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CEMR Response

**To the Draft Community Guidelines for the
application of State aid rules in relation
to rapid deployment of broadband networks**

Brussels, June 2009

Draft Community Guidelines for the application of State aid rules in relation to rapid deployment of broadband networks

Response by the Council of European Municipalities and Regions (CEMR)

General Comments

1. CEMR has been asking for a clarification of State aid rules in relation to broadband for a long time¹. We therefore welcome that the Commission takes this initiative to clarify how the State aid rules adapt to the aim of rapid deployment of broadband throughout the whole territory of the EU.
2. We welcome the objective of full 100% high-speed internet coverage by 2010 as set out in the European Economic Recovery Plan². The question of how to reach this target is crucial for local and regional authorities as they have a key role in the promotion and facilitation of roll-out of high-speed broadband networks.³
3. CEMR fully shares the Commission's view that "widespread and affordable access to broadband is of great importance because of its ability to accelerate the contribution of these technologies to growth and innovation in all sectors of the economy and to social and regional cohesion." The availability of broadband is especially important for the future rural development.
4. We also agree that broadband infrastructure and services - where possible - should be provided by the market and that State aid control aims at making sure that State aid results in better or more timely broadband coverage and penetration. At the same time this control has "to ensure that the positive effects of aid outweigh its negative effects in terms of distortion of competition."
5. In our view, the draft guidelines contribute to a better understanding of problems concerning the provision of State aid in the broadband market and these clarifications can have a scaling effect and can help Member States in applying State aid rules.
6. However, there are still some points, which remain unclear and be subject to different interpretations. We wish to present our comments in the following part and invite the Commission to take them into consideration for further clarification.

¹ See for example point 49 in CEMR's Response To the public consultation on Next Generation Access (NGA) networks, November 2008

(http://www.ccre.org/prises_de_positions_detail_en.htm?ID=76): "Public finance contribution touches complex legal questions on State aid and European internal market rules. We would therefore welcome clarification and guidance for local and regional authorities on how to act within the legal framework on competition."

² COM(2008) 800 final http://ec.europa.eu/commission_barroso/president/pdf/Comm_20081126.pdf

³ See CEMR's Response To the Communication on the second periodic review of the scope of universal service in electronic communications, March 2009

(http://www.ccre.org/prises_de_positions_detail_en.htm?ID=87), CEMR's Response To the public consultation on Next Generation Access (NGA) networks, November 2008

(http://www.ccre.org/prises_de_positions_detail_en.htm?ID=76) and CEMR's Policy Paper

"Broadband Infrastructure – The Regional and Local Perspective" (Brussels, September 2008)

(http://www.ccre.org/prises_de_positions_detail_en.htm?ID=77)

Comments on specific points of the Draft guidelines

On market failure (paragraph 4):

7. CEMR agrees in principle with the content of paragraph 4. However, we would like to have a specification on the statement that “State aid can correct market failures”. We believe that the correction of market failures is not an end in itself. Public authorities should deal with the correction of market failure in this area only if this is needed to ensure the accessibility of broadband and important eServices for all citizens and businesses.

On SGEIs (paragraph 24):

8. We welcome that the Commission recalls the “wide discretion” of Member States “to define what they regard as services of general economic interest or a public service task”. However, the current wording does not make it clear whether a Member State can define *full broadband coverage* as service of general economic interest. In our view, this is the case, and we invite the Commission to reformulate the paragraph accordingly.
9. More precisely the question is whether Member States can, other than in case of market failure, define the provision of broadband infrastructure and services as service of general interest according to Article 86(2) EC, or if the guidelines bear restrictions in this matter.
10. The scrutiny should not only focus on the market failure, but also consider other principles, such as the universal and non-discriminatory access to the broadband services.
11. Furthermore, we also wonder what is meant by “adequate coverage”? Is this defined by the local or regional authorities, the national regulator or will the European Commission have a scrutiny reservation?

On “black areas” and SGEIs (paragraphs 24 and 37):

12. We would like to propose a more differentiated approach towards the question whether the pure existence of private investors (having already invested or are in the process of expanding further their network) is sufficient to come to the conclusion that there is a market situation. There might be cases where even in black areas market failure occurs, as competition does not automatically lead to affordable prices. There might still be a case for public intervention to guarantee availability of broadband at affordable prices. This possibility for public intervention in line with the common interest should be included in the text.

On the compatibility assessment under Article 87(3) EC:

13. **Chapter 2.3:** Do the rules of Article 87(3) EC limit the possibility of Member States to define full coverage of basic services as a public service or a service of general economic interest, and if yes, why? (See comment on paragraph 24 above).
14. **Paragraph 29:** CEMR considers the focus on “market failure” as unfortunate. As mentioned above, to prevent market failure is no end in itself. In our opinion, “Well-defined objective of common interest” should be defined as measures aiming at compensating for/completing what the market failed to provide: full coverage and accessibility to services important for citizens, society and businesses.

On State aid in “white areas”:

15. **Paragraph 36:** CEMR agrees that if Member States provide support for the provision of broadband services in white areas where there are no plans for investment in the near future, they “pursue genuine cohesion and economic development objectives”. Therefore we propose to delete the caveat “is likely to be”. The text should be clear and read “and thus, their intervention is in line with the common interest.”

On State aid in “grey areas”:

16. **Paragraph 40:** What is “adequate overall market conditions” referring to? Is it the market on broadband and the related market conditions? And what are these “adequate market conditions”?

On the necessary conditions for the compatibility of State aid with the common market (paragraph 45 a):

17. A “detailed mapping and coverage analysis – market analysis” is a very complicated and difficult matter. However it is necessary in order to decide if, when and how State aid can be allocated without unnecessary distortion of competition. One of the difficulties consists in the judgement whether a private investor would consider investing within a certain period. Is it compatible with the guidelines to request an investment within such a period as a SGEI- obligation?

Paragraph 45 f:

18. CEMR welcomes that the guidelines also deal with third parties and wholesale access.

On the definition of NGA (paragraph 48):

19. We believe that it is not appropriate to provide technical specifications to define NGA in the guidelines. The rapid technical development asks for caution giving speeds or standards as basis for the definition of NGA. Experience shows that market players tend to abuse such figures as excuse for lack of further investment. What we need is a scalable IT-infrastructure which can ensure all services important for citizens, society and business without need to reconstruct the whole network. The basis for the judgement of the capacity needs has always to be the common interest (including business needs).

On the time period for the planning of future investment in NGA networks (paragraphs (63-65), (69), (73):

20. Concerning the proposed time periods in chapter 3, 5 years can be a long period concerning technical development. (On the other hand, 5, or even 7 years are too short in terms of amortisation on infrastructure⁴.)

⁴ The guidelines seem to consider the amortisation period for infrastructure 20 years, see last bullet point under (74).