

Case No: 75349
Event No: 706050
Decision No: 219/14/COL

EFTA SURVEILLANCE AUTHORITY DECISION

of 11 June 2014

on the state aid scheme for broadband rollout

(Norway)

The EFTA Surveillance Authority (“the Authority”)

HAVING REGARD to the Agreement on the European Economic Area (“the EEA Agreement”), in particular to Article 61(3)(c) and Protocol 26 thereof,

HAVING REGARD to the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice (“the Surveillance and Court Agreement”), in particular to Article 24,

HAVING REGARD to Protocol 3 to the Surveillance and Court Agreement (“Protocol 3”), in particular to Article 1(3) of Part I and Article 4(3) of Part II,

HAVING REGARD to the consolidated version of the Authority’s Decision No 195/04/COL of 14 July 2004 on the implementing provisions referred to under Article 27 of Part II of Protocol 3 (“the Implementing Provisions Decision”)¹,

Whereas:

I. FACTS

1. Procedure

- (1) Following pre-notification discussion, by letter dated 11 April 2014,² the Norwegian authorities notified the planned national scheme for broadband rollout, pursuant to Article 1(3) of Part I of Protocol 3.
- (2) By e-mail dated 19 May 2014,³ the Norwegian Authorities provided certain clarifications on the functioning of the scheme.

¹ Available at: <http://www.eftasurv.int/media/decisions/195-04-COL.pdf>.

² Events No 705584, 705585, 705586, 705587, 705588 and 705589.

³ Event No 708775.

2. Context: Broadband availability in Norway

- (3) Broadband national initiatives are very much encouraged by the Europe 2020 Strategy⁴ and its flagship initiative Digital Agenda for Europe,⁵ because of the important role of broadband availability in terms of economic and social development. Broadband connectivity supports business efficiencies and growth, preserves and ensures that economies remain competitive and enables citizens to enhance their skills and learning. It also allows citizens to access online services and offering, including public services.
- (4) According to the Norwegian authorities, Norway is not an easy country in which to deploy broadband networks due to its unevenly distributed population, long distances, and challenging natural environment. Rolling out broadband in sparsely populated areas costs more per subscriber than in densely populated areas, hence, broadband service providers may not consider all areas commercially viable. In certain areas (mainly rural and scarcely populated areas), broadband capacities will therefore not be deployed or increased until long after capacity has been increased in other parts of the country, if at all.
- (5) In order to avoid the broadening of the digital divide,⁶ the Norwegian authorities consider it to be of utmost importance that the country, with its special geographical conditions, is given the opportunity to support the deployment of broadband networks in scarcely populated areas where private investments from market players are unlikely to occur.
- (6) According to information provided by the Norwegian authorities, up to 99.6% of the Norwegian population has currently access to basic broadband services of at least 4 Mbit/s (i.e. there is still 0.4% of the population currently not being served at all by any broadband infrastructure) and up to 72% has access to Next Generation Access (“NGA”) services. However, there is a large difference between urban and rural areas in terms of NGA availability. According to the Norwegian authorities, while almost 90% of urban households are offered NGA broadband access through FTTH, HFC or VDSL type networks, less than 20% of households in rural areas have access to NGA services.⁷
- (7) Despite the relatively scarce offer of NGA services in rural areas, the Norwegian authorities estimate that the demand for higher broadband capacity will likely grow in the near future;⁸ enterprises will need higher speeds when, for example, conducting video

⁴ See http://ec.europa.eu/europe2020/index_en.htm

⁵ Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions (COM (2010) 245. A Digital Agenda for Europe, as recognised in the resolution from the 37th Meeting of the EEA Joint Parliamentary Committee on 26 October 2011. The document is available at: [http://eur-lex.europa.eu/legal-content/EN/ALL/?jsessionid=Y4vLTX8KtHt58G2x4R1h26h111zYRJcHnMBhTTx3cKhqvYf4R8m0!-1629905942?uri=CELEX:52010DC0245R\(01\)](http://eur-lex.europa.eu/legal-content/EN/ALL/?jsessionid=Y4vLTX8KtHt58G2x4R1h26h111zYRJcHnMBhTTx3cKhqvYf4R8m0!-1629905942?uri=CELEX:52010DC0245R(01))

The Digital Agenda establishes the objective to bring basic broadband to all Europeans by 2013 and it seeks to ensure that by 2020 the access to NGA services will be much increased (all Europeans should have access to Internet speed of above 30 Mbps, and 50% or more of European households should subscribe to Internet connections above 100 Mbps).

⁶ The term “digital divide” refers to the gap between individuals, households, businesses and geographic areas at different socio-economic levels with regard to both their opportunities to access information and communication technologies (ICTs) and to their use of the Internet for a wide variety of activities. See on this issue *inter alia*: <http://stats.oecd.org/glossary/detail.asp?ID=4719>

⁷ This information is confirmed in the latest broadband survey carried out by the Norwegian authorities. Survey 2013. The report is available at: http://www.regjeringen.no/upload/FAD/Vedlegg/IKT-politikk/Bredbandsdekning_2013.pdf (only in Norwegian).

⁸ The constant increase of consumers’ demand for broadband high speed connection was already confirmed in 2012 by the European Union in a report on the progress of broadband sector adopted in the framework of the Digital Agenda. The conclusions of the report are available at:

conferences and other location independent communication, which in turn can facilitate more effective methods of working and collaborating. Private users will need more capacity to view TV and video content via broadband, as well as e.g. to take online education courses. Furthermore, many families will have more users sharing the same broadband connection. Both private individuals and enterprises are expected to use more cloud based services e.g. to store photos and videos online. To provide the entire country with access to these services requires good and reliable broadband capacities in all regions, including those where private operators are not willing to invest.

- (8) Historically the Norwegian broadband strategy has been based on a market driven strategy, where private operators rollout broadband according to the demand from inhabitants and business. However, the Norwegian authorities consider that this strategy, together with the Significant Market Power (SMP) regulation, are not sufficient to achieve the objectives of the scheme, i.e. to ensure good basic broadband services for all Norwegian citizens (i.e. covering the 0.4% of the population currently not been served) and to increase the NGA services offer, mainly in rural and scarcely populated areas.
- (9) The Norwegian authorities have informed the Authority that there is no universal service obligation to provide broadband services in the country.

3. Description of the proposed measure

3.1 General description of the scheme

3.1.1 An umbrella scheme

- (10) The notified scheme relates to a nationwide scheme which will be managed by the Norwegian Post and Telecommunication Authority (“NPT”).
- (11) The scheme foresees that only local authorities (i.e. the municipalities and the county municipalities⁹) will apply for funds from the NPT. The applications have to be filed via the county municipalities. The county municipality will carry out a first prioritization and selection of projects, presenting these to the NPT for a final decision.
- (12) The evaluation of the project by the county municipality and again by the NPT will be based on the following criteria:
- the additional number of households receiving an offer of broadband of basic good quality (minimum 4 Mbit/s) (25 %);
 - the cost effective network rollout (20%);
 - the local co-financing (10%);
 - the plan for sustainable operations and service provision after the rollout has been completed (15%);

http://europa.eu/rapid/press-release_IP-12-614_en.htm.

See

also:

<http://broadbandeurope.wordpress.com/category/digital-agenda-for-europe/>

⁹ In Norwegian: “Fylkeskommunen”. According to the Norwegian authorities, it cannot be excluded that in some cases the county municipalities will apply for funds under the present scheme on behalf of their municipalities. This might be the case for small municipalities for which the administrative burden related to the application would be too demanding. It is also not excluded that the county municipalities apply for funds on their own behalf.

- the additional number of households offered improved broadband connectivity and the size of the capacity increase, i.e. NGA capacity (minimum 30 Mbit/s) (15%); and
 - the importance for local community development, value creation and attractiveness to the inhabitants, businesses and visitors (15%).
- (13) Once a project has been selected by the NPT, the concerned local authority will assume the responsibility for the project and will be considered as the “project owner”. The local authority will select, through an open and transparent public procurement procedure (see paragraphs (39) to (42) to below), the private operator which will implement the project under the conditions set out in the scheme. Even if local projects might vary, all of them will comply with the conditions set out in the scheme and in the present Decision. The Authority’s Decision will be an annex to the contract to be signed between the municipalities or the county municipalities and the winners of their respective tenders.
- (14) The measure can be defined as an “umbrella scheme”, i.e. a country wide scheme to cover a number of forthcoming broadband projects implemented at local level.¹⁰

3.1.2 Objective of the scheme

- (15) The objective of the scheme is to finance local broadband projects designed to deploy new broadband infrastructure. Its final aim is double: first, to ensure that all Norwegian households receive good quality basic broadband services and, second, to increase the percentage of NGA broadband services within the country, mainly in rural areas. The Norwegian businesses located in the target areas will also benefit from the measure.
- (16) Broadband with basic good quality is defined by the Norwegian authorities as services providing “*minimum 4 Mbit/s downstream capacity needed for normal use including video streaming and without additional limitations such as restricted data volume and long delay/response time experienced with e.g. satellite based access*”.¹¹
- (17) NGA broadband infrastructure is defined as offering minimum 30 Mbit/s downstream capacity.

