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**Public funding for broadband networks and EU State aid rules:
Issues ahead**

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Ladies and Gentlemen¹,

The European Union has successfully developed broadband via competitive market principles:

- Mass market deployment of broadband in cities and urban areas has taken place in a number of Member States, both xDSL and TV cable networks,
- New alternative platforms are emerging—wireless , satellite, mobile,
- Subsequent to full scale market liberalization in 1998 and the development of the EU telecommunications framework since then—with its emphasis on unbundling of the local loop and the introduction of the related unbundling regulation—competitive forces have driven the introduction of broadband. Market entrants have started to climb up the investment ladder.

However:

- The deployment of broadband in rural areas continues to face serious obstacles,
- There are not sufficient market incentives for private operators to roll-out networks in these areas,

¹ The author is Deputy Director General, DGCompetition. European Commission. The paper represents the personal opinion of the author.

There is therefore a genuine case for public support.

The job is also far from accomplished in the urban areas:

- 40% of households in the European Union have by now broadband access,
- but only 1 million of those lines are fibre-based.

[Issues]

We are therefore facing two major issues:

- the danger of a digital divide developing in Europe between rural and urban areas,

And

- Insufficient speed of deployment of Next Generation Broadband networks based on fibre and other high speed technologies which will take us beyond 50 Mbit/s for the subscriber line.

This then defines the difficult equation which we will have to resolve over the coming months:

- How to provide public support for broadband deployment,

Without

- Crowding out private investors and damaging the competitive environment that has taken European telecommunications so far ahead, both in fixed and mobile communications.

Addressing this task will on the one hand require the development of a clear regulatory framework for broadband introduction which will have to tread a fine line between investment incentives and openness of networks, in order to maintain the competitive dynamics generated by open markets. This is at the very heart of the ongoing debate on the NGA (Next Generation Access networks) Recommendation currently in work² and very much at the centre of debate also at this conference. On the other hand, it will require a well balanced position on public funding where the market cannot deliver.

This leads right to the role of EU State aid control in this major investment area, critical for the Union's future.

[State aid rules]

Let me first describe briefly the rules that have been developed during recent years in applying EU State aid control to public funding for broadband deployment.

As a starting point in our assessment of cases, we have to check if we are faced with State intervention falling under the State aid rules of the EU Treaty—Article 87(1) of the EC Treaty.

² Draft Commission Recommendation on access to Next Generation Access Networks (NGA); at http://ec.europa.eu/information_society/policy/ecomm/library/public_consult/index_en.htm

Public funding of the deployment of broadband will normally qualify as aid according to the criteria of this Article. However, there are two important exceptions:

- The public investor behaves in all aspects as a private investor would do—the so-called market economy investor principle developed in the context of EU State aid rules. To date, we have found this to be the case only in one single broadband case submitted.
- The Member State claims legitimately the public service exemption of the EC Treaty—Article 86(2) and the associated so-called Altmark criteria.

In the latter case we have to check a number of criteria, in order to determine if that exception can be claimed. In case it can we have to check if the costs of the entrusted service of general economic interest (SGEI) are overcompensated. Again, to date we have found in only two cases in favour of such a claim by a Member State in the broadband field.

In the vast majority of cases submitted the Commission has found that the funding would qualify as State aid under Art 87(1) of the EC Treaty and therefore could only be allowed if it was found compatible with Article 87(3) of the Treaty. Roughly speaking, public funding of a project will be admitted under the compatibility test of Article 87(3) if it can be proven that

- We are facing a situation of market failure. This means in plain words that the development of the broadband project would not take place without the aid,

However:

- The applicant will have to prove the incentive effect of the aid. In other words, the project would not take place without the aid. There must be no crowding out of private investment caused by the aid,
- The effect on competition and trade must be limited. There must not be an unacceptable distortive effect and therefore damage to the competitive telecommunications market structure.

