Draft Guidelines outlines the Commission's policy on State aid for "traditional" broadband projects. In general, it is said that the Commission has taken an "*overwhelmingly favourable view*" towards State measures for broadband deployment in remote areas, whereas it has been much more sceptical in areas that are served already and competition exists.¹⁰

In paras. (17) – (19), the Draft Guidelines describe the application of the Market Economy Investor Principle in the field of broadband cases, e.g. in the Commission's Amsterdam decision.¹¹ This case dealt with the construction of a "Fibre-to-the-Home"-Network (FTTH-Network) in an area in Amsterdam that was already served by several competing networks. The municipality of Amsterdam wanted to invest in the passive layer of an FTTH-network together with two private investors and five housing corporations. The Commission examined the conformity of the public investment by underlining that it has to be in conformity with market terms¹²; this has to be demonstrated thoroughly and comprehensively, either by means of a significant participation of the private investor and/or the existence of a sound and detailed business plan showing an adequate return on investment. In its State aid assessment the Commission took also into consideration that the municipality of Amsterdam invests on the same terms and conditions as the private parties involved in the project.¹³ Thus, the investment did not constitute State aid within the meaning of Art. 87 (1) EC as it was in conformity with the Market Economy Investor Principle.

6 http://ec.europa.eu/comm/competition/state_aid/reform/reform.cfm, 19 May 2009. After a public consultation (19.5.2009 to 22.6.2009) the Commission published over 90 contributions of the stakeholders on its website, cf http://ec.europa.eu/competition/consultations/2009_broadband_guidelines/index.html (16.8.2009).

7 Paras. 7, 52 of the Draft Guidelines. Member States often decide to provide financial support in order to ensure that areas which are deemed as being unprofitable will still benefit from the spill-over effects that NGA networks may bring to the economy and will not suffer a new digital divide.

8 Speech Philip Lowe, Presentation of the Commission's State aid proposals: draft Guidelines for broadband networks, ECTA Conference on "Fibre investment for Europe's recovery", Brussels, 25 June 2009.

9 This approach may be transferred to any sector of infrastructure funding, such as airport infrastructure funding, cf *Koenig/Trias*, A New Sound Approach to EC State Aid Control of Airport Infrastructure Funding – What can we learn from the Draft Broadband Guidelines?, EStALQ 3/2009.

10 Para. 9 of the Draft Guidelines.

11 Commission Decision of 11 December, C 53/2006 Citynet Amsterdam – investment by the city of Amsterdam in a fibre to the home (FTTH) network, [2008] OJ L 247, 16.9.2008, p. 27.

12 C 53/2006 Citynet Amsterdam – investment by the city of Amsterdam in a fibre to the home (FTTH) network, [2008] OJ L 247, 16.9.2008, p. 18 ff.

13 C 53/2006 Citynet Amsterdam – investment by the city of Amsterdam in a fibre to the home (FTTH) network, [2008] OJ L 247, 16.9.2008, p. 14.

Moreover, the Commission outlines its practice with regard to public service compensation.¹⁴ The Draft Guidelines were amended in its final version by setting out a list of conditions that must be met if a public service compensation is granted to an undertaking entrusted with the operation of a service of general economic interest (SGEI), cf. paras 25-29 of the final version. These conditions are based on the specificities of the broadband sector. In two (exceptional) cases concerning measures taken by French regional authorities to award a subsidised public service concession to private operators for the deployment of basic broadband networks in rural regions, the Commission held that the measures were in conformity with the four criteria laid down in the landmark Altmark decision, and did therefore not fall under Article 87 (1) EC.¹⁵

However, considering the complete State aid decision-making practice of the Commission in the field of broadband, it becomes obvious that projects very often involve the presence of State aid within the meaning of Art. 87 (1) of the Treaty. Where a measure has been found to constitute State aid within the meaning of Article 87 (1) EC, it must be held compatible with the Common Market if it fulfils the requirements of Art. 87 (2) EC or can be deemed compatible in accordance with Art. 87 (3) or Art. 86 (2) EC as developed by the relevant secondary law.