3.1.3 Target areas

- (18) The scheme does not identify specific target areas at national level. On the contrary, the notified scheme is based on a bottom-up approach where local and regional authorities identify areas eligible for state aid based on existing and planned local coverage.
- (19) However, the eligible projects will only be carried out in “*basic broadband white areas*” and “*white NGA areas*”. These areas will be defined according to a detailed coverage mapping to be carried out by the project owner (see paragraphs (35) and (36) below).
- (20) For the purposes of this scheme “*basic broadband white areas*” are defined in line with the Authority’s state aid Guidelines: Application of state aids rules in relation to rapid

¹⁰ This terminology has already been used in prior broadband practice. See the Commission’s Decision. State aid SA. 33671 (2012/n) – *United Kingdom. National Broadband scheme for the UK – Broadband delivery UK*.

¹¹ The Norwegian authorities have explained that the average downstream capacity for broadband services in Norway in 2013 was 17.7 Mbits/s. Nearly all commercially available broadband services are offering capacities above 4 Mbit/s and lower capacities are not recommended for normal use.

deployment of broadband network¹² (“the Broadband Guidelines”) including, therefore, those areas in which there is no broadband infrastructure and it is unlikely to be developed in the near future (defined as a three years period).¹³

- (21) “White NGA areas” are defined are those where NGA networks do not exist at present and where they are not likely to be built within a period of three years.¹⁴

3.1.4 Beneficiaries of the aid scheme

- (22) The direct beneficiaries of the scheme are the winners of the tenders to be completed by the concerned local authorities. The direct beneficiaries will normally be electronic communications operators rolling-out the broadband infrastructure and offering broadband services (retail and/or wholesale services). They will become the owner of the new network infrastructure.
- (23) For state aid purposes, indirect beneficiaries of the measure would be third party services providers (e.g. electronic communication operators) utilising the new network for offering retail services to households and business users.
- (24) The Norwegian authorities informs that all companies (small medium and large) will be eligible for direct aid. The number of direct beneficiaries is estimated from 11 to 50.

3.1.5 Eligible costs

- (25) The projects will primarily cover deployment of broadband access networks (i.e. last mile connections¹⁵) but may also include parts of backhaul¹⁶, backbone¹⁷ and/or passive infrastructure (i.e. trenches, ducts, poles or masts) if necessary. Operating costs will be excluded.

3.1.6 Legal basis

- (26) The legal basis for the state aid scheme is Government Decision dated 13.11.2013, which instructs the NPT to implement the national broadband scheme as described in the annex to the same Decision.
- (27) The funding is given through the State budget for 2014 (the budget chapter 1380 post 70, and chapter 551, post 61).

¹² Available at: <http://www.eftasurv.int/media/state-aid-guidelines/Part-IV---Application-of-state-aid-rules-in-relation-to-rapid-deployment-of-broadband-networks.pdf>

¹³ Paragraph 62 of the Broadband Guidelines. The Authority recalls that according to paragraph 59 of the Guidelines “The term “near future” should be understood as referring to a period of three years. If the granting authority takes a longer time horizon for the deployment of the subsidised infrastructure, the same time horizon should also be used to assess the existence of commercial investment plans”.

¹⁴ Paragraph 71 of the Broadband Guidelines. The reference to the term “near future” included in paragraph 59 of the Broadband Guidelines will also be applicable to the definition of the white NGA areas.

¹⁵ The last mile network are those connecting the final client.

¹⁶ The backhaul networks are defined as the intermediate links of a fixed network excluding the access part. In other words, backhaul networks connect backbone networks with access networks.

¹⁷ The backbone network consists of fibre lines which cover large distances and typically connect different cities. Due to large data transmission, these backbone line require very large capacity.

3.1.7 Budget and aid intensity

- (28) The total amount of public funding available for the state aid scheme is limited to 2 billion NOK¹⁸ (i.e. 500 million NOK annually¹⁹) and includes both funding from the Norwegian Central Government, and funding from local authorities.
- (29) The aid intensity will depend on the outcome of the open tender process and thus vary from project to project. However, accumulation of aid will not be allowed. This means that the total amount of public aid for a single project²⁰ (combining aid from this or any other state aid scheme or individual aid measure) will not exceed 10 million EUR.²¹

3.1.8 Form of support

- (30) The Norwegian authorities have informed the Authority that the public funding will be provided in form of direct grants.

3.1.9 Duration

- (31) The Norwegian authorities have informed the Authority that the planning of projects for 2014 has already been initiated at local level. However, aid will not be granted until the state aid scheme has been approved by the Authority. The measures will be put into effect as soon as possible after the Authority's approval.
- (32) The duration of the aid covers the period of 2014 to 2017. No prolongation of the scheme is currently foreseen.

3.1.10 Monitoring

- (33) According to the information provided by the Norwegian authorities, the NPT will report annually to the Norwegian Ministry of Transport and Communications on the use of the funds, indicating the number of households that have received broadband during that period, the increase of broadband capacity and other relevant information on the implementation of the scheme.

3.1.11 Ex-post evaluation

- (34) The Norwegian authorities commit to perform an *ex-post* evaluation of the scheme in line with paragraph 49 in the Broadband Guidelines. The evaluation will be undertaken by an independent body or consultancy and be completed by the end of September 2017. Any possible prolongation of the scheme will depend on the results of the evaluation. The Norwegian authorities clarify that the evaluation will be conducted on the basis of the principles laid down in the Commission's draft methodological guidance paper, on evaluation in the field of state aid.²² The Norwegian authorities have confirmed that the

¹⁸ Approximately €240 million.

¹⁹ Approximately €60.4 million

²⁰ The Norwegian authorities have confirmed that the term "*single project*" correspond to a single application for funds under this scheme. In principle, each local authority can only submit an application for funds unless the concerned local authority can clearly defined different projects in its geographic areas. This possibility cannot be excluded since in Norway, several municipalities and counties municipalities cover a large geographic area with mainly scattered population.

²¹ Approximately NOK 85 million.

²² Draft available at:

http://ec.europa.eu/competition/consultations/2013_state_aid_modernisation/draft_guidance_paper_en.pdf

independent expert will be selected through a public tender procedure and the evaluation plan will be submitted to the Authority in advance.

3.2 Specific conditions from granting aid under the scheme

3.2.1 Detail mapping and coverage analysis

- (35) The Norwegian authorities have explained that the scheme foresees a detailed *mapping* exercise to ensure that only *basic broadband white areas* and *white NGA areas* are eligible for public funds.
- (36) The Norwegian authorities inform the Authority that a national broadband survey is carried out annually, based on data collected from all broadband providers.²³ *Mapping* data for broadband coverage at national, regional and local level is available to all interested stakeholders on the Internet. However, the scheme foresees that this data will be double-checked and updated by means of a detailed analysis of the existing broadband infrastructure carried out by the local authorities applying for funds from the scheme.

3.2.2 Public consultation.

- (37) The local authorities will implement a public consultation in line with the conditions set out in the Broadband Guidelines.²⁴ Any project selected will be closely linked to the result of this public consultation, since only *basic broadband white areas* and *white NGA areas* are eligible for state aid.
- (38) The public consultations of the local authorities will be announced both on the webpage of the concerned local authority and on the national webpage of the NPT. Stakeholders will be granted a period of at least one month to comment on the proposed local broadband projects. NPT will get a copy of the replies.

3.2.3 Tender procedure. Awarding criteria

- (39) Once the NPT selects a local project for funding from the scheme, the local authority concerned will launch a public tender in order to select the bidder for the construction and the commercial exploitation of the network in an open, non-discriminatory and competitive process in full compliance with national and EEA public procurement rules.
- (40) The tenders will be published in the DOFFIN database (www.doffin.no), which is a national public procurement database.
- (41) In order to ensure compliance with procurement rule and certain coordination among different local projects, the letter of aid-allocation to be sent by the NPT to the concerned local authorities will explicitly specify the conditions for the public tenders that they have to fulfil.
- (42) The local authorities will select the most economically advantageous offer among those presented by the operators. The award criteria and their relative weighting will be stipulated in advance. The scheme foresees that the bidder with the lowest amount of aid requested will be selected.

²³ The last survey was carried out in September 2013. The results are available at: http://www.regjeringen.no/nb/dep/sd/dok/rapporter_planer/rapporter/2013/bredbandsdekning-2013.html?regj_oss=1&id=735443

²⁴ Paragraph 74(b) of the Broadband Guidelines.

3.2.4 Technological neutrality

- (43) The scheme will be technology neutral and open for all technical solutions, leaving it to commercial operators to choose the most appropriate technological solutions to provide retail and wholesale broadband services to end users through the new network.

