

Case No: 69800
Event No: 596250
Decision No 231/11/COL

EFTA SURVEILLANCE AUTHORITY DECISION

of 13 July 2011

on the rapid deployment of a Next Generation Access network in rural areas of the municipality of Tromsø

(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

The Norwegian authorities notified the planned grant of aid to facilitate the rapid deployment of a Next Generation Access network in rural areas of the municipality of Tromsø, pursuant to Article 1(3) of Part I of Protocol 3, by letter of 19 April 2011 (Event No 595151).

By letter dated 6 June 2011 (Event No 600087), the Authority requested additional information.

By letter dated 17 June 2011 (Event No 601250), the Norwegian authorities replied to the information request.

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

2. Description of the proposed measure

2.1 The project

2.1.1 General description of the project

The municipality of Tromsø intends to contribute to the financing of the costs of a fibre-based broadband network (FTTH/FTTB – fibre to the home/fibre to the building)², a so-called Next Generation Access network (“NGA”), to be deployed in rural areas of the municipality (“the project” or “the measure”). NGA networks are wired access networks which consist wholly or in part of optical elements and which are capable of delivering broadband access services with enhanced characteristics (such as higher throughput) as compared to those provided over existing copper networks³.

The municipality will publish an open tender in order to choose a supplier of the network infrastructure. The construction costs will be co-financed by the supplier and the municipality. The tender documents will stipulate that the supplier/developer shall project and perform the construction work. The supplier will also be the owner of the infrastructure and will have the obligation to operate it during 20 years as from completion. The chosen supplier shall also deliver content services (internet, IP services and television services) but will not receive any aid for the provision of content services.

The new fibre network will be open for all technical solutions and hence be technology neutral. For a period of at least ten years, third party operators will have a non-discriminatory wholesale access to the subsidised network. In addition, it is planned that the municipality will lay some fibres between municipal buildings free of charge in order to provide certain public sector institutions (such as kindergartens, schools and municipal health stations directed towards children and schoolchildren) with access to a reliable high speed NGA network.

Lastly, the project also foresees that masts (light poles and masts used in the low voltage grid) owned by the municipality may be used by the supplier in the construction of the new broadband network. These masts will be free of the normally applicable one-off initial charge per mast, however the supplier will have to pay the annual charges for the use of the masts.

2.1.2 Coverage of the new NGA broadband network

Currently, 48% of Troms County is covered by broadband infrastructure with speeds above 25 Mbit/s⁴. The municipality of Tromsø has approximately 68 000 inhabitants. The number of inhabitants in the rural areas in which the planned network will be built is about 6 500.

² The design must include at least one fibre from the node/concentrator to each potential access. The entry cable from the drain point/drop point on the backbone to the access point (customer) must contain at least one fibre.

³ Paragraph 51 of the Authority’s State Aid Guidelines on the Application of State Aid Rules in Relation to Rapid Deployment of Broadband Networks, 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>.

⁴ See report on the broadband coverage in Norway “Kapasitetskartlegging av bredbåndsdekning i privatmarkedet”, issued by the Norwegian Post and Telecommunications Authority in 2009, available at http://www.npt.no/ikbViewer/Content/109845/Kapasitetskartlegging_av_bredbåndsdekning_i_privatmarkedet.pdf. Coverage data for Troms County are available in table 1 at page 24 and figure 15 on page 28 in the report. The report, however, does not go into detail with regard to where in Troms County such coverage is present.

The municipality of Tromsø has conducted a detailed market, mapping and coverage analysis. As a result of this mapping analysis, the following areas of the municipality of Tromsø have been included in the project:

- Malangshalvøya
- Kvaløya (except some areas on Kvaløya mentioned below)
- Vengsøy
- Ringvassøya and Rebbenesøy (the parts of these islands located in the municipality of Tromsø)
- From Sollidalselva to Ramfjordnes
- From Sandvika through Sandvikeidet to Fagernes and further through Sørbotn, Kristofferjord to Andersdal and to the Balsfjord municipality border
- The stretch from Fagernes to Breivikeidet/Breiviknes, the whole area of Ullsfjord to the gravel pit at Fornes (including Lakselvdalen)
- From Skjelnan (kindergarten/school) to Oldervik.

The project will be developed in three phases, each one covering certain of the above areas. The areas to be covered by the new network are characterized by low population density and challenging geography with islands, fjords and mountains. In most of the area to be covered, there is no basic broadband available. However, since the mapping exercise has focused on the situation as regards NGA networks, it cannot be excluded that some minor areas or parts of areas mentioned above may contain some existing traditional broadband infrastructure, mainly based on Telenor's copper network. According to the Norwegian authorities, however, given the long distances and geography of the designated areas, the existence of such copper networks would in any case be marginal.