In its practice on cases of State measures to support broadband, the compatibility assessment regularly has been (and still is) based directly on Art. 87 (3) lit. (c) EC. In assessing whether an aid measure can be deemed compatible with the Common Market, the Commission balances the positive impact of the aid in measuring an objective of common interest against its potential negative effects,

i.e. distortions of trade and competition.¹⁶ This test was introduced by the 2005 State Aid Action plan, concretised by the Guidelines and covers the following questions¹⁷:

- (1) *Is the aid measure aimed at a well-defined objective of common interest, i.e. does the proposed aid address a market failure or other objective?*
- (2) *Is the aid well designed to deliver the objective of common interest? In particular:*
 - (a) *Is the aid measure an appropriate policy instrument, i.e. are there other, better-placed instruments?*
 - (b) *Is there an incentive effect, i.e. does the aid change the behaviour of undertakings?*
 - (c) *Is the aid measure proportional, i.e. could the same change in behaviour be obtained with less aid?*
- (3) *Are the distortions of competition and the effect on trade limited, so that the overall balance is positive?"*

In its Draft Guidelines, the Commission proceeds further by explaining the individual steps of the balancing test in the very special field of broadband funding.¹⁸ Its approach is based upon a distinction between areas where no broadband infrastructure exists or is unlikely to be developed in the near term ("white areas"), areas where only one broadband network operator is present ("grey areas") and areas, where at least two or more broadband network providers are present ("black areas").¹⁹ The methodological and analytical approach of the Commission is described as follows in the Draft Guidelines:

- *White areas:* In remote and underserved areas, the Commission considers financial support to be in line with European State aid rules, as it promotes regional cohesion and addresses market failures.²⁰ Hence, interventions in white areas are likely to be approved.
- *Black areas:* The Commission considers measures funding the roll-out of an additional broadband infrastructure in a black area negatively. As there exists no market failure, there is no scope for State aid to bring further benefits. Moreover, it leads to a distortion of competition, and the crowding out of private investors.²¹
- *Grey areas:* The assessment in the so-called grey areas is much more complex, as it might be deemed compatible, but requires a much more detailed analysis of the regions where the provi-

14 Paras. 20 ff. of the Draft Guidelines.

15 Commission Decision N 381/2004 – France, Project de réseau de télécommunications haut débit des Pyrénées-Atlantiques; Commission Decision N 382/2004 – France, Mise en place d'une infrastructure haut débit sur le territoire de la région Limousin (Dorsal).

16 Para. 28 of the Draft Guidelines.

17 Para. 29 of the Draft Guidelines.

18 However, it may be expected that this new approach will be also applied in other sectors of infrastructure.

19 See e.g. Commission decision N 201/2006 – Greece, "Broadband access development in underserved areas".

20 Para. 35 of the Draft Guidelines.

21 Para. 37 of the Draft Guidelines.

sion of an infrastructure is still a de facto monopoly provided that there are no less distortive measures available and no adequate or affordable services are offered that can satisfy the demand of the population. According to the Draft Guidelines, it is crucial to show that

- “(...) the overall market conditions are not adequate, by looking, inter alia, into the level of current broadband prices, the type of services offered to end-users (residential and business users) and the conditions thereto;
- effective network access is not offered to third parties or access conditions (regulated and unregulated access) are not conducive to effective competition;
- overall entry barriers preclude potential entry of other electronic communication operators, and
- any measures taken and/or remedies imposed by the competent national regulatory or competition authority with regard to the existing network provider are not able to overcome such problems (...)”²²

In order to give further guidance, the Commission has pointed out a bundle of conditions to minimise the State aid involved and a potential distortion of competition.²³ Ignoring one of these conditions that are set out in the following, usually leads to a negative outcome, thus to the incompatibility of the measure:

- Detailed market analysis;
- Open tender process;
- Best economic offer;
- Technological neutrality;
- Use of existing infrastructure;
- Wholesale access;
- Benchmarking pricing exercise; and
- Claw-back mechanism to avoid over-compensation.

