



EUROPEAN COMMISSION

Competition DG

Markets and Cases II: Information, Communication and Media
State Aid

Brussels, 30.06.2016
COMP C4/TK/kv -D*2016/057098

Permanent Representation of
Slovakia to the EU
Avenue de Cortenbergh 79
1000 Brussels

Subject: Planned NGA State aid broadband scheme – parallel duct placement

Dear Sir / Madam,

This letter is a reply to the request of the Slovak Ministry of Finance dated 16th March 2016 (your reference MF/011677/2015-1743) to clarify certain questions concerning a request for coordination of civil works addressed to a network operator benefiting from State aid.

The Slovak authorities have doubts about the extent and conditions for such coordination under the Guidelines for the application of State aid rules in relation to the rapid deployment of broadband networks ("the Guidelines")¹ and Directive 2014/61/EU on measures to reduce the cost of deploying high-speed electronic communications networks ("the Directive")². The Commission's clarification should help the Slovak authorities in the preparation of the expected pre-notification on the new NGA broadband State aid scheme ("NGA Scheme").

As for the relevant provisions of the Directive, its Article 5(2) obliges every network operator performing directly or indirectly civil works, either fully or partially financed by public means, to meet any reasonable request to coordinate civil works on transparent and non-discriminatory terms, made by undertakings providing or authorised to provide public communications networks, with a view to deploying elements of high speed electronic communications networks. This scenario applies in situations when network operators undertake civil works that are fully or partially financed by public means. There is in any case no contradiction between Article 5 of the Directive and recital 29 of the Guidelines. The latter provision authorises Member States to decide in accordance with the Directive, for instance to facilitate the acquisition process of rights of ways, to require that network operators coordinate their civil engineering works and/or that they share part of their infrastructure.

¹ OJ C 25/1; 26.1.2013.

² OJ L 155/1, 23.5.2014.

The Guidelines contain specific provisions on administrative and regulatory measures supporting broadband roll-out falling outside the scope of EU State aid rules in section 2.4 and recognise that a large part of the cost of deploying NGA networks is in the civil engineering work. For this reason, Member States may require that for any new constructions (including new water, energy, transport or sewage networks) and/or buildings a connection suitable for NGA should be in place. Third parties may also place at their own cost their passive network infrastructure when general civil engineering works are carried out in any event. This opportunity must be offered in a transparent and non-discriminatory way to all interested operators and should in principle be open to all potential users and not just electronic communications operators (i.e. electricity, gas, water utilities, etc.).

It follows from the Guidelines that the placement of ducts and broadband infrastructure at the occasion of general civil engineering works falls outside the scope of EU State aid rules³ when this opportunity is (i) announced publicly, (ii) not limited to or geared towards the broadband sector, (iii) offered in a transparent and non-discriminatory way to all interested operators and (iv) financed entirely by the interested operators. Taking into account these elements and without prejudice to the need to carry out civil works which may be subject to a coordination obligation (also recognised in the specific time limitations included in the Directive), if private operators place ducts under such a measure, there do not exist any limitations on the provision of services, irrespective of whether this happens in a white, grey or black area.

Instead, it is not excluded that public funding of such works falls within the notion of aid of Article 107(1) TFEU if it is limited to or clearly geared towards the broadband sector. In the latter scenario, any such measure needs to comply with the Guidelines and be notified to the Commission unless it is part of an approved scheme or covered by the General Block Exemption Regulation⁴ (GBER) or the *De minimis* Regulation⁵.

In relation to the questions of the Slovak authorities, the Guidelines' distinction between white, grey and black areas is relevant to assess the effects of the measure in the area where (retail or backhaul) connections are offered to the end consumer. Accordingly, the Guidelines do not impose conditions on a duct placement, as far as the duct "merely passes" through a particular area (i.e. without any connection of end consumers).

As regards more specifically the second question raised by the Slovak authorities, firstly I would like to point out that the Guidelines require a prior public consultation and mapping. This should in particular enable the authorities to ensure that the proposed aid measure is proportionate and the least distortive, which might be aid for civil works⁶, rather than for network deployment. This would also apply in the case of duct placement. Secondly, once such a placement of ducts has occurred and at least one operator uses that infrastructure to provide services to end consumers,

³ See N 383/09 – Germany – Amendment of N 150/08 Broadband in the rural areas of Saxony for a case where general civil engineering works, like road maintenances, did not constitute State aid.

⁴ Commission Regulation (EU) No 651/2014 of 17 June 2014 declaring certain categories of aid compatible with the internal market in application of Articles 107 and 108 of the Treaty. OJ L 187/1; 26.6.2014.

⁵ Commission Regulation (EU) No 1407/2013 of 18 December 2013 on the application of Articles 107 and 108 of the Treaty on the Functioning of the European Union to *de minimis* aid, OJ L 352/1, 24.12.2013.

⁶ See N 53/2010 – Germany – Federal framework programme on duct support.

the Slovak Government's interpretation is correct that in such case that area cannot be considered any longer to be white. Thirdly, provided that the identification of the nature of the area targeted by the measure has been correctly carried out (through the mapping of infrastructures and investments foreseen in the near future and a public consultation on the planned aid measure), the decision of a competitor to request coordination of publicly subsidised civil works, without having expressed in the public consultation stage its interest to deploy broadband in that area, could be considered unreasonable in the sense of Article 5(2) of the Directive. The "reasonableness" of the request is to be assessed by the national dispute settlement body.

This position is not a definitive position of the European Commission itself, but only an informal guidance provided by the services of the Directorate-General for Competition in order to facilitate the application of the Guidelines.

We would appreciate receiving an update on the ongoing market consultation to prepare the NGA Scheme within 20 working days from the receipt of this letter.

The Directorate-General for Competition remains available to help the Slovak authorities with the preparation of the pre-notification on the NGA Scheme, including on the issue of parallel duct placement in white and black areas.

Yours faithfully,



Ewoud SAKKERS
Head of Unit

Case handler: Tomas Kukal, email tomas.kukal@ec.europa.eu; tel.:+32.2.29.663.34