The following areas are excluded from the coverage of the project:

- From Skjelnan school/kindergarten to Sollidalselva
- Tromsøya
- Kvaløya: from Eide handel junction through Åsland to Slettaelva residential area

2.1.3 Alternative NGA networks

At present, there are no alternative NGA networks in the areas covered by the project. In order to ascertain that there are no plans for private investments in NGA networks within the areas embraced by the measure within the near future, the municipality has undertaken a market consultation.

The following stakeholders have been consulted: Canal Digital, Pronea, NetCom, Ice, Ventelo, NextGenTel, Nordix Data, Telenor, Troms Kraft, Hålogaland kraft, Ymber, Signal Bredbånd. Only Pronea, Troms Kraft and Canal Digital submitted comments. Pronea and Troms Kraft confirmed that they had no plans to develop NGA broadband within these areas. Canal Digital informed the municipality about their future plans in Tromsø, which largely depend on the development of residential areas. However, they confirmed that no plans exist for the development of NGA broadband in the areas to be covered by the project within the next three years. Both Canal Digital and Pronea (a wholly-owned subsidiary of Troms Kraft) offer NGA broadband network in areas of the municipality not covered by the project.

Furthermore, the project has already been subject to an open tender procedure, published in both the TED database⁵ and the national DOFFIN database in July 2010⁶. The tender documents stated that the maximum aid intensity was limited to 65% of the supplier's documented costs connected to the project. However, the municipality had received no offers by the deadline of 27 September 2010.

2.1.4 Use of existing infrastructure

It is foreseen that masts (light poles and masts used in the low voltage grid) owned by the municipality of Tromsø may be used by the supplier in the construction of the new broadband network to avoid duplication and to avoid unnecessary construction in a fragile arctic environment. The municipality estimates that the supplier will use approximately 3800 masts free of the normally applicable one-off initial charge per mast⁷. The supplier will, however, still have to pay the annual charges for the use of the masts.

In addition, fibre cables may also be laid in the tunnels in rural Tromsø (for example in the Rya tunnel).

2.1.5 Wholesale access

For a period of at least ten years, the NGA network shall be open to all parties who wish to rent capacity or fibre. In this period, third party operators will have non-discriminatory wholesale access to the subsidised network. The operator will be obliged to publish its reference offer for wholesale access services on its website. The prices shall be equal for equal services and third parties shall not be treated less favourably than the supplier/operator of the network. On a yearly basis, the operator will be obliged to submit information to the municipality that shows that this obligation is respected, and in particular inform the municipality about access requests it has received and the conditions of the access that has been granted, including prices.

Third party access includes both passive and active infrastructure. According to the Norwegian authorities, this open access policy will support effective and full unbundling and satisfy all different types of network access that operators may seek (including but not limited to access to ducts, dark fibre and bit stream access).

If the operator does not respect the obligation of ensuring wholesale access, the municipality may demand recovery of the aid, either partly or in full. This will be specified in the contract entered into between the operator and the municipality.

The municipality of Tromsø has by e-mail of 9 March 2011 informed the Norwegian Post and Telecommunications Authority (NPT) about its intention to grant aid to the development of an NGA network in rural Tromsø and requested information about the applicable conditions for wholesale access. According to the answer given by the NPT to the municipality of Tromsø on 9 March 2011, the market for wholesale access to NGA broadband networks is currently not regulated in Norway. Hence, there are presently no published regulated wholesale prices for NGA networks available in Norway.

The contract between the municipality and the supplier/operator will therefore contain an obligation on the operator to base its prices on available information on wholesale prices in more competitive areas of Norway, be it information it possesses itself or information

⁵ The European public procurement journal *Tenders Electronic Daily* (TED).

⁶ The Norwegian national database for public procurement.

⁷ The Municipal Council decided on 27 January 2010 (Decision no. 12/10) that the initial one-off charge per mast for broadband development would not be imposed.

available by other means⁸. On a yearly basis, the operator will have to submit information to the municipality of Tromsø showing that this obligation is respected. Once NPT has decided to regulate the market for NGA broadband access and impose a price control obligation on operators with significant market power and make the regulated prices publicly available, the operator of the NGA network in Tromsø will be obliged to base its wholesale prices on the average published wholesale prices.

2.1.6 Monitoring and claw back mechanism

The supplier will be obliged to keep project accounts for the construction costs of each of the three different phases of the project⁹. The transfer of public funding will occur after the completion of each of the three phases on the basis of documented costs in auditor approved accounts. If documented costs are lower than the estimated costs, the public funding will be correspondingly reduced. On the other hand, if the actual costs are higher than the estimated costs, the public funding will not be increased.