3.2.5 Use of existing infrastructure

- (44) The scheme envisages that existing infrastructure suitable for broadband deployment (e.g. ducts, trenches, masts, poles, etc.) should be used as far as possible. As a consequence, the concerned local authority will investigate the potential use of existing infrastructure in the target area. The consultation will be done by bilateral contacts with operators and by means of the public consultation to be carried out with stakeholders (see paragraphs (37) and (38) above). Local authorities will have to prove, while applying for funds under this scheme, that the possible usage of existing infrastructure has been evaluated.
- (45) Those operators interested in participating in the local tenders, should inform the local authority about its own infrastructure availability.
- (46) All relevant information about existing infrastructure in the target area would be made publicly available to interested parties during the bidding process. All bidders would receive the same information about the possibilities of using existing infrastructure as a mean to ensure equal treatment and transparency.
- (47) According to the Norwegian authorities, a national database for available infrastructure has not been established in Norway, but local infrastructure development, including broadband, is coordinated by local authorities.
- (48) In addition, network providers with significant market power (SMP) in the relevant markets for broadband access are subject to specific obligations concerning sharing of infrastructure resources, those obligation will be maintained for those operators with SMP within the framework of the scheme.
- (49) The Norwegian authorities clarify that the terms and conditions offered for third party access to passive infrastructure will be specified in the application for state aid filed by the local authority and also outlined in the public tender irrespective of the participation of the owner in the tender itself. However, the terms and conditions for such access are offered on a voluntary basis. This is so because only infrastructure owners who receive state aid (winners of public tenders) and network operators with SMP in broadband markets (M4/M5, i.e. wholesale markets for LLU and broadband access²⁵) have an obligation to meet reasonable requests for access to its own passive infrastructure.

²⁵ Reference is made to the Authority's Recommendation of 5 November 2008 on relevant product and service markets within the electronic communications sector susceptible to ex ante regulation in accordance with the Act referred to at point 5c1 of Annex XI to the EEA Agreement (Directive 2002/21/EC of the European Parliament and of the Council on a common regulatory framework for electronic communication networks and services), as adapted by Protocol I thereto and by the sectoral adaptations contained in Annex XI to that Agreement. Available at: <http://www.eftasurv.int/media/esa-docs/physical/15344/data.pdf>

Market 4 refers to the wholesale (physical) network infrastructure access (including shared or fully unbundled access) at a fixed location.

Market 5 refers to wholesale broadband access. This market comprises non-physical or virtual network access including "bit-stream" access at a fixed location. This market is situated downstream from the physical access covered by market 4 listed above.

- (50) According to the Norwegian authorities, the use of the passive infrastructure will be based on the principles of cost-orientated prices, non-discrimination and transparency.

3.2.6 Wholesale access

Wholesale access to subsidised basic broadband networks

- (51) The scheme foresees that the selected supplier/operator will have to offer wholesale services and access to the subsidised network to other operators for at least 7 years. However, if the winner of the tender, and therefore the owner of the new subsidised network, is an undertaking holding SMP in the relevant market, the wholesale open access condition will last until the operator is no longer designated as a SMP operator, even if this goes beyond the period of seven years.
- (52) Furthermore, if funds under this scheme are used to build new passive infrastructure elements such as ducts, poles or tubes, access to those shall be open and be unlimited in time.
- (53) Wholesale access will be offered on non-discriminatory terms, enabling third party operators to compete with the selected bidder (when the latter is also present at the retail level). Wholesale access obligations imposed on subsidised basic broadband networks would be aligned with the portfolio of access obligations laid down under the national sectorial regulation. The Norwegian authorities consider that there are no objective technical reasons to justify refusal to grant access to subsidised basic broadband networks. This fact will be specified in the contracts entered into between the winners of the tenders and the project owners.
- (54) Operators of subsidised networks will yearly provide information to the project owners about compliance with the access obligation. The operators will be obliged to inform about the access requests they have had and the conditions of the accesses granted, hereunder prices.
- (55) Operators of subsidised networks will be obliged to publish their reference offers for wholesale access on their websites.
- (56) If operators of subsidised networks do not respect the obligation of providing wholesale access, the concerned local authority will demand recovery of the aid in full. This rule will also be specified in the contracts entered into between operators and the project owners.

Wholesale access to subsidised NGA networks

- (57) The above mentioned conditions for wholesale access to the subsidised basic broadband network will also be fulfilled when aid is granted for the deployment of NGA networks. However, in addition to the condition referred above (paragraphs (51) to (56)), the following additional conditions will be imposed on NGA projects:
- The possibility of effective and full unbundling must be provided;
 - Third party operators must have access to passive and not only active network infrastructure. Apart from bit stream access and unbundled access to the local loop, the access obligation will also include the right to use ducts and poles, dark fibre or street cabinets; and

- An operator of a subsidised point-to-multipoint topology network will provide effective unbundling via wavelength division multiplexing (WDM) as soon as the access is standardized and commercial available. Until WDM unbundling becomes effective, access to a virtually unbundled product (VULA), as close as possible to physical unbundling, will be offered.
- (58) The Norwegian authorities are of the opinion that there are no objective technical reasons to justify a total refusal to grant access to subsidised NGA networks. However, there might be technical and/or economic reasons justifying refusal of certain types of access. For example, in a passive-optical point-to-multipoint fibre network (PON), physical unbundling at the passive splitter is, for the time being, not considered feasible.²⁶
- (59) As said before, for NGA projects wholesale access have to fulfil all the conditions imposed regarding wholesale access to basic broadband networks and all the extra criteria described in paragraph (57). However, the Norwegian authorities believe that, for *small local companies* carrying out broadband projects in areas with low population density, it may not be proportionate to impose the obligation to establishing a wholesale access offer with all access types listed above (paragraph (57) above), before it can be determined that a reasonable demand²⁷ for wholesale access actually exists. In their opinion, for *small local companies*, implementing NGA projects in low populated areas, the imposition of all types of access products might disproportionately increase investment costs without delivering significant benefits in terms of increased competition. This would typically be projects of very limited scope, where the selected bidder is not already present on the supply side of the wholesale market. In such cases, the establishing and facilitating of for instance necessary support systems for a wholesale access offer is not considered to be proportional, considering the costs of fulfilling such a requirement relative to the total cost of the project.
- (60) What constitutes an «area with low population density» is determined by the Norwegian regional aid map for 2014-2020. The Authority considers the Norwegian regional aid map for 2014-2020 to be compatible with the principles set out in the Authority's Guidelines on regional state aid for 2014-2020 ("the RAG").²⁸
- (61) The Norwegian authorities define «*small local company*» on the basis of its annual revenue and geographic presence. If a company has total yearly revenue below NOK 5 million²⁹ (measured in 2013-NOK - the amount will be subject to indexation), it will be regarded as a small company. A small company that only operates within one county will normally be regarded as a «small local company».³⁰ The revenue threshold of NOK 5

²⁶ For instance, in its draft explanatory note to the March 2014 draft recommendation on relevant markets (see <http://ec.europa.eu/digital-agenda/en/news/commission-requests-berec-opinion-draft-revised-recommendation-relevant-markets>, page 41), the Commission mentions WDM unbundling as a future solution for access in a PON scenario, but there is no mentioning of physical unbundling at the passive splitter. However, if physical unbundling at the passive splitter, contrary to expectation, would be technically/economically feasible sometime in the future, the Norwegian authorities will ensure that also this type of access should be made available for wholesale customers.

²⁷ The Norwegian authorities have specified that the term "*reasonable demand*" in this context refers to the definition provided in paragraph 76(a) second line of the Broadband Guidelines.

²⁸ See the Authority's Decision No 91/14/COL. Available at: <http://www.eftasurv.int/media/decisions/91-14-COL-with-map.pdf>.

The map is annexed to the Decision. Available at:

<http://www.eftasurv.int/media/decisions/91-14-COL-with-map.pdf#page=7>

²⁹ Approximately €600,000.

³⁰ The exceptions are - in this context - small local companies where the majority of shares are owned by other providers of electronic communication networks and/or services and the total annual revenue of

million and the limited area of operation (county) have been set on the basis that any easing in wholesale access obligations is intended to be the exception of the rule, as wholesale open access is a main compatibility condition for approving the state aid.

- (62) As a consequence, small local companies implemented NGA projects in low populated areas will be exempted from the obligation to establishing a wholesale access offer with all access types listed above. However, if it is determined that a reasonable demand for the wholesale access services listed in paragraph (57) above actually exists, the winner of the tender will have to provide them.