In a second part of the Guidelines, the Commission addresses public financing of very high-speed, so-called “Next Generation Access”-Networks. According to the Commission, NGA networks are “(...) 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 (...)”²⁴

In its Draft version, the Commission further has defined the NGA networks as networks:

- “(...) laying fibre to existing street cabinets offering the prospects of downstream bandwidths of a minimum of 40 Mbps and 15 Mbps upstream (compared with today’s downstream speeds of a maximum of 8 and 24 Mbps for ADSL and ADSL2+ access technologies, respectively);
- upgrading current cable networks to deliver speeds up to and beyond 50 Mbps against the previous maximum speed of 20 Mbps, using the new ‘DOCSIS 3.0’ cable modem standard, or
- connecting newly built homes and offices with fibre connections offering services up to 100 Mbps and beyond (...)”²⁵

In contrast to the Commission’s former approach in its Draft version, the definition does not contain any specific bandwidth thresholds and thus, does not exclude e.g. VDSL networks. The bandwidth thresholds that were chosen in the former definition seemed to be arbitrary and were neither substantiated by the Commission nor adjusted to the sector-specific EC regulatory regime on Electronic Communications Networks and Services. As consumer demand as well as the supply-side capacities develop steadily, it is not appropriate to define NGA in terms of a particular upstream or downstream speed.

It is to be welcomed that the Commission does not any longer set specific bandwidth limits for either upstream or downstream speeds as this could have hindered an efficient breakdown of upstream or downstream speeds. Private undertakings will be best suited to set such an efficient breakdown of total bandwidth taking into account the actual demand of their consumers.

In assessing the compatibility of State aid for the development of NGA networks the Commission refers to the distinction between “white”, “grey” and “black” areas as it is applied for traditional broadband schemes. However, the specificities of NGA networks call for a more refined definition that is given by the Commission in paras. (63) to (65) of the Draft Guidelines:

Whereas “white NGA areas” are areas where NGA networks do not exist and are not likely to be built within the following three years, “black NGA

22 Para. 40 of the Draft Guidelines.

23 Para. 45 of the Draft Guidelines.

24 Para. 47 of the Draft Guidelines.

25 Para. 48 of the Draft Guidelines.

areas" are described as areas where at least two providers operate NGA networks or will be operating in the next three years. "Grey NGA areas" are areas where only one NGA network is in place and there are no plans by another operator to deploy an infrastructure in the following three years.

With regard to the compatibility assessment the Commission takes the following view:

- White NGA areas: The grant of State aid in "white NGA areas" is always admissible if no basic broadband networks are in place. Where only one basic broadband network already exists (traditional grey area), the grant of aid will be subject to the condition that there are no less distortive (regulatory) means. Moreover, Member States have to demonstrate that the existing network is insufficient to satisfy the demand of citizens and business users.²⁶
- Black NGA areas: State measures supporting schemes in so-called "black NGA areas" are considered to seriously distort competition and therefore are declared incompatible with the State aid rules.²⁷
- Grey NGA areas: With regard to "grey NGA areas" the Commission closely investigates whether the overall conditions are not adequate, by looking, inter alia, into the level of current NGA broadband prices, the type of service offered and the existence of demand for new services that cannot be met by the existing network. Moreover, the Commission assess, whether effective network access is offered to third parties, overall entry barriers preclude potential entry, the NGA networks were already in place/built on the basis of a privileged use and measures are already taken/ remedies are imposed by a regulator or a competition authority.²⁸

In addition to the conditions applying to traditional broadband schemes (market analysis, tender

process, etc.), some further safeguards are set out to limit distortions of competition²⁹: Enhanced wholesale access for third parties should be provided for at least seven years; conditions for wholesale network access should be established in consultation with National Regulators; the infrastructure should be a point-to-point "multi fiber" architecture or an architecture that can be unbundled; the aid must not cover the last mile access segment, in cases where operators already provide advanced basic broadband networks.

IV. The Draft Guidelines as a Viable Model?

As it may be expected that the Commission's approach will be also applied in other sectors of infrastructure funding, the question is raised if the Draft Guidelines can serve as a viable model. The Draft Guidelines summarise the Commission's policy in applying the State aid rules of the Treaty to State measures that support on the one hand the deployment of the traditional broadband networks and – on the other hand – the roll-out of the very high, super fast NGA networks. According to the Commission, the Guidelines shall be a tool increasing legal certainty and the transparency of its decision-making.

However, despite these good intentions, the Draft Guidelines already have come under heavy criticism. Incumbent operators fear that investment might be stifled and new market entrants fear that the new framework fosters collusion.³⁰ Moreover, regulators claim that the draft seems to be "overly prescriptive".³¹ Others also complain that the contribution represents a mere compendium of the past case practice that – with regard to the deployment of NGA networks – exclude wireless mobile technology and thus contradicts the technology neutrality principle.³²

As Member States and stakeholders were invited to comment on the draft rules and conditions suggested by the Commission by the end of June 2009, it is very enlightening to see in how far the public consultation process has influenced the content of the final Guidelines.