Further, the contract with the supplier will include a reverse payment mechanism if retail customers' demand for broadband in the targeted area grows beyond anticipated levels. At the present stage, the municipality has estimated the number of potential retail customers in the areas covered by the project to be approximately 3375 (3250 households and 125 business customers). If the estimated number of customers is exceeded by 30%, the amount of public funding equal to the extra income generated by the increased number of customers above 30% shall be reduced or repaid, depending on the stage of development of the project. The claw back mechanism will be maintained for five years after the network is operational.

2.2 The objective of the aid measure

The objective of the project is to ensure economic and social development in rural areas of Tromsø municipality and well-being by promoting the knowledge economy, enabling residents to acquire basic technology skills and providing advanced accessible public services using modern information and communication technology. Such services include the development of technology-enabled services with significant benefit to rural areas, such as telemedicine, electronic collaboration between practitioners¹⁰ and videoconferencing. According to the Norwegian authorities, the measure will lead to a more innovative private and public sector and will make it more attractive to settle in the area covered by the measure. Furthermore, the measure will contribute to reducing the "digital divide" that sets apart areas in the region where affordable and competitive broadband services are on offer and areas where such services are not available.

Another reason to support the deployment of NGA networks with public funding (even in areas where basic broadband services might exist) is, according to the Norwegian authorities, that more and more public services are being digitised. This implies increased dependency on digital networks to get hold of societal information and to get along with business and everyday life. Also, reliable high speed networks are needed for the future in

⁸ This may be information available through statistics, market surveys, prices which are published one way or another, prices published on websites from operators providing wholesale access, information available through companies cooperating with the operator, prices the operator itself pays for third party access in other parts of the country, etc.

⁹ Expenditures connected to operation of the infrastructure cannot be included in the project accounts.

¹⁰ An example is the project "FUNNKe", which is aimed at electronic collaboration between (amongst others) general practitioners, the municipal health stations and the University Hospital in Tromsø.

order to capitalise on education¹¹, develop business innovations, and to be able to enjoy cultural events.

Furthermore, the meetings of the municipal council of Tromsø are also broadcasted on the internet, making it possible for all inhabitants with internet access to follow the political debate in the municipality without being present at the meetings.

In summary, according to the Norwegian authorities, digital infrastructure can provide a foundation for development in areas with limited commercial activities, be used as a leverage for future growth and counteract divides in society.

2.3 National legal basis for the aid measure

The funding will be provided through the State budget (budget chapter 551 post 61), and the legal basis for the grant of aid will be the contract entered into between the municipality and the chosen supplier. The Norwegian authorities have committed themselves to including in the tender documents and the contract the necessary provisions to ensure that all criteria and conditions in the Authority's present Decision will be complied with. The Authority's Decision will be a legally binding annex to the contract entered into between the operator and the municipality.

2.4 Recipient

The direct beneficiary of the aid will be the successful tenderer, which will be chosen by way of an open public tender procedure published in the DOFFIN and TED databases. The Norwegian authorities have emphasised that the tender will be held according to the public procurement rules, hereunder Directive 2004/18/EC¹².

The municipality of Tromsø will select the most economically advantageous offer. The municipality will select the offer based on price only and this criterion will hence have a weighting of 100%. The municipality of Tromsø has confirmed that in order to reduce the amount of aid to be granted, at similar conditions, the bidder with the lowest amount of aid requested will be chosen.

Indirect beneficiaries of the measure may be third party service providers (e.g. electronic communication operators utilising the network for offering retail services to end users), business users, public users and residential users. Furthermore, part of the project foresees that some fibres will be laid between municipal buildings free of charge - to the exclusive benefit of the municipality's non-economic activities performed in fulfilment of public authority tasks, such as kindergartens, schools and municipal health stations directed towards children.

2.5 Budget, aid intensity, eligible costs and duration

Based on other comparable projects, the municipality has estimated a total cost of deployment at approximately NOK 125 000 000. The municipality has foreseen a grant of approximately NOK 94 000 000, which means that the aid intensity will amount to

¹¹ For instance in the form of lectures provided through video streams or the possibility to offer distance learning for children whose mother tongue is not Norwegian (be it one of the Sami languages or the languages of immigrants to Norway). Offering some education in the mother tongue of the child is one of the requirements of the Norwegian legislation.

¹² Act referred to at point 2 of Annex XVI to the EEA Agreement (*Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts*, OJ L 134, 30.4.2004, p. 114) (as amended), as adapted to the Agreement by Protocol 1.

approximately 75%. Accordingly, the supplier is expected to contribute approximately NOK 31 000 000, *i.e.* 25% of the cost. The Norwegian authorities have explained that the costs and contributions by the supplier are only estimates. As the supplier will be chosen through a procurement process, it is not at present possible to calculate the final amount of public funding or the aid intensity.