3.2.7 Wholesale price benchmarking

- (63) In order to ensure effective wholesale access and to minimize potential distortion of competition, the Norwegian authorities have informed the Authority that wholesale access prices will be based on pricing principles set by NPT³¹ for the sectorial regulation and on benchmarks. Wholesale access prices will take into account the aid received by the network operator.³²
- (64) For the benchmarks, the average published wholesale prices that prevail in other comparable, more competitive areas of the country or the EEA will be used. Contracts between the concerned local authority and selected bidders will contain an obligation to base wholesale prices on available information on such prices in more competitive areas of Norway. Pricing can be based on the information the winner of the bid possesses itself or on information available by other means.
- (65) Project owners will have to check that wholesale prices are in line with these conditions and therefore that the private operators are not overpricing. The concerned local authority will use the following sources of information (if available) when assessing whether wholesale prices are too-high (i.e. whether there is overpricing):

parent and subsidiary is over NOK 5 million. Also, if a small local company with a network subsidised under this scheme is acquired by a provider of electronic communication networks and/or services during the period of seven years (thus, during the validity of the obligation to provide open wholesale access), and this in turn leads to total yearly revenue of parent and subsidiary over NOK 5 million, it will no longer be regarded as a small local company. In such cases, any easing in wholesale access obligations granted on basis of being a small local company, will no longer apply in the remainder of the aforementioned seven-year period. If the acquiring company is holding significant market power (SMP) in the relevant markets, the wholesale access obligations will be imposed until the acquiring company in question is no longer designated with SMP, even if that means beyond the seven-year period.

³¹ The Norwegian authorities have confirmed that the pricing principle for wholesale access to the SMP-operators basic broadband network (copper based LLU and bitstream) is cost-orientation, and the prices shall also be non-discriminatory. Prices for wholesale access to the SMP operator's NGA network (fibre) shall be non-discriminatory, but no direct price regulation is imposed. As a part of NPT's new decisions for broadband markets (markets 4 and 5), NPT will develop a margin squeeze model for NGA wholesale access. The use of such a model could also be relevant in case of complaints related to access to subsidized networks.

³² The Norwegian authorities have informed the Authority on how the amount of aid will be taken into account. According to those authorities *"When calculating wholesale prices for establishing accesses (one-off fees), the aid received should be taken into account, as the establishing fees would typically be based mainly on deployment costs. For instance, if 50 % of the deployment costs in a project are covered by state aid under this scheme, the wholesale access establishing fee charged to third parties should be based mainly on the remaining 50 % deployment costs covered by the selected bidder. Monthly wholesale fees in subsidized networks would typically be based mainly on running operating costs, where the aid received for deployment costs should not be taken into account"*.

- Information from the selected bidders on wholesale prices and conditions they offer in other parts of the country;
 - Prices the selected bidders themselves pay for wholesale access in other parts of the country;
 - Information available through statistics and market surveys;
 - Prices which are published, for example on the WebPages of operators providing wholesale access;
 - Information available through companies cooperating with selected bidders;
 - Wholesale prices from the SMP-operator (Telenor) in the relevant wholesale markets;
 - Regulated prices in Nordic countries, if available and comparable; and
 - The Commission's guiding principles in the NGA Recommendation.
- (66) The assessment of whether there is overpricing will be based on the information mentioned above, and will be an overall assessment carried out by the concerned local authority, taking into account all the information referred to above (paragraph (65)). The NPT will assist the local authorities to carry out this assessment, if required. The purpose is to ensure that prices do not deviate significantly from the prices observed in more competitive areas of the country. The Norwegian authorities clarify that the existence of a “significant deviation” will be assessed on a case by case basis. However, in principle, a 10% deviation from comparable offers would be considered as significant.
- (67) The scheme foresees that the selected bidders are in principle free to calculate their charges for wholesale access within the constraints mentioned above. However, non-discriminatory terms (including prices) is a compatibility condition for projects under this scheme, and the selected bidders cannot charge wholesale customers more than they charge their own retail arm if they also provide retail services.
- (68) The overall assessment will take into account the fact that a part of the costs for the rollout has been paid for by public funds. The selected bidders may not charge prices above market price by reference to higher investment costs in areas covered by measures within the state aid scheme, as these higher investment costs mainly will be paid for by public funds. Open tenders will ensure that selected bidders will not end up with more aid than needed to build the networks.

3.2.8 *Monitoring and claw back*

- (69) The operators are selected on the basis of a competitive selection procedure, therefore the Norwegian authorities consider that there is less need to monitor the subsequent development of the profitability of the project. However, the scheme leaves up to the project owners the decision on whether to monitor their projects or not.
- (70) As already mentioned (see paragraph (29) above), the total amount of public aid granted for a single project (under this or any other state aid scheme or individual aid measure) will not exceed EUR 10 million. Therefore, in line with paragraph 74(i) of the Broadband Guidelines, no claw-back mechanism is provided for in the state aid scheme.

3.2.9 Transparency

- (71) In order to ensure a high level of transparency for the use of public funds, the Norwegian authorities have informed the Authority that all relevant information concerning the state aid scheme and the individual aid awarded will be made publicly available. In particular, the full text of the approved aid scheme and its implementation provisions, name of the beneficiaries, the aid amount, the aid intensity and the used technologies of each eligible project will be available for 10 years on the national web page of the NPT, after the approval decision of each project has been adopted.

3.2.10 Reporting

- (72) NPT will report, every two years, key information on the implementation of the scheme to the Authority.

4. Comments by the Norwegian authorities

- (73) The Norwegian authorities do not dispute that the intended measure classifies as state aid that requires an individual notification to the Authority. However, they argue that the aid should be declared compatible under Article 61(3)(c) of the EEA Agreement in combination with the Broadband Guidelines, due to the following reasons.
- (74) The Norwegian authorities believe that the scheme will contribute to the achievement of an objective of common interest within the EEA, i.e. the development of broadband availability in the country. In their opinion, ensuring broadband connectivity in basic broadband white areas and improving coverage in NGA white areas will contribute towards achieving the goals set up in the Digital Agenda.
- (75) The Norwegian authorities also argue that the scheme responds to a market failure since only white areas are eligible for funding, thus, areas where the market does not provide the required services to households and business and, where state aid can be a useful and necessary instrument to correct the market failure.
- (76) State aid, in the form of direct grants, is considered to be the appropriate instrument since other solutions and initiatives, such as for instance *ex ante* regulation, are not sufficient to solve the problem related to the lack of infrastructure investments. The same refers to SMP regulation. According to the Norwegian authorities, SMP regulation has contributed to establish more competition, both on the service and on infrastructure level, which in turn has led to faster broadband rollout in certain areas of Norway. However, SMP regulation will not lead to rollout of broadband networks in areas considered non-profitable.
- (77) The Norwegian authorities recall that several conditions are imposed to ensure that the aid is limited to the minimum necessary and therefore to avoid unnecessary distortion of competition. Moreover, according to the Norwegian authorities, the fact that the scheme only covers white areas ensure a limited negative effect on competition since public intervention will only take place in areas where no private offer exists and no private investment is foreseen in the coming three years.
- (78) Finally, the Norwegian authorities believe that the scheme ensures a “*step change*” in terms of broadband availability as defined by the Broadband Guidelines.³³ Accordingly, a step change exist when, as a result of the public intervention, private bidders will

³³ Paragraph 47 of the Broadband Guidelines.

undertake investments in broadband networks and the subsidised infrastructure will bring significant new improvements to the market in terms of broadband services availability, capacity and speed.

II. ASSESSMENT

1. The presence of state aid within the meaning of Article 61(1) of the EEA Agreement

(79) Article 61(1) of the EEA Agreement reads as follows:

“Save as otherwise provided in this Agreement, any aid granted by EC Member States, EFTA States or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods shall, in so far as it affects trade between Contracting Parties, be incompatible with the functioning of this Agreement.”

(80) Consequently, the Authority will assess whether the funding of the scheme for rollout in Norway constitutes state aid, by asking the following questions:

- Is the support granted by the State or through State resources?
- Does the measure provide an economic advantage?
- Does it favour certain undertakings or the production of certain goods, i.e. is the measure selective?
- Is it liable of distorting competition and affecting trade between the Contracting Parties to the EEA Agreement?

1.1 Presence of state resources

(81) The aid measure must be granted by the State or through state resources. In the case at hand, the scheme will be financed (i) by the national State budget (State budget for 2014, chapter 1380 post 70, and chapter 551, post 61), and (ii) by local authorities,³⁴ therefore state resources are directly involved.