Taking part in the public discussion, it is our concern to express our view regarding the controversial subjects that have come into the public's focus and – moreover – to call attention to some

26 Para. 68 of the Draft Guidelines.

27 Para. 71 of the Draft Guidelines.

28 Para. 70 of the Draft Guidelines.

29 Para. 74 of the Draft Guidelines.

30 Brunsten, Jim, State aid limits to be clarified, 2 July 2009, <http://europeanvoice.com>.

31 Brunsten, Jim, State aid limits to be clarified, 2 July 2009, <http://europeanvoice.com>.

32 Steptoe & Johnson LLP, EU Competition Briefing – July 2009, Brussels.

crucial issues that seemed to be unnoticed up to the present.

1. Compatibility with Community Law: The Principle of symmetrical Market Intervention

Under the EC Treaty, compatible State aid requires, as well as all other competition law interventions entrusted to the Commission, a consistent symmetrical control approach. Asymmetrical regulatory instruments are neither covered by Artt. 87, 88 EC (State aid), except under the small and medium enterprises (SME) regime, nor by Art. 82 EC (abuse of dominant positions) or Art. 81 EC (cartels). This principle of symmetrical market intervention under the EC Treaty is also reflected by the European Court of Justice case law. The European Court of Justice (ECJ) has elaborated on this principle particularly in its *Bronner* case.³³ According to the ECJ a refusal by a dominant undertaking to supply access to its essential facility can only be considered to be an abuse of its market power and thus in violation of Art. 82 EC, if:

- the refusal to supply access to a facility is likely to prevent any competition at all on the applicant's market;
- the access is indispensable for carrying out the applicant's business; and
- the access is denied without any objective justification.

These very restrictive requirements on asymmetric access obligations imposed on dominant undertakings as defined by the ECJ reflect the general principle that under primary competition law of the EC Treaty all remedies against market failures are to be applied symmetrically.

The introduction of asymmetric regulatory instruments can only be legitimate under the power of the Community, acting through the Parliament and the Council, to legislate on the approximation of national laws under Art. 95 EC in order to remedy diverging national regulatory instruments as obstacles for the internal market. In contrast, State aid rules and policies must not be used as a substitute for Community legislation on regulation to be enacted only under the codecision procedure of Art. 251 EC.

However, the Draft Guidelines might penalise those operators who have already invested heavily in infrastructure. The asymmetrical treatment is especially indicated by the Commission's geographically differentiated subsidy strategy for "grey areas". Generally, grey areas are those regions where you can find an efficient business case for only one single broadband infrastructure. Here, it is only profitable for one single operator to set up a network, not for two or even more.³⁴ If the deployment of an additional infrastructure is subsidised, investors who have already invested in the existing network are heavily disadvantaged. Private investors can never compete with a state funded network on an equal footing. In their planning process, they took a certain risk and anticipated a certain return on invested capital that cannot be realised under the new circumstances. This loss of profitability prospects of their existing networks ("crowding out") lowers their willingness to make new investments in the future.

Consequently, it should be ensured that any asymmetric distribution of State aid is excluded and that private operators get the legal certainty that is necessary to invest in their networks. The Draft Guidelines, requiring only a "more detailed assessment"³⁵ cannot create this legal certainty for private operators.

Moreover, the Commission should also apply a more consistent approach in "grey NGA areas". The risk of crowding out existing investors and distorting competition is especially high. According to the Commission, an area is to be considered as a "grey NGA area" where only one NGA network is in place or is being deployed in the coming three years and there are no plans by any operator to deploy a NGA network in the coming three years.³⁶ A key feature of the assessment of State aid for NGA is the fact that it cannot be based on an observation of the actual deployment of networks and the resulting provision of services, as investments still have to take place and NGA-based services will further

33 ECJ C-7/97, ECR I-7791, 26 November 1998, Oscar Bronner GmbH & Co. KG v Mediaprint Zeitungs- und Zeitschriftenverlag GmbH & Co. KG et al., para. 43 ff.

34 BITKOM, Comments on the draft Community Guidelines for the application of State aid rules in relation to rapid deployment of broadband networks, 18 June 2008, p. 2.