The funding will be provided by the State budget (budget chapter 551 post 61). The amount of NOK 94 000 000 has been earmarked in the State budget for allocation to Troms County for regional development by way of compensation for increased social security tax. In 2009, the municipality of Tromsø applied to Troms County for a part of these funds to establish the NGA network. The County has accepted the application by earmarking approximately NOK 94 000 000 for the project. The Norwegian authorities have committed themselves to notify the Authority of any increase in the amount of aid to be granted by the municipality by more than 20% .

Eligible costs of the project include construction costs of the broadband infrastructure to be rolled-out. The eligible cost components are as follows:

- a. Digging of trenches, refilling of trenches, asphalt, clearing and removal of surplus material;
- b. Documented costs of acquiring land for digging trenches (if any);
- c. Procurement of necessary equipment to ensure a fully functioning network according to the specifications laid down in the public tender;
- d. Man hours for specialists installing the network;
- e. Management necessary for the construction;
- f. One-off initial charge for poles and masts not owned by the municipality;
- g. Rent of ship for laying down sea cables;
- h. Other clearly documented construction costs directly related to the construction may also be covered, subject to individual assessment.

The cumulation of aid will not be allowed. The municipality confirms that it will ensure that no other aid, be it individual aid or aid granted under a scheme, will be granted for the same eligible costs. This will be clearly specified in the contract entered into between the operator and the municipality.

The measure will be put into effect as soon as possible after the Authority's approval. The tender will be published immediately after receipt of the Authority's approval. The Norwegian authorities estimate that the construction project will be completed within approximately three years after the signature of the contract with the chosen supplier.

II. ASSESSMENT

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

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.”

Consequently, the Authority will assess whether the funding of the roll-out of an NGA network in rural areas of the municipality of Tromsø constitutes state aid, by asking the following questions:

- Is the support granted by the State or through State resources?
- Does it favour certain undertakings or the production of certain goods?
- Is it capable of distorting competition and affecting trade between the Contracting Parties to the EEA Agreement?

As a preliminary remark, 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 engaged in an economic activity¹³. Any activity consisting in offering goods and services on a given market is an economic activity¹⁴.

The measure will allow an economic operator deploy an NGA broadband network in rural areas of the municipality of Tromsø. The aid will, therefore, be granted to an undertaking within the meaning of Article 61(1) of the EEA Agreement.

¹³ Case C-41/90 *Höfner and Elser* [1991] ECR I-1979, paragraph 21.

¹⁴ Case C-218/00 *Cisal* [2002] ECR I-691, paragraph 23.

However, part of the project foresees that some fibres will be disposed between municipal buildings free of charge, *i.e.* it can indirectly benefit municipality's activities. The Norwegian authorities have confirmed that the purpose of this is purely to benefit non-economic activities of the municipality of Tromsø, in particular its activities which are performed in fulfilment of public authority tasks, such as kindergartens, schools and municipal health stations directed towards children and schoolchildren. According to the case-law of the Court of Justice of the European Union, exercising powers which are typically those of a public authority is not of an economic nature¹⁵. Consequently, any advantage granted to the municipality's activities for the performance of its public authority functions does not amount to state aid in the meaning of Article 61(1) of the EEA Agreement.

1.1 Presence of state resources

The aid measure must be granted by the State or through state resources. In the case at hand, the financial contribution of the public authorities will be paid from the State budget (budget chapter 551 post 61), therefore state resources are directly involved.

In addition, approximately 3800 electricity masts owned by the municipality of Tromsø will be made available to the supplier of the network for the purpose of using them in the construction of the NGA network in the rural areas. There are two types of charges normally applicable to the use of these masts: firstly, a one-off initial charge per mast, and secondly, annual charges for the use of the masts. For the purpose of the construction of project, the supplier will be granted an exemption from the payment of the one-off initial charge per mast, whereas the annual charges will still be applied. By making available masts free of a normally applicable charge imposed by the municipality of Tromsø, the public authorities forego their regular revenue and therefore state resources are also involved as regards this aspect of the measure.

1.2 Favouring certain undertakings or the production of certain goods

Firstly, the aid measure must confer on the beneficiary undertaking advantages that relieve it of charges that are normally borne from its budget. In the present case, co-financing of the project by public authorities will provide to the supplier of the NGA broadband network in rural areas of Tromsø municipality an economic advantage that would normally be covered by the budget of the supplier of the network and will allow the selected operator to provide an NGA 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.

As regards making available electricity masts to the supplier of the network free of the one-off initial charge, normally the supplier would have to cover this cost from its budget. Therefore an exemption from making those payments also produces an economic advantage to the beneficiary undertaking.

In addition, due to the public co-financing of the project, it cannot be excluded that third party operators may obtain reductions of wholesale prices for access to the infrastructure and business users may be provided with broadband connectivity under more advantageous terms and conditions. This translates into a potential indirect economic

¹⁵ Case C-364/92 *Eurocontrol* [1994] ECR I-43 and Case C-343/95 *Calí* [1997] ECR I-1547. See also in this context EFTA Court judgement in Case E-5-07 *Private Barnehagers Landsforbund v EFTA Surveillance Authority*, EFTA Court Report 2008, p. 62 and Commission's decision in Case N 46/2007 *United Kingdom – Welsh Public Sector Network Scheme*, OJ C 157, 10.7.2007, p. 3.