1.2 Economic advantages to undertakings

(82) Firstly, for a measure to be covered by Article 61(1) of the EEA Agreement, it has to be granted to (an) undertaking(s). The concept of an undertaking encompasses every entity

³⁴ The Authority recalls that the term “state” for the purpose of Article 61(1) of the EEA Agreement covers all bodies of the state administration, from the central government to the city level or the lowest administrative level as well as public undertakings and bodies. As a consequence, municipal and county resources are considered to constitute state resources within the meaning of Article 61 of the EEA Agreement. See the EFTA Surveillance Authority’s Decision No 55/05/COL, *to close the formal investigation procedure provided for in Article 1(2) in part I of Protocol 3 to the Surveillance and Court Agreement with regard to the sale of 1 744 rental apartments in Oslo (Norway)*.

engaged in an economic activity.³⁵ Any activity consisting in offering goods and services on a given market is an economic activity.³⁶

- (83) The scheme at hand will allow an economic operator (i.e. the winner of the public tenders) to deploy new broadband networks.³⁷ Those economic operators will manage and commercially exploit the new infrastructure by offering wholesale services to other third party electronic communications operators. All of them will be able to provide retail broadband services through the subsidised network. The provision of broadband services (both wholesale and retail services) is considered to be an economic service, since these are provided against remuneration and also offered by private telecom operators. The aid will, therefore, be granted to undertakings within the meaning of Article 61(1) of the EEA Agreement.
- (84) Secondly, the aid measure must confer on the beneficiaries an economic advantage, which it would not have obtained under normal market conditions.³⁸ A state aid measure can take different form, and must be assessed in relation to their effects.³⁹ The most common form of such an advantage is the granting of a subsidy, i.e. a payment in cash or in kind made in support of an undertaking other than the payment by the purchaser or consumer for the goods or services, which it produces.⁴⁰
- (85) In the present case, direct cash subsidies will be granted to the winner of the local public tenders. Co-financing the investments amounts to an economic advantage, since their cost should have normally be covered by the private operator's budgets. The aid will allow the selected operator to rollout new broadband network on conditions not otherwise available on the market. In addition, the financial support might enable the successful bidder to conduct its future commercial activities in respect of the network under conditions which would not otherwise have existed in the absence of the measure.
- (86) Moreover, due to the public co-financing of the project, third party electronic operators may obtain reductions of wholesale prices for access to the infrastructure. They may get an advantage through the terms and conditions established for the wholesale access that would not apply without the state aid. This translates into a potential indirect economic

³⁵ Case C-41/90 *Höfner and Elser* [1991] ECR I-1979, paragraph 21; Case C-222/04 *Cassa di Risparmio di Firenze and Others* [2006] ECR I-289, paragraph 107 and the case-law cited; Case C-205/03 P *FENIN v Commission* [2006] ECR I-6295, paragraph 25; Case T-443/08 and T-455/08 *Freistaat Sachsen and Land Sachsen-Anhalt v Commission* [2011] ECR II-01311, paragraph 88 and Case C-49/07 *MOTOE* [2008] ECR I-4863, paragraph 21. See also Case E-1/12, *Den Norske Forleggerforeing v EFTA Surveillance Authority*, EFTA Ct. Rep [2012] p. 1040.

³⁶ See *inter alia* Case C-218/00 *Cisal* [2002] ECR I-691, paragraph 23; Case C-205/03 P *FENIN v Commission* [2006] ECR I-6295, paragraph 25; Case 118/85 *Commission v Italy* [1987] ECR 2599, paragraph 7; Case C-35/96 *Commission v Italy* [1998] ECR I-3851, paragraph 36 and joined Cases C-180/98 to C-184/98 *Pavlov and Others* [2000] ECR I-6451, paragraph 75.

³⁷ According to paragraph 7 of the Broadband Guidelines, the construction of a broadband network infrastructure with a view of its future commercial exploitation constitutes an economic activity. See also the case-law thereby cited.

³⁸ Case C-301/87 *France v Commission* [1990] ECR I-307, paragraph 41; Case 30/59 *De Gezamenlijke Steenkolenmijnen v High Authority of the European Coal and Steel Community* [1961] ECR 50, paragraph 19; Case C-241/94 *France v Commission (Kimberly Clark)* [1996] ECR I-4551, paragraph 34 and Case T-109/01 *Fleuren Compost* [2004] ECR II-132, paragraph 53.

³⁹ Case C-124/10 P *Commission v EDF and Others* [2012] ECR I-0000, paragraph 77 and the case-law cited. See also joined cases C-399/10 and C -401/10 P, *Bouygues v Commission*, not yet published, paragraph 102.

⁴⁰ Case 30/59 *De Gezamenlijke Steenkolenmijnen v High Authority of the European Coal and Steel Community* [1961] ECR 50, paragraphs 9 et seq.

advantage to third party operators that would not be available to them without the state intervention.

- (87) Finally, the Authority notes that the scheme aims at improving the provision of existing broadband services to business users and residential users. Whereas residential users are not subject to state aid rules, businesses in the targeted areas will ultimately benefit from the improved broadband services and coverage in comparison with what would be provided on a purely commercial basis.

1.3 Selectivity

- (88) The aid measure must be selective in that it favours “*certain undertakings or the production of certain goods*”.
- (89) Public funding from the scheme will only be granted to a close circle of beneficiaries which are active only in certain segments of the overall electronic communications services market:⁴¹ i.e. (i) the successful tenderer of each of the local projects, and (ii) the third party electronic operators contracting with him. As a consequence, the measure will be selective.
- (90) However, the measure does not appear to be selective with regard to the business users of the subsidised network, since access to the subsidised infrastructure is open to all sectors of the economy.⁴²

1.4 Distortion of competition and effect on trade between Contracting Parties

- (91) It is established case law that a measure distorts or threatens to distort competition in a way that affects trade between Contracting Parties if it strengthens the position of the recipient compared with other companies⁴³ and if the recipient is active in a sector, in which trade between Contracting Parties takes place.⁴⁴
- (92) The scheme has the potential to distort competition. Public involvement in deploying infrastructure to provide electronic communications services strengthen the position of the selected supplier in relation to its competitors. In particular, state support to rollout new broadband networks might reduce profitability and crowd out investment by alternative market players that might be willing to invest in the targeted area or parts of it in the middle to long term. In fact, due to the state aid granted to a competitor, existing operators might reduce capacity or potential operators may decide not to enter into the market. Distortions of competition are likely to occur if the beneficiary of the aid is a SMP operator, since its market position will be reinforced.

⁴¹ See paragraph 9 of the Broadband Guidelines.

⁴² See paragraph 9 of the Broadband Guidelines. See also the Authority’s Decision No 444/13/COL *on the deployment of a Next Generation Access network in the municipality of Skeiða- and Gnúpverjahreppur*.

⁴³ Case 730/79 *Philip Morris Holland BV v Commission* [2005] ECR, 2671, paragraph 11.

⁴⁴ Case 102/87 *France v Commission* (SEB) [1988] ECR 4067, Case C-310/99 *Italian Republic v Commission* [2002] ECR I-289, paragraph 85, Case C-280/00 *Altmark Trans GmbH and Regierungspräsidium Magdeburg v Nahverkehrsgesellschaft Altmark GmbH (Altmark)* [2003] ECR I-7747, paragraph 77, Case T-55/99 *Confederación Española de Transporte de Mercancías (CETM) v Commission* [2000] ECR II-3207, paragraph 86.

- (93) The State intervention has also a potential effect on trade since the markets for electronic communications services (including the wholesale and the retail broadband markets) are open to trade and competition between operators and service providers across the EEA.⁴⁵

1.5 Conclusion

- (94) In light of the above, the Authority concludes that the proposed measure constitutes state aid within the meaning of Article 61(1) of the EEA Agreement in favour of the successful tenderer of each of the local projects, and the third party electronic operators contracting with him.

2. Procedural requirements

- (95) Pursuant to Article 1(3) of Part I of Protocol 3, “[t]he EFTA Surveillance Authority shall be informed, in sufficient time to enable it to submit its comments, of any plans to grant or alter aid (...). The State concerned shall not put its proposed measures into effect until this procedure has resulted in a final decision”.
- (96) By submitting a notification of the scheme by letter dated 11 April 2014, the Norwegian authorities have complied with the notification requirement.
- (97) The Authority can therefore conclude that the Norwegian authorities have respected their obligations pursuant to Article 1(3) of Part I of Protocol 3.

3. Compatibility of the aid

- (98) The Authority has assessed the compatibility of the planned measure according to Article 61(3)(c) of the EEA Agreement in light of the Broadband Guidelines. The Broadband Guidelines contain a detailed interpretation of Article 61(3)(c) of the EEA Agreement in this sector. In particular, section 2.5 of the Broadband Guidelines explains the methodology to carry out the legal assessment of broadband state aid measures.
- (99) The scheme targets “*basic broadband white areas*” and “*NGA white areas*”, as defined in paragraphs (20) and (21) above; these are areas where no basic broadband or NGA networks currently exist and where there are no credible deployment plans from private operators in the coming near future (see footnote 13 above).
- (100) Taking into account this fact, the Authority considers that the scheme has to be assessed under the conditions laid down in sections 3.4 and 3.5 of the Broadband Guidelines; it is not necessary to carry out an in-depth compatibility assessment⁴⁶ (see section 3.2.2 and section 3.3.2 of the Broadband Guidelines).

⁴⁵ See the Authority’s Decision No 231/11/COL on the rapid deployment of a NGA network in rural areas of the municipality of Tromsø. See also Commission’s Decision in Cases N237/2008 – *Germany, Broadband support in Niedersachsen* and N33807- *Italy. National broadband plan Italy*.