35 Paras. 38 ff. of the Draft Guidelines.

36 Para. 63 of the Draft Guidelines (five years); new para. 68 of the final version.

develop.³⁷ There is a lot of uncertainty on the demand for the very high bandwidth services, the prices consumers are willing to pay, the technologies that can be used to deliver these services and the competition from existing broadband networks. The crucial question, whether a network turns out to be "sufficient" in the future, is therefore quite difficult to answer, especially because many NGA investments are at a very nascent stage. That is why the risk of crowding out private investment by state-financed networks is even greater with regard to NGA investments than for current generation broadband.

2. Compatibility Assessment: No universal Services Pricing Policy; less distortive Regulatory Measures

According to the Draft Guidelines State aid measures might be compatible in "grey areas" or "grey NGA areas" where the provision of a broadband infrastructure "(...) is still a *de facto* monopoly provided that (i) no affordable or adequate services are offered to satisfy the needs of the citizens or business users and that (ii) there are no less distortive measures available (including *ex ante* regulation) to reach the same goals (...)"³⁸ For the purpose of establishing this, the Commission has highlighted a number of indicators, e.g. overall entry barriers that preclude potential entry and the overall market conditions. In order to find out if these market conditions are adequate, the Commission explicitly refers to:

- the type of services offered to end-users;
- the conditions thereto; and
- the level of current broadband prices.

a) No universal services pricing policy

The Draft Guidelines neglect the fact that price differences as such are by no means a sign of market failure but might just as well be justified by different underlying cost structures in different regions. For instance, topographical disadvantages of a

mountain area are perfectly reflected in higher prices of services by a functioning market. The Draft Guidelines appear to induce a universal services pricing policy, which is again reserved to the Community legislator under Artt. 95, 251 EC. The policy to achieve such universal services pricing effects through State aid interventions, e.g. in regions with a difficult topography, can therefore not be based on the concept of market failure in the sense of the State Aid Action Plan.

b) Less distortive (regulatory) measures available?

Before granting State aid, it is in any case up to the Member State to provide evidence that all other (regulatory) measures have been exhausted. Regulatory shortcomings in the market should not be remedied by a certain State aid policy. State aid should be regarded only as a measure of last resort in cases where there remains to be no viable business case for at least one private investor after all regulatory measures available have been taken into serious consideration. Although the Commission explicitly states in the Draft Guidelines that *ex ante* regulation is seen as a "less distortive measure available to reach the same goals", it abandons its own approach by favouring direct state interventions without adjusting appropriate regulatory instruments to the State aid option in order to optimise infrastructure-based and service-based competition for broadband access keeping in mind the informational asymmetry between the State aid granting agency and the recipient. Only the recipient of State aid, not the granting agency, is qualified as an active market participant for innovative investment decisions by virtue of its inside-market knowledge.

Especially new and emerging markets in the Electronic Communications sector are subject to a lack of data necessary for market definition and analysis. In contrast to conventional markets the lack of data generated by the interaction between the demand- and the supply-side often stems from informational asymmetries because only the supply-side is in a technological position to evaluate electronic communications solutions and options. Instead of distorting new and emerging markets (which always suffer from severe informational asymmetries) through State aid interventions a more differentiated incentive approach should be taken under the forthcoming NGA Recommendation.³⁹ The crucial question in this context is how

37 ETNO, Reflection Document on the draft "Community Guidelines for the application of State aid rules to rapid deployment of broadband networks", June 2009, p. 9.

38 Paras. 40, 70 of the Draft Guidelines.

39 Commission's Draft Recommendation on regulated access to Next Generation Access Networks (NGA) published under: http://ec.europa.eu/information_society/policy/ecomm/doc/library/public_consult/nga/dr_recomm_nga.pdf (16.08.2009)

to choose the least harmful and most incentive-efficient alternative. The regulatory framework for electronic communications calls for a proportionate approach, based on the nature of the problem identified in a specific, i.e. well-defined relevant market of electronic communications. Article 8 of the Access Directive states: "(...) *Obligations imposed in accordance with this Article shall be based on the nature of the problem identified, proportionate and justified in the light of the objectives laid down in Article 8 of Directive 2002/21/EC (...)*"⁴⁰.