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

Secondly, the aid measure must be selective in that it favours “*certain undertakings or the production of certain goods*”. Public funding of the NGA broadband network in rural areas of Tromsø municipality and the exemption from the one-off initial charge related to the usage of electricity masts (generally applicable to all undertakings) will be granted to the successful tenderer to be published by the municipality for that purpose. Since the supplier of the network will be the only recipient of the state funds, the measure is considered to be selective.

1.3 Distortion of competition and affect on trade between Contracting Parties

The aid measure must distort competition and affect trade (or have the potential to distort competition and affect trade) between the Contracting Parties to the EEA Agreement. Public involvement in deploying infrastructure to provide electronic communications services strengthens the position of the selected supplier of the network in relation to its competitors. In particular, state support to the planned NGA network 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.

The beneficiary of the measure will be active in deploying an NGA broadband network infrastructure, a market which can be entered directly or through financial involvement by participants from other EEA States. In general, 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. Therefore, the measure has the potential of distorting competition and affecting trading conditions between Contracting Parties.

1.4 Conclusion

In light of the above, the Authority concludes that the proposed measure does constitute state aid within the meaning of Article 61(1) of the EEA Agreement.

2. Procedural requirements

Pursuant to Article 1(3) of Part I of Protocol 3, “*the 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 the procedure has resulted in a final decision*”.

By submitting a notification of the planned grant of aid to facilitate rapid deployment of an NGA broadband network in rural areas of the municipality of Tromsø by letter dated 19 April 2011 (Event No 595151), the Norwegian authorities have complied with the notification requirement.

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

The Authority has assessed the compatibility of the planned measure according to Article 61(3)(c) of the EEA Agreement in light of the State Aid Guidelines on the Application of State Aid Rules in Relation to Rapid Deployment of Broadband Networks (“the

Broadband Guidelines”). The Broadband Guidelines contain a detailed interpretation of Article 61(3)(c) of the EEA Agreement in this sector.

3.1 Distinction between white, grey and black areas for NGA networks

According to the Broadband Guidelines, in order to carry out a compatibility assessment of public financing of NGA projects, the region in which the new broadband network will be deployed needs to be defined as a white, grey or black area.

“*White NGA area*”: an area where NGA networks do not at present exist and where they are not likely to be built and be fully operational in the near future by private investors, regardless of whether basic broadband infrastructure provided over existing copper network is already in place in that region or not¹⁶. The term “*in the near future*” corresponds in that regard to a period of three years. This period appears to correspond to an average period needed for the deployment of a next generation access network covering a town or a city. In this regard, an operator should be able to demonstrate that within a coming period of three years it would have carried out the necessary infrastructure investments in order to have covered by then a substantial part of the territory and of the population concerned thereby.

“*Grey NGA area*”: only one NGA network is in place in a certain area or will be deployed in the coming three years and there are no plans by any other operator to deploy an NGA network in the coming three years. In assessing whether other network investors could deploy additional NGA networks in a given area, account should be taken of any existing regulatory or legislative measures that may have lowered barriers for such network deployments (access to ducts, sharing of infrastructure etc.) (cf. paragraph 67 of the Broadband Guidelines).

“*Black NGA area*”: if more than one NGA network exists in a given area or will be deployed in the coming three years, such an area should, in principle, be considered as a “*black NGA area*” (cf. paragraph 68 of the Broadband Guidelines).

The area of the project is currently not covered by any NGA network. As regards traditional broadband networks, it cannot be excluded that parts of the area to be covered by the new NGA network have already deployed basic broadband infrastructure, mainly based on Telenor’s copper network (*i.e.* they may constitute traditional grey areas).

In addition, the municipality of Tromsø has undertaken a market consultation to ascertain that there are no plans for private investments in NGA networks within the areas embraced by the measure. The respondents Pronea and Troms Kraft confirmed that they had no plans to develop NGA broadband within these areas. Canal Digital informed the municipality about their future plans in Tromsø, which largely depend on the development of residential areas, but they confirmed that no plans exist for the development of NGA broadband in the areas to be covered by the project within the next three years. According to the information provided by the Norwegian authorities, it is not likely that private investors would engage in development of NGA networks in the given area and make them fully operational within the next three years (which corresponds to the term “*in the near future*” within the meaning of the Broadband Guidelines).

¹⁶ See paragraph 66 and footnote 67 of the Broadband Guidelines. It might therefore be at the same time a traditional white, grey or even black area, see paragraphs 39-44 of the Broadband Guidelines.