⁴⁶ The Broadband Guidelines foresees an in-depth assessment of broadband projects to be implemented in “*grey areas*” See paragraphs 63 and seq. of the Broadband Guidelines. “*Grey areas*” are defined as those areas where de facto a monopoly or a lack of sufficient competition exist (“*grey basic broadband areas*” areas are defined in paragraph 63 of the Broadband Guidelines and “*grey NGA areas*” are defined in paragraph 72 of the same Guidelines). In those areas, State intervention can be permitted but only under certain strict circumstances and following a thorough assessment.

The Guidelines also define “*black areas*” where more than one network exists or will be deployed in the coming three years (cf. paragraph 68 of the Broadband Guidelines for the definition of “*black basic broadband areas*” and paragraph 73 for the definition of “*black NGA areas*”). In these areas it can be assumed that there is no market failure. As a consequence, in line with the Broadband Guidelines, in the

3.1 Balancing test and its application to the state aid scheme

- (101) In the assessment of compatibility of state aid to deploy broadband networks, the Authority balances the positive impact of the aid measure in reaching an objective of common interest against its potential negative side effects, such as distortions of trade and competition (a so-called “balancing test”).
- (102) In applying the balancing test, the Authority assesses the following questions:⁴⁷
- (a) Is the aid measure aimed at a well-defined objective of common interest?
 - (b) Does the proposed aid address a market failure or other objective?
 - (c) Is the aid well designed to deliver the objective of common interest? In particular:
 - (i) Is state aid an appropriate policy instrument, *i.e.* are there other, better-placed instruments?
 - (ii) Is there an incentive effect, *i.e.* does the aid change the behaviour of undertakings?
 - (iii) Is the aid measure proportional, *i.e.* could the same change in behaviour be obtained with less aid?
 - (d) Are the distortions of competition and the effect on trade limited, so that the overall balance is positive?
- (103) In line with the Broadband Guidelines,⁴⁸ in applying the balancing test, the Authority considers the objective of the measure, its design and the need to limit distortions of competition.

3.1.1 Objective of the measure

3.1.1.1 State aid in white areas

- (104) The Authority underlines that the scheme exclusively relates to basic broadband white areas and NGA white areas.
- (105) The Authority believes, in line with the Guidelines of Broadband, that these areas are, in principle, eligible for state aid since it promotes territorial, social and economic cohesion and addresses a proven market failure. However, in order to define the measure as compatible with the EEA Agreement, certain conditions must be fulfilled. Those conditions will be assessed in the following subsections.

3.1.1.2 Well-defined objective of common interest

- (106) The Authority agrees with the Norwegian authorities that broadband connectivity is a key component for economic and social development. The scheme is fully in line with “A Digital Agenda for Europe”.

absence of a clearly demonstrated market failure, the support for the rollout of new broadband infrastructure would be declared incompatible state aid.

⁴⁷ See paragraph 29 of the Broadband Guidelines.

⁴⁸ Paragraph 29 of the Broadband Guidelines.

- (107) The Europe 2020 strategy recognises the importance of broadband projects in order to accelerate the contribution of broadband technologies to growth and innovation in all sectors of the economy and to social and regional cohesion. The deployment of new basic and/or NGA broadband networks contributes to job creation as well as to improving health and education services in the target areas.
- (108) Moreover, the roll-out of a broadband network contributes to reducing the “*digital divide*” that sets apart areas or regions within a country where affordable and competitive broadband services are on offer and areas where such services are not. The Authority can agree that without public intervention there is a real risk of an emergence of a “*digital divide*” between the Norwegian regions, mainly between rural and urban areas. This could lead to the economic and social exclusion of the local inhabitants and undertakings, and could also lead to further depopulation from already sparsely populated areas. Although there are several reasons for digital divides, one of the most important ones is lack of adequate broadband infrastructure.
- (109) Furthermore, the Authority recalls that providing broadband services to all European citizens by 2013 is one of the main goals of the European Digital Agenda (see footnote 5).
- (110) As a conclusion, the Authority agrees that the scheme, by deploying new broadband networks in *basic broadband white areas* pursues a genuine cohesion and economic development objectives, which is considered to be a well-defined objective of common interest. This would ensure that all Norwegian citizens are offered good quality basic broadband services, thus, including the remaining 0.4% of the population currently not been covered, in a more rapidly manner, than would occur without the scheme.
- (111) The Broadband Guidelines also refer to the risk of a new digital “*NGA divide*” (cf. paragraph 55), thus, differences between areas that will be covered by NGA networks and those that will not be covered.⁴⁹ Taking into account the increasing importance of NGA services which will allow households and businesses to obtain the maximum benefits that the information society offers, the deployment of NGA broadband projects also responds to an objective of common interest.
- (112) Furthermore, the scheme will also enable households and businesses in the targeted area to have access to affordable broadband services. This is also a common interest objective, since broadband services have to be available at affordable prices in order to ensure that the maximum of citizens profit of the public aid.⁵⁰ Without the scheme, the cost of deploying the required broadband infrastructure will be very costly for private operators in scarcely populated areas and it will be translated into high retail prices, not affordable for all citizens. As a consequence, the public financing of the broadband infrastructure would not only ensure broadband availability but it will also make sure that the services are provided at affordable prices as wanted in the Digital Agenda. In other words, the scheme will enable access to retail broadband services in the targeted areas (i.e. low populated areas, mainly rural areas) at prices similar to those applicable in the more populated areas (i.e. urban areas).
- (113) Hence, the objectives of the scheme are in line with those set up within the Broadband Guideline (paragraph 32) and respond to a common interest objective.

⁴⁹ The risk of a NGA digital divide has also been acknowledged within the framework of the Digital Agenda. See: http://europa.eu/rapid/press-release_IP-10-1142_en.htm

⁵⁰ Affordable broadband services is also one of the goals of the Digital Agenda. See <https://ec.europa.eu/digital-agenda/en/about-broadband>.

3.1.1.3 Does the measure respond to a market failure?

- (114) As already indicated, since only white areas will be eligible for state aid, the Authority accepts that in those areas a market failure exists. In other words, the market left to its own devices, without intervention, fail to deliver an efficient outcome for society.⁵¹

3.1.2 *Design of the measure and the need to limit distortions of competition*

3.1.2.1 Aid is the appropriate instrument

- (115) The Authority takes note of the Norwegian authorities' arguments described in paragraph (76) above.
- (116) As stated in paragraph 40 of the Broadband Guidelines, the Authority acknowledges that *ex ante* regulation might boost the development of broadband networks in urban and more densely populated areas but it is not sufficient to correct the market failure stemming from the lack of private infrastructure investments in certain areas.
- (117) The Authority also shares the opinion that SMP regulation is a useful instrument to limit any possible distortion of competition due to the presence of SMP in the market. However, this type of regulation would not be an appropriate instrument to overcome the problems related to the absence of infrastructure and private investment.
- (118) The Authority,⁵² as well as the European Commission,⁵³ has also previously examined the use of grants or tax incentives to end users. These measures have been found unlikely to lead to sufficient investments for the provision of broadband services to underserved areas.
- (119) As a consequence, the Authority accepts that in order to ensure good quality basic broadband services to all Norwegian citizens and boost the availability of NGA services (mainly in rural areas), state aid is the most effective and appropriate instrument to achieve the common interest objectives.

3.1.2.2 The aid provides the right incentives to operators

- (120) According to the Broadband Guidelines,⁵⁴ in order to assess the existence of incentive effect it must be examined whether the broadband investments concerned would have been undertaken without public financing.
- (121) Firstly, it has to be recalled that in Norway there is no universal service obligation to provide broadband services (paragraph (9) above); as a consequence, private operators are not obliged to invest in broadband infrastructure. On the contrary, the scheme, by means of co-financing projects, may boost private investments.
- (122) Secondly, the Authority notes that the Norwegian authorities have foreseen to carry out a detailed market analysis for each of the local projects, as well as undertaking a complete and transparent public consultation (see paragraphs (35) to (36) above). This will ensure

⁵¹ See paragraphs 33 to 35 of the Broadband Guidelines.

⁵² See for example the Authority's Decisions No 231/11/COL *on the rapid deployment of a NGA network in rural areas of the municipality of Tromsø*, point 3.2.2.1 and No 444/13/COL *on the deployment of a Next Generation Access network in the municipality of Skeiða- and Gnúpverjahreppur*, paragraph 96.

⁵³ See *inter alia* the Commission Decision N 14/2008, *Broadband in Scotland - Extending broadband reach*, paragraphs 54-55.

⁵⁴ Paragraph 41.

that funding will only be granted in white areas with no existing (basic or NGA) broadband infrastructure and where no private investments are foreseen for the near future (see footnote 13). As a consequence, the scheme will produce a change in the decision of private operators applying for public funds for investments projects in those areas. In fact without the public intervention, private operators were not willing to invest in those areas. Thanks to the public support, private investors will deploy broadband networks in those areas.