The vast majority of projects submitted to the Commission's State aid control in the broadband field have qualified under these criteria. In general, the projects concerned the development of rural broadband.

[Case practice]

In assessing these projects, the Commission has developed—across a sequence of more than 40 aid decisions—a “white, grey, black zone approach” to the assessment of public funding for broadband networks:

- “White zones”: broadband is not provided at this stage in the area concerned. In these cases, mostly concerning rural deployment, the Commission has normally taken a positive

decision,

- “Black zones”: a number of competing operators do already exist. This has been the red line—in this situation there is a high risk of crowding out of private investors. Normally, a negative decision would be taken,
- “Grey zones”: at least one broadband provider is already operating in the area. In this case, a detailed analysis will be needed and the result will depend on the specifics of the case.

Looking at the decision practice of the Commission to this date,

- In more than 40 cases³ a decision was taken declaring the submitted public funding project for broadband deployment compatible with State aid rules. In general, these cases were falling under the white zone approach, mostly concerning deployment in rural areas
- To date there has been only one negative decision under a “black zone” finding, with a resulting prohibition⁴,
- One no aid decision has been taken. In this case the Commission found that the public investor behaved as a private investor would have done.⁵

³ for reference to all Commission decisions taken under the State aid rules in the broadband field, see http://ec.europa.eu/competition/sectors/telecommunications/broadband_decisions.pdf

⁴ the “Appingedam decision”; Commission Decision of 19 July 2006 on case C 35/2005, [2007] OJ L 86, 27.3.2007, p.1

While the decision practice of the Commission has been largely positive, these decisions have not come without conditions. Common elements of our decision practice have been:

- The requirement of *technology neutrality*. The operator should have the choice which technology to use,
- *Open access*. Public funding should not be used to foreclose markets, quite independent of general regulatory requirements resulting from the EU's telecommunications framework and the related Recommendations,
- There should be normally an *open tender* to choose the project operator in a neutral and non-discriminatory manner,
- There should be a *claw back mechanism* built into the project, in order to minimize the aid. Once the project profitable, part of the profits should flow back to the public purse,
- There should be a *market test* concerning the project, in order to give competitors an opportunity to comment and to allow the determination of possible distortions of competition.

⁵ the "Amsterdam decision"; Commission Decision of 11 December 2007 in case 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

[Future Issues]

While the decision practice of the Commission on public funding for broadband has now settled on firm grounds, the emergence of new technologies and of Next Generation Networks—in particular high speed fibre optic networks with capabilities of often beyond 50 Mbits bandwidth per subscriber—now raise novel issues going beyond case practice to date.

We are faced with a number of developments:

- Increasing inter-platform competition (wireless, satellite, and 3 G) in basic broadband. This can raise the question how far areas normally considered as “white” may turn “black” in the future,
- The transition from basic broadband towards Next Generation Networks—be it via cable or FTTx. How far should public funding be allowed to support rapid deployment of these new high speed technologies, even in areas where basic broadband may already exist. In other terms: can “black” areas turn into “white”?
- We may have to determine how to cope with situations as those above, where the distinction between “white”, “grey” and “black” may become more fuzzy.

Cases now before the Commission will help to answer certain of these questions. With the key importance of rapid deployment of broadband for the European Union in mind, the Commission may also decide to issue more formal guidance on the application of EU State aid rules to public

funding of broadband networks which would clarify the Commission practice further—as a useful complement to the Next Generation Access Recommendation on the future regulation of broadband currently in consultation.

[Final reminder: Develop broadband but do not kill competition]

The European Union cannot accept the development of a digital divide between the future broadband haves and have not's. In a number of cases, public funding of broadband will therefore have to play a role in this deployment. However, we will have to keep in mind that safeguards must be in place. We should create the right conditions for the rapid deployment of broadband via private investment and we should allow for public funding where needed—however we will have to be careful not to kill competition in the process.

I refer you here back to the statement by Competition Commissioner Kroes this morning at this conference.