Therefore, regulatory measures should be defined in accordance with the actual competitive situation of the specific relevant market. Insofar as there is no effective competition, the national regulatory authorities must act by imposing access (or – if necessary – wholesale resale) obligations. However, in order to uphold the incentives of private investors, regulators should refrain from stepping in too quickly and shift their focus to a deregulatory approach if genuine competition occurs efficiently. Remedies should be applied in a gradual fashion, depending on each particular relevant market situation and respective of market specificities and geographical differences. The gradual approach, specifically endorsed by the upcoming new legislation on Electronic Communications (Review), relies on varying degrees and mixing elements, which will inter alia encourage regulatory risk sharing between the infrastructure investor and the access seeker.⁴¹ It will have a positive impact on investment decisions in NGA networks while – at the same time – being a safeguard that measures are implemented if the analysis of the market clearly demonstrates a lack of competition.

Keeping in mind that the regulator's policy can range from being anticipatory through the implementation of strict regulatory policies to being merely reactive, depending on the stakeholders' behaviour, it is more likely that market players struggle for innovative solutions that will alter the competitive landscape. The "threat" of regulation should be construed as an incentive-inducing sanction in order to remedy inappropriate behaviour of the infrastructure provider. In contrast to the granting of State aid, public agencies are much better in a position to cope with their imperfect demand and supply-side information of the relevant access market by inducing a mere "threat" of regulation. The "threat" of appropriate regulation leaves enough room for the infrastructure provider to

develop creative access solutions in order to meet the demand and preferences of service providers, and downstream, last but not least, of end-consumers.

However, if regulators fail to impose the proportionate level of regulatory policy, the consequences might be serious. As NGA networks represent a market that requires substantial investment, it is of paramount importance to uphold private incentives through substantial regulatory tools of risk sharing between the infrastructure investor and the access seeker.⁴² The costs to private investors could be also lowered significantly by fostering access to civil works, e.g. by making available access to ducts of all utilities and allowing for the sharing of investment in civil works among operators.⁴³ However, the regulation of access to civil works still differs substantially between the Member States. Therefore, the Community should further legislate on the approximation of national laws under Art. 95 EC in order to minimize diverging national cost levels as obstacles of investments into broadband infrastructure, especially into the passive infrastructure for NGA networks. Granting State aid under such diverging access conditions to civil works would further distort competition for broadband infrastructure investments between the Member States. In this context, it becomes obvious that State aid policies shall not be used as a substitute for the approximation of national laws or as a remedy against its lack.

40 Directive 2002/19/EC of the European Parliament and of the Council of 7 March 2002 on access to, and interconnection of, electronic communications networks and associated facilities (Access Directive), OJ L 108, 24.04.2002.

41 One technique of risk sharing is to provide for adequate access contract periods combined with access prices, which are partly covering the initial infrastructure investment costs. For an overview of risk sharing methods cf Nitsche, Assessing risk sharing proposals, ECTA conference: Fibre investment for Europe's recovery, Brussels, 25 June 2009, http://www.apritel.org/fotos/editor2/Rainer_Nitsche.pdf (16.08.2009).

42 Cf Elixmann et al., Anforderungen der Next Generation Networks an Politik und Regulierung – Herausforderungen des NGN für das aktuell bestehende Regulierungsregime, Studie für das Bundesministerium für Wirtschaft und Technologie, WIK Consult GmbH, April 2008, <http://www.bmwi.de/BMWi/Navigation/Service/publikationen,did=251140.html>, S. 37 ff. (16.08.2009).

43 Alternative measures: Ease the acquisition process of right of ways, accelerated processes of infrastructure sharing, measures that lead to lower capital cost of investment, e.g. tax incentives.

3. Technology Neutrality

Para. 45 lit. (d) of the Draft Guidelines clearly states that broadband services can be delivered “on a host of infrastructures” and that Member States should not favour any particular technology or network platform, absent objective justification.⁴⁴ Despite this clear statement the Commission seems to favour certain technologies: In footnote 44 it is declared that neither satellite nor mobile network technologies appear to be capable of providing very high speed symmetrical broadband services. Apart from the disadvantage of ineligibility for aid under the Guidelines, the ignorance or negligence with regard to the capabilities of such technologies⁴⁵ may lead to a discriminatory market assessment if a comparable broadband infrastructure is dismissed.⁴⁶