- (123) Moreover, as described in paragraph (39) above, the beneficiary of the aid will be selected through a competitive selection process.
- (124) As a conclusion the Authority believes that by providing financial support for the deployment of new broadband infrastructure where this is missing, there will be a step change in the investment decisions of the operators (cfr. paragraph (78) above). In combination with the fact that the recipient of the aid will be selected by a competitive selection process, the aid should provide a direct and appropriate investment incentive for the selected operator.

3.1.2.3 Proportionality

- (125) The Norwegian authorities have designed the measure in such a way as to minimise the state aid involved and the potential distortion of competition arising from the scheme. The compatibility conditions set up in the Broadband Guidelines are met:
- (a) **Detailed mapping and coverage analysis.** The foreseen *mapping* exercise, described in paragraphs (35) to (36) above, will allow the national authorities to clearly identify the basic broadband white areas and the white NGA areas in which public support is allowed. The objective of this *mapping* exercise is to ensure that private investment is not crowded out. Taking into account the definition of “white areas”, the Authority can agree that reducing the public intervention to white areas, where a market failure exists, will ensure that there is no risk of crowding out private investment.
 - (b) **Public consultation:** The Broadband Guidelines⁵⁵ impose to launch a public consultation with existing operators through an open and transparent procedure in order to further ensure that public funds are used only in basic broadband white areas and NGA white areas.

The Authority notes that, in the case at hand, local authorities can rely on the result of the annual nationwide broadband survey. However, local authorities will carry out its own detailed *mapping* to ensure that private plans are duly taken into account before implementing any public project.

The public consultation will be published on a central webpage (NPT’s webpage) as well as in other local websites, where the main characteristics of the local project will be described. This condition will ensure full transparency on the project. Stakeholders will be granted sufficient time (one month) to reply to the public consultation, being therefore able to raise its comments on the project.

The Authority concludes that by conducting an analysis of the competitive conditions and market structure prevailing in each local area applying for funds

⁵⁵ Paragraph 74(b) of the Broadband Guidelines.

under the scheme and by consulting all stakeholders potentially affected by the relevant measure, the scheme ensures that potential distortions of competition are minimised.

The Authority recalls nevertheless that if a private operator communicates a concrete deployment plan in the concerned geographic area, the area would not be considered as a white area. The Authority accepts that the operator has to substantiate its commitments regarding the upcoming broadband investment for the investment plan to be taken into account in line with the Broadband Guidelines.⁵⁶

- (c) **Open tender process:** The Authority considers that a competitive selection process, as foreseen in the scheme and described in paragraph (39) above, in line with EEA rules, reduce the intensity of state aid and at the same time reduces the selective nature of the measure in so far as the choice of the beneficiary is not known in advance.

In fact, the Authority believes, in line with the Broadband Guidelines,⁵⁷ that a competitive tender is the appropriate method to reduce the cost of the project for the public budget. Furthermore, the competitive selection process ensures that there is transparency for all investors wishing to bid for the project. By conducting an open non-discriminatory selection procedure, the Norwegian authorities ensure competition between private operators, and guarantee that state aid does not disproportionately distort competition by pre-selecting the beneficiary or by giving preference to one broadband operator over alternative operators.

The Authority also notes that all the local tenders will be published in a website at national level (www.doffin.no) to ensure full transparency and increase the likelihood of a competitive outcome. This will make it easier for potentially interested bidders to be informed of all potential projects to bid for.

The Authority recalls the awarding criteria have to be known *ex ante* by the bidders, as well as the relative weighting which it will be given to each of them.⁵⁸ Those criteria must be of qualitative nature, avoiding any unjustified restrictive condition.

- (d) **Most economically advantageous offer:** Within the context of the competitive selection process, the local authorities will select the most economically advantageous offer among those presented by the operators.

The Authority considers that allocating the implementation to the most advantageous offer allows reducing the amount of aid to be granted.⁵⁹ By doing so, the concerned local authority can shift the burden of how much aid is really necessary to the market and thus reduce the information asymmetry that usually benefits private investors. This methodology will ensure that the aid intensity is proportional and reduced to the minimum.

⁵⁶ See footnote 75 of the Broadband Guidelines.

⁵⁷ Paragraph 74(c) of the Broadband Guidelines.

⁵⁸ Paragraph 74(d) of the Broadband Guidelines.

⁵⁹ Paragraph 74(d) of the Broadband Guidelines.

- (e) **Technological neutrality:** The scheme will be open for all technical solutions and hence be technology neutral, as required in the Broadband Guidelines.⁶⁰ The measure will not favour any particular technology or network platform leaving it to commercial operators to define the most appropriate technological solutions to provide wholesale broadband services to end users through the network.

The Authority believes that by applying the technological neutrality principle, the most appropriate technology or a mix of them will be selected, in order to ensure that the highest number of operators and companies benefit from the scheme.

These criteria will also reduce possible distortion of competition among electronic communication operators.

- (f) **Use of existing infrastructure:** As described in this Decision (see paragraphs (44) to (50)), the Norwegian authorities have ensured that existing infrastructure will be used as far as possible to avoid duplication and to avoid unnecessary investments.

The Authority underlines that the scheme would not cover the deployment of new broadband networks (either basic broadband network or NGN -next generation networks-) where private investment already exists.

However, it could be other infrastructure suitable for broadband deployment (e.g. ducts, trenches, masts, poles, etc.) and that infrastructure would be used as much as possible in the framework of this scheme.

Based on the information provided, the Authority notes that operators which own infrastructure (irrespective of whether it is actually used) in the target area and which wishes to participate in the selection to receive the aid,⁶¹ shall: (i) inform the concerned local authority about that infrastructure during the public consultation; and (ii) provide all relevant information to other bidders to allow the latter to include such infrastructure in their own bids (see paragraphs (45) and (46) above). These conditions are required by the Broadband Guidelines⁶² and will contribute to render the aid proportional, avoiding at the same time unnecessary and costly duplication of resources.

- (g) **Wholesale access:** Mandating third parties effective wholesale access to a subsidised broadband infrastructure is a necessary component of any state measure funding the construction of a new broadband infrastructure. In particular, wholesale access enables third party operators to compete with the selected bidder (when the latter is also present at the retail level), thereby strengthening choice and competition in the areas concerned by the measure while at the same time avoiding the creation of local service monopolies.

⁶⁰ Paragraph 74(e) of the Broadband Guidelines.

⁶¹ The Authority acknowledges that the Broadband Guidelines establish in paragraph 74(f) that “EFTA States should encourage bidders to have recourse to any available existing infrastructure so as to avoid unnecessary and wasteful duplication of resources and to reduce the amount of public funds”. As a consequence, operators willing to obtain state aid from the scheme should assume on voluntary basis this condition. Otherwise, and except for the case of SMP operators, the Authority understands that private operators owning infrastructure but not willing to participate in the project cannot be forced to share its own infrastructure.

⁶² Paragraph 74(f) of the Broadband Guidelines.

The importance of granting effective third-party wholesale access to subsidised networks has also been emphasised by both the Authority and the European Commission in numerous decisions.⁶³

The Authority believes that the provisions set out in the scheme to ensure wholesale access (regarding the new subsidised basic broadband and NGA networks) are in line with the ones required in the Guidelines on Broadband, and will contribute to reduce any possible distortion of competition stemming from the scheme.

According to the Broadband Guidelines the scheme foresees effective wholesale access to the subsidised infrastructure for at least a period of 7 years. This condition is clearly stated in the scheme. Moreover, the Authority welcomes the specific provisions proposed by the Norwegian authorities regarding those operators holding an SMP position, who would have to grant wholesale access to the subsidised network while they are considered an SMP operator.⁶⁴ The Authority also notes that if the state aid measure covers the funding of new passive infrastructure elements such as ducts or poles, access to those would be granted and be unlimited in time.

The Authority accepts the exception provided for *small local companies* carrying out NGA project in scarcely populated areas which are in line with paragraph 76(a) of the Broadband Guidelines. The proposed definition of small local companies is also accepted. However, the Authority recalls that the two conditions have to be met for the exception to apply: (i) NGA projects have to be implemented in areas with low population density and (ii) carried out by small local companies. Furthermore, if a reasonable demand, as defined in paragraph 76(a) of the Broadband Guidelines, is established the foreseen exception will not be applicable.

The Authority finally recalls that wholesale access should be granted as early as possible before starting network operation.⁶⁵

- (h) Wholesale access pricing:** According to the Broadband Guidelines⁶⁶ in order to ensure effective wholesale access and to minimise potential distortion of competition, access wholesale prices should be based on the average published (regulated) wholesale prices that prevail in other comparable, more competitive areas of the country or the EEA or, in the absence of such published prices, on prices already set or approved by the national regulators for the markets and services concerned.