Thus, in light of the above, the areas to be covered by the project are considered by the Authority to be “white NGA areas” for the purpose of the application of the Broadband Guidelines.

3.2 Balancing test and its application to aid for the NGA broadband network deployment

As a preliminary remark, although NGA networks are qualitatively far more advanced than existing traditional copper-based broadband networks, in assessing the compatibility of state aid for the deployment of an NGA network with the state aid rules, the Authority looks into the effects of such aid on existing broadband networks given the degree of substitution that at present appears to exist with regard to broadband services offered over broadband and NGA networks alike.

Moreover, in the assessment of compatibility of state aid to NGA 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”), according to the criteria laid down in the Broadband Guidelines.

In applying the balancing test, the Authority assesses the following questions:

- (a) Is the aid measure aimed at a well-defined objective of common interest, *i.e.* does the proposed aid address a market failure or other objective?
- (b) 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?
- (c) Are the distortions of competition and the effect on trade limited, so that the overall balance is positive?

In line with the Broadband Guidelines, in applying the balancing test, the Authority considers the objective of the measure, its design and the need to limit distortions of competition (cf. paragraph 34 of the Broadband Guidelines).

3.2.1 Objective of the measure

3.2.1.1 The requirements of the Broadband Guidelines

The Authority considers that measures that support the deployment of NGA networks in areas where no broadband infrastructure currently exists, or in areas where existing broadband operators consider it unprofitable to deploy NGA networks, are compatible with the state aid rules of the EEA Agreement.

In white NGA areas where one basic broadband network already exists, the grant of aid for an NGA network is subject to the demonstration by the EFTA State concerned that:

- (i) the broadband services provided over the basic broadband network are not sufficient to satisfy the needs of citizens and business users in the area in question (also taking into account a possible future upgrade); and

- (ii) there are no less distortive means (including *ex ante* regulation) to reach the stated goals (cf. paragraph 71 of the Broadband Guidelines).

3.2.1.2 Well-defined objective of common interest

Broadband connectivity is a key component for the development, adoption and use of information and communication technologies in the economy and in society. Broadband is of strategic importance because of its ability to accelerate the contribution of these technologies to growth and innovation in all sectors of the economy and to social and regional cohesion. The funding of NGA infrastructure in rural areas of the municipality of Tromsø targets areas where no broadband coverage is currently available (or traditional broadband is available to a limited extent) and where there are no plans by private investors to roll out such infrastructure in the near future. The deployment of an NGA broadband network contributes to job creation and retention as well as to improving health and education services in the target area.

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. On the contrary, without further public intervention there is a real risk of an emergence of a new “*digital divide*” 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 of an already sparsely populated area. Although there are several reasons for digital divides, the most important one is the lack of an adequate broadband infrastructure. The Broadband Guidelines refer to the risk of a new digital “*NGA divide*” (cf. paragraph 55).

Furthermore, the Norwegian authorities have stated that in their view the planned measure will also enable all households and businesses in the targeted area to have access to affordable broadband services.

As regards part of the area to be covered by the new NGA infrastructure, where traditional copper networks might be present, the municipality of Tromsø has submitted that the broadband services provided over the existing networks are not sufficient to satisfy the continuously growing needs of citizens and business users in the area in question. Due to the distance from the centrals, the speed of any potential broadband submitted through the copper network in this area will be very limited.

In addition, more and more public services are being digitised. This implies increased dependency on digital networks to get hold of societal information and to carry on business and everyday life. Also, reliable high speed networks are needed for the future in order to develop business innovations, and to allow citizens to enjoy cultural events. As mentioned above, the need for reliable and fast access to the internet is particularly prevalent in the health care sector. Secure and efficient communication between health care providers is important to give the population in the region, characterized by low population density and a challenging geography, access to advanced health services. There is also an increasing demand for high speed internet access within the field of education. As mentioned above, the only way to ensure the offer of education services such as education in the children’s mother tongue at all schools in rural Tromsø is through the Internet and through distance learning. In Tromsø, the meetings of the municipal council are broadcasted on the Internet, making it possible for all inhabitants with internet access to follow the political debate in the municipality without being present.

In conclusion, by extending NGA broadband coverage to areas where private operators have no commercial interest to invest in the near future, the municipality pursues genuine cohesion and economic development objectives, which is considered to be a well-defined objective of common interest.

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

3.2.2.1 Aid is the appropriate instrument

The granting authority had contemplated the use of alternative instruments, such as grants or tax incentives to end users, in order to achieve the above-mentioned objective of cohesion and economic development of the region. However, such alternative solutions do not appear appropriate to address the problems related to the lack of supply of high speed broadband in the targeted areas of Tromsø, *i.e.* non-existence of broadband infrastructure. The same consideration applies to the possibility of using *ex ante* regulation. Therefore, in the current situation, there are no alternative means to achieve the above-stated goals.