4. Time Criterion: Need for more Flexibility

Although nowadays the development of new advanced communications services and the convergence of different technologies and infrastructures have made some of the traditional broadband networks insufficient to provide certain advanced telecommunication and audiovisual services, the Draft Guidelines seem to be concentrated on a too ambitiously timeframe. According to the Commission, it is a primary objective to ensure that State aid measures will result in a higher level of broadband coverage and penetration, or *in a more timely manner*, than would occur without the aid.⁴⁷ The *rapid and timely roll-out* of NGA networks in particular is encouraged and supported.⁴⁸ When assessing the compatibility of State aid for “white NGA” and

“grey NGA” areas, the Commission considers the likelihood that an operator may deploy a NGA *within three years*.

Instead of stating fixed time frames and thereby becoming over-ambitious there should be provided a certain degree of flexibility. It appears problematic to predefine specific and predetermined dates for investments in the market. Especially the telecommunications sector is characterized by a high degree of technological development and thus, subject to uncertainties concerning the level of demand to certain investments and its appropriate time frames. The Draft Guidelines should therefore reflect these deficiencies of public interventions stemming from informational asymmetries and from a lack of regulatory adjustments to actual market challenges allowing for regulatory remedies that are adaptable by the market players to specific market conditions.

V. Conclusions and some Key Proposals

In sum, the Commission's policy represents a development in its general approach to State aid control of infrastructure funding. Whereas a more predictable and clear framework is generally to be welcomed, the new approach leaves room for imperative improvements. The Commission's policy must be in line with Community law and establish a system that complies with (not over-) ambitious policy goals for future broadband networks in Europe. Further clarification, development and concretization should be foreseen in the following main areas:

- Private operators who have already invested in infrastructure should not be disadvantaged by an asymmetrical treatment. If – in very exceptional cases – State aid is justified, it must be granted in an open, transparent and symmetrical manner. Any discrimination must be excluded, i.e. first and foremost, that the investor must be selected irrespective of his market position and his status as a former incumbent or newcomer. Under the EC Treaty, compatible State aid requires, as well as all competition law interventions entrusted to the Commission, a consistent symmetrical approach. Asymmetrical regulatory instruments are neither covered by Artt. 87, 88 EC (State aid), except for SMEs, nor by

44 The Commission has accepted the justified use of one specific technology (ADSL) only in one case: Commission Decision N 222/2006 – Italy, Aid to bridge the digital divide in Sardinia, para. 45.

45 Especially mobile technologies (WiMAX) will increasingly offer speeds comparable to fixed broadband, McKinsey report, Broadband for the masses, February 2009.

46 American Chamber of Commerce to the European Union, Response to the Consultation on the Commission's Broadband Guidelines, 22 June 2009, p. 5.

47 Para. 5 of the Draft Guidelines.

48 Para. 7 of the Draft Guidelines.

- Art. 82 EC (abuse of dominant positions) or Art. 81 EC (cartels). This principle of symmetrical market intervention that is also reflected by the European Court of Justice case law should be clearly expressed in the final version of the Guidelines.
- State aid policies must not be used as a substitute for Community legislation on regulation to be enacted only under the codecision procedure of Art. 251 EC. The Draft Guidelines appear to induce a universal pricing policy, which is reserved to the Community legislator.
 - Instead of distorting new and emerging electronic communications markets through state aid interventions a more differentiated, flexible regulatory approach should be taken with regard to an appropriate risk sharing between the infrastructure investor and the access seeker (risk sharing options discussed in detail by Nitsche, Assessing risk sharing proposals, http://www.apritel.org/fotos/editor2/Rainer_Nitsche.pdf). Thus, it can be expected that market players will struggle for innovative solutions that benefit the whole electronic communication environment.
 - The Commission should take care not to distort competition by favouring one type of infrastructure over the others. The definition of NGA should be technologically neutral and imply reference to the actual market demand- and the supply-side potentials.
 - Concerning the time frame for the deployment of NGA networks, the Commission should take a more sophisticated and realistic approach. The telecommunications sector is characterized by a lot of uncertainties concerning the level of future demand and supply-side capacities. Therefore, the time periods indicated by the Commission are inappropriate, as a matter of principle, and should be amended by some flexible mechanisms adaptable to the supply-side flexibility and creativity and the permanently changing demand side preferences.