⁶³ See the Authority's Decisions No 302/13/COL, *to initiate the formal investigation procedure into potential state aid granted to Síminn for the roll-out of broadband services in rural areas in Iceland*; and No 444/13/COL *on the deployment of a Next Generation Access network in the municipality of Skeiða- and Gnúpverjahreppur*. In the same line, see the Commission's Decisions C 53/2006 *Investment by the city of Amsterdam in a fibre-to-the home (FtH) network*, paragraph 96, N 14/2008 *United Kingdom, Broadband in Scotland - Extending Broadband Reach*, paragraph 57(c), and N 475/2007– *Ireland, National Broadband Scheme ("NBS")*, paragraph 45(e).

⁶⁴ This condition is in line with the rule established in paragraph 74(g) of the Broadband Guidelines.

⁶⁵ Paragraph 74(g) of the Broadband Guidelines. Footnote 103 of the Broadband Guidelines specifies that where the network operator also provides retail services this would normally imply granting at least six months before the launch of such a retail service.

⁶⁶ Paragraph 74(h) of the Broadband Guidelines.

The Authority notes that wholesale prices will be based on the pricing principles set up by the NPT for the sectorial regulation and on benchmarks. The Norwegian Authorities have confirmed that those pricing principles have as objective to ensure that prices are not discriminatory. The objective is to ensure that competition is allowed and maintained in the retail market.

The NPT will ensure that wholesale access pricing in the subsidised network is reasonable, in line with the prices applicable to urban areas where there exist competition in the market. The NPT will monitor the effect of wholesale prices on the retail prices.

The Authority considers that the reference to NPT's pricing principles (see footnote 31 of this Decision) and the foreseen conditions for undertaking the price benchmarks are important safeguards to ensure that the aid granted will serve to replicate market conditions like those prevailing in other competitive broadband markets.

- (i) **Monitoring and claw-back mechanism to avoid over-compensation:** In general terms, the granting authorities have to implement monitoring mechanisms to avoid any risk of overcompensation. However, the Broadband Guidelines accepts that, in order to avoid including a disproportional high administrative burden on small, local projects, projects below EUR 10 million are not requested to include claw-back mechanisms (paragraph 74(1)).

In the case at stake, the Norwegian authorities have confirmed that no project will obtain more than EUR 10 million of aid. As a consequence, the Authority accepts that there is no need to include monitoring and claw-back mechanisms.

The Authority recalls nevertheless that a project cannot be artificially divided into different smaller projects with the only objective to avoid the claw back mechanism. On this issue the Norwegian authorities have committed to ensure the correct application of this condition. It is underlined that, in principle, only one application for funds will be accepted from the same municipality or county municipality (see footnote 20).

The existence of public tenders should be considered sufficient to limit the amount of aid to the minimum.

- (j) **Transparency:** As described in paragraph (71) above, the Norwegian authorities confirm that they will publish on a central website the most relevant information on the scheme and at least: the full text of the approved aid scheme and its implementing provisions, name of the aid beneficiary, aid amount, aid intensity and technology used. This information will be kept for at least 10 years.

Furthermore, the aid beneficiary will be obliged to provide entitled third parties with comprehensive and non-discriminatory access to information on its infrastructure (including *inter alia* ducts, street cabinets and fibre) deployed under the State aid measure (see the conditions regarding the use of existing infrastructure).

The Authority believes that these conditions are in line with the Broadband Guidelines⁶⁷, thus ensuring the required transparency regarding the implementation of the scheme.

- (k) **Reporting:** The Norwegian authorities confirmed that starting from the date when the scheme is implemented, for the duration of the aid measure, the State aid granting authority (NPT) would report every two years, the key information on the aid projects to the Authority.⁶⁸

3.1.3 *The overall balancing exercise*

- (126) After having assessed the measure under the relevant criteria of the balancing test, the Authority concludes that, on balance, the scheme for broadband rollout has been designed to ensure that the overall balance of its effects is positive.
- (127) As mentioned above, the primary objective of the measure is to provide access to good quality basic broadband to all Norwegian citizens and to boost NGA broadband services where they are currently not available by making available funds for projects in areas in white areas. The scheme will contribute towards offsetting a geographic and commercial disadvantage in white areas which would not otherwise be addressed via market-based solutions in the near future.
- (128) The new co-financed investments will bring significant new capabilities to the market in terms of broadband service availability, capacity and speed. The scheme will help to overcome the digital divide and the limits of basic broadband connections in providing innovative services, which businesses and citizens require. Consequently, public support to investments that the market is not willing to undertake (i.e. in areas where a market failure exists) will ensure a "*step change*" in terms of broadband availability for the target areas, in line with paragraph 47 of the Broadband Guidelines. When the concerned area is a NGA white area, but a grey or black basic broadband one, the local authorities will have to ensure, under the supervision of the NPT, that the project implies a clear step change in terms of capacity and speed.⁶⁹
- (129) The Authority notes that the scheme will be implemented as soon as possible after its approval and it will be in force until the end of 2017, thus, three years and a few months. These facts will help to ensure that the *mapping* is updated throughout the project period.
- (130) The Authority also welcomes the approach of the Norwegian authorities adopting a nationwide scheme (i.e. an "**umbrella scheme**") to cover potential forthcoming local projects. As stated in paragraph 37 of the Broadband Guidelines, the Authority encourages this type of approach because it provides for coherence among the projects, reduces the administrative burden for local authorities, accelerates the implementation of the measures and ensures equal access to public funds for all Norwegian geographic areas.
- (131) The Authority further underlines the importance of the **involvement of the NPT** in the project, which will ensure that the scheme will be in line with the applicable regulatory

⁶⁷ Paragraph 74(j) of the Broadband Guidelines.

⁶⁸ Paragraph 74(k) of the Broadband Guidelines.

⁶⁹ On this issue the Authority refers to the European Commission document. "*The broadband state aid rules explained. An eGuide for decision makers*". Final report, where it is defined what could be considered a step change in white NGA areas (grey or black white basic broadband areas). The documents is available at: <https://ec.europa.eu/digital-agenda/en/news/handbook-decision-makers-broadband-state-aid-rules-explained>. See also footnote 59 of the Broadband Guidelines.

rules. The Broadband Guidelines⁷⁰ recalls that National Regulators (in the case at hand the NPT) are the entities best placed to support public authorities with regards to the broadband state aid schemes. The Authority notes that, in the case at hand and in order to ensure the full compliance with the conditions set out in this Decision, the NPT will support the concerned local authorities in the implementation of the scheme. The Norwegian authorities have also committed to carry out an *ex-post evaluation* in line with paragraph 49 of the Broadband Guidelines. The scheme foresees that the *ex-post* evaluation will be carry out by an independent expert and according to the principles set out in the methodology proposed by the European Commission to perform ex-post evaluation in state aid matters (see paragraph (34) above). The expert will be selected by the NPT through a public tender.

- (132) The Authority welcomes this commitment. The Authority notes that even if the scheme has as objective to finance local projects up to EUR 10 million, the total budget of the scheme is approximately EUR 264 million (NOK 2 billion); and the annual budget is approximately EUR 60.4 million (NOK 500 million). In other words, it is a very large project to be implemented in a short period of time (i.e. three years and a few months, from 2014 to 2017). Furthermore, the fact that the project is a nationwide scheme justifies the need to carry out an *ex-post* evaluation in line with paragraph 49 of the Broadband Guidelines.
- (133) The Authority recalls that in order to carry out the *ex-post* assessment a well-targeted questionnaire has to be drafted. The objective of this evaluation should be to demonstrate the increase of broadband coverage in white areas and the efficiency of the scheme (investments costs/aid per connecting a household and number of households signing up new services).⁷¹ The Norwegian authorities have accepted that those main indicators will be used in the evaluation. Furthermore, the Norwegian authorities have committed to submit to the Authority the evaluation plan in advance.

4. Conclusion

- (134) On the basis of the foregoing assessment, the Authority considers that the notified scheme for broadband rollout in Norway constitutes state aid that is compatible with the functioning of the EEA Agreement within the meaning of Article 61(3)(c) of the EEA Agreement.
- (135) The Authority recalls that failure to comply with one of the above mentioned conditions will result on the project being out of the scheme and incompatible with the EEA Agreement.

HAS ADOPTED THIS DECISION:

Article 1

The state aid scheme for broadband rollout in Norway notified on 11 April 2014 is compatible with the EEA Agreement.

⁷⁰ Paragraph 38 of the Broadband Guidelines.

⁷¹ Annex II of the Commission's draft methodological guidance paper. Evaluation in the field of State aid, refers to the list of possible results indicators in Broadband projects. See footnote 22 of this Decision.

Article 2

The implementation of the scheme is authorised accordingly.

Article 3

This Decision is addressed to the Kingdom of Norway.

Article 4

Only the English language version of this Decision is authentic.

Decision made in Brussels, 11 June 2014

For the EFTA Surveillance Authority

Oda Helen Sletnes
President

Frank Büchel
College Member