3.2.2.2 The aid provides the right incentives to operators

The public consultation conducted by the Tromsø municipality has shown that it is unlikely that any private investors will roll out an NGA network in the area in the near future.

The lack of adequate broadband coverage may be due, among other factors, to some of the typical economic problems associated with networks industries. Due to economics of density, broadband networks are generally more profitable to roll out where potential demand is higher and concentrated, *i.e.* in densely populated areas. This is also assumed to be the reason why higher speed broadband services are currently only available in the more densely populated areas of the municipality.

By providing financial support for the establishment of an NGA infrastructure in rural areas of the municipality of Tromsø, there will be a change in the investment decisions of the operators. In combination with the fact that the recipient of the aid will be selected by public tender, the aid should provide a direct and appropriate investment incentive for the selected operator.

3.2.2.3 Proportionality

State aid in favour of NGA network deployment may constitute an appropriate and justified instrument, provided that a number of fundamental conditions are complied with. According to the Broadband Guidelines, the following conditions need to be met:

- (a) **Detailed mapping and coverage analysis:** The municipality of Tromsø has undertaken a detailed analysis of the existing broadband infrastructure in order to clearly identify the areas where intervention by the municipality would be necessary. The consultation with existing operators through an open and transparent procedure ensures that public funds are used only in areas where such private investments do not exist and are not planned in the near future. The current measure does not target areas where NGA infrastructure is already present. By conducting an analysis of the competitive conditions and structure prevailing in rural Tromsø and by consulting all stakeholders potentially affected by the relevant measure, the municipality has ensured that potential distortions of competition are minimised.
- (b) **Open tender process:** The municipality of Tromsø has committed itself to selecting the preferred bidder for the construction and the management of the

network in an open, non-discriminatory and competitive tender process in full compliance with national and EEA public procurement rules. The tender will be published in the DOFFIN and TED databases.

The Authority considers that an open tender minimises the potential state aid advantage involved 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. The open tender approach ensures that there is transparency for all investors wishing to bid for the realisation of the subsidised project. The Authority recalls in this context that the equal and non-discriminatory treatment of all bidders is an indispensable condition for an open tender.

- (c) **Most economically advantageous offer:** Within the context of the open tender procedure, the municipality of Tromsø has committed itself to selecting the most economically advantageous offer among those presented by the operators. Based on the award criteria and their relative weighting, which have been stipulated in advance (cf. footnote 53 of the Broadband Guidelines), the municipality will select the offer on the basis of price only. Accordingly, the municipality has confirmed that in order to reduce the amount of aid to be granted, at similar conditions, the bidder with the lowest amount of aid requested will be chosen. The Authority considers that, in this way, the municipality 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.
- (d) **Technological neutrality:** The fibre network funded by the municipality of Tromsø will be open for all technical solutions and hence be technology neutral. The measure will not favour any particular technology or network platform leaving it to commercial operators to come up with the most appropriate technological solutions to provide retail and wholesale broadband services to end users through the fibre network.
- (e) **Use of existing infrastructure:** Masts (light poles and masts used in the low voltage grid) owned by the municipality may be used by the supplier to avoid duplication and to avoid unnecessary construction in a fragile arctic environment. Fibre cables may also be laid in the tunnels in rural Tromsø (for example in the Rya tunnel).
- (f) **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 regional service monopolies. In addition, this obligation also ensures that existing ADSL operators can migrate their customers to an NGA network as soon as the new network is in place and thus start planning their own future investments without suffering any real competitive disadvantage.

In the notified project, the selected supplier/operator will have to offer wholesale services and access to the subsidised network to other operators for at least ten years. The Authority considers that this is in line with the Broadband Guidelines which require that the effective wholesale access to the subsidised infrastructure should be offered for at least a period of 7 years.

The selected operator will have to offer other operators access to a network element or to the capacity of the network in an open, transparent and non-discriminatory manner. The operator will be obliged to publish its reference offer for wholesale access services on its website. On a yearly basis, the operator will be obliged to submit information to the municipality that shows that this obligation is respected, in particular to inform the municipality about the access requests it has received and the conditions of the access that has been granted, including prices. Third party access includes both passive and active infrastructure, including the right to use ducts or street cabinets.

If the operator does not respect the obligation of ensuring wholesale access, the municipality may demand recovery of the aid, either partly or in full. This will be specified in the contract entered into between the operator and the municipality.

In setting the conditions for wholesale access to the subsidised NGA network, the municipality of Tromsø has fulfilled the requirement of consulting the NPT, which is the relevant national regulatory authority to carry out *ex ante* market analyses of the relevant markets in accordance with Article 7 of Directive 2002/21/EC (Framework Directive)¹⁷. The municipality has informed the NPT about its plans to grant the proposed aid and has discussed the applicable conditions for wholesale network access with the NPT. The obligation of wholesale access is without prejudice to any future analysis of the relevant market and imposition of sector specific regulatory remedies on undertakings with significant market power as defined by NPT.

Finally, as submitted by the Norwegian authorities, the NGA network architecture that will benefit from the state aid will support effective and full unbundling and satisfy all different types of network access that operators may seek, including active and passive access to products on an open wholesale basis.

- (g) Benchmarking pricing exercise:** 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 NRA for the markets and services concerned.

The contract with the supplier/operator of the new NGA network in rural areas of the municipality of Tromsø will contain an obligation to base its prices on available information on wholesale prices in more competitive areas of Norway, be it information it possesses itself or information available by other means¹⁸. On a yearly basis, the operator will have to submit information to the municipality showing that this obligation is respected. For the moment, operators of NGA networks in Norway are not subject to regulatory remedies under the currently

¹⁷ Act referred to at point 5cl of Annex XI to the EEA Agreement (*Directive 2002/21/EC of the European Parliament and of the Council of 7 March 2002 on a common regulatory framework for electronic communications networks and services*), OJ L 108, 24.4.2002, p. 33, as amended by Regulation (EC) No 717/2007, OJ L 171, 29.6.2007, p. 32 and Regulation (EC) No 544/2009, OJ L 167, 29.6.2009, p. 12, as adapted to the Agreement by Protocol 1.

¹⁸ See above footnote 8.

applicable analysis of market 5 (wholesale broadband access)¹⁹ and NPT's decisions on designation of undertakings with significant market power on this market. As soon as NPT decides to regulate the relevant market and wholesale prices for access to NGA networks will be made available, the operator of the new NGA network in rural areas of Tromsø municipality will be obliged to base its prices on the average published wholesale prices.

In view of the unavailability of regulated or approved prices, the municipality has set a number of principles, according to which the operator of the new NGA network will be able to calculate its prices. As regards wholesale access prices, the operator will not charge third parties more than it charges its own retail provider, if the operator also provides retail services. The assessment by the municipality of whether the prices are abusive will be mainly based on the fact that most of the costs of building the network have been paid for by public funds²⁰. This means that the operator may normally not charge prices above market price by reference to higher investment costs in the area covered by the measure, as these higher investment costs will have principally been met by public funds.

(h) Claw-back mechanism to avoid over-compensation: In order to ensure that the selected bidder of the project is not over-compensated, the contract will include a reverse payment mechanism if demand for broadband in the targeted area grows beyond anticipated levels. As mentioned above, if the estimated number of customers is exceeded by 30%, the aid will be reduced or repaid, accordingly. In such circumstances, the amount to be recovered will correspond to the absolute amount of the extra income the increased number of customers has generated. The claw-back mechanism will be maintained for five years after the network is operational.

4. Conclusion

On the basis of the foregoing assessment, the Authority considers that the grant of aid to facilitate the rapid deployment of an NGA broadband network in rural areas of the municipality of Tromsø which the Norwegian authorities are planning to implement constitutes state aid that is compatible with the functioning of the EEA Agreement within the meaning of Article 61 of the EEA Agreement.

The Norwegian authorities are also reminded that all plans to modify the individual aid to be granted, including any increase in the amount of aid to be granted by the municipality by more than 20%, must be notified to the Authority.

HAS ADOPTED THIS DECISION:

¹⁹ See the list of markets in the EFTA Surveillance Authority Recommendation of 5.11.2008 on relevant product and service markets within the electronic communications sector susceptible to *ex ante* regulation, OJ C 156, 9.7.2009, p. 18 and EEA Supplement No 36, p. 1.

²⁰ The Norwegian authorities have confirmed that the municipality will use the following sources of information in assessing whether the prices are abusive: information from the operator on wholesale prices and conditions it offers in other parts of the country; prices the operator itself pays for third party access in other parts of the country; information available through statistics or market surveys; prices which are published one way or another, for example on the web pages of operators providing wholesale access; information available through companies cooperating with the operator; wholesale prices from Telenor for access to the fibre network, available on the webpage www.jara.no; prices available through the means referred to at footnote 8 above; regulated prices in Nordic countries, if available and comparable; and the Commission's guiding principles in the Recommendation on NGA networks and services. The municipality may also request assistance from the Norwegian Post and Telecommunications Authority.

Article 1

The EFTA Surveillance Authority concludes that the aid measure is compatible with the EEA Agreement and raises no objections to the notified grant of aid to facilitate the rapid deployment of a Next Generation Access broadband network in rural areas of the municipality of Tromsø on the basis of Article 61(3)(c) of the EEA Agreement.

Article 2

The implementation of the measure 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, on 13 July 2011

For the EFTA Surveillance Authority

Oda Helen Sletnes
President

Sverrir Haukur Gunnlaugsson
College Member