



EUROPEAN COMMISSION

LEGAL SERVICE

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*Opinion of the Legal Service**

NOTE FOR THE ATTENTION OF MR R. VIOLA DIRECTOR-GENERAL, DG CNECT

Subject: WiFi4EU First Pilot Call

Ref.: Ares(2018)2742292 of 28 May 2018

By note of 28 May 2018, DG CONNECT has requested the opinion of the Legal Service on legal issues in relation to the WiFi4EU First Pilot Call. DG CONNECT has provided further explanations in a meeting with the Legal Service on the 1st June 2018.

WiFi4EU First Pilot Call was launched on the basis of the 2017 Work Programme for the Connecting Europe Facility – Telecom (Commission Decision C(2017)696, as amended by C(2017)7732).

The purpose of the call is to select municipalities or associations of municipalities, which will be awarded grants in the form of a lump sum of 15.000 euros ('vouchers'), for WiFi installation. An indicative number of 1.183 grants are available under that call. According to the conditions of the call, the eligible applicants must register in advance via the WiFi4EU Portal and create a EU Login account. According to the terms of the call, it opens on 15 May 2018 (13:00:00 CEST) and closes on 15 June 2018 (17:00:00 CEST). The applications must be submitted via the WiFi4EU portal, using the EU Login account, and include supporting documents.

Section 7 of the conditions of the call indicates that the grants will be awarded on a 'first come, first served' basis, using the timestamp recorded in the WiFi4EU Portal. Additional criteria are provided in order to ensure a balanced geographical distribution: the call provides for a minimum of 15 vouchers, and maximum 8% of the call budget, per

Member State and EEA state. A reserve list per country will be established in case additional budget becomes available.

According to the DG CNECT note, the call was launched on May 15 at 13:00 CEST. After the launch, the Commission was alerted by an external source to two vulnerabilities affecting the WiFi4EU portal. One of them concerned potential unauthorised access to personal data, which is not addressed in this consultation. The second concerned potential alteration to the record of the arrival of applications. DG DIGIT has confirmed that it was not possible to alter the record externally. However, DG DIGIT has detected a design flaw in the portal application: the enabling of the 'apply' button on the screen of the applicant was activated on the basis of each applicant's own computer clock, rather than on the central server clock.

According to further explanations provided by DG CNECT, the portal was supposed to be designed in such a way that the 'apply' button on the applicant's screen would only be activated (turn green) precisely at 13:00 CET on May 15. However, due to the design fault, the button 'turned green' according to the hour set on each applicant's own computer.

That error had in particular the following implications:

- (i) a large number of applications have been submitted shortly before the opening of the call according to the central server, since their computer clock was set (in most cases, seconds) later than the central server ;
- (ii) it is also highly likely that some applicants could not apply immediately after the opening of the call according to the central server, since their computer clock was set earlier than central server, and the 'apply' button on their screen was not active.

According to the indications provided by DG CNECT, and subject to the results of further verification, the fact that applicants responded to the call from different time zones did not affect the results. According to DG CNECT, the system, including the operation of the apply button, was designed so as to operate in function of CET and hence to neutralise the time differences between the various zones.

DG CNECT indicates that the call included a very high rate of applications. The probabilities of being rated among the first were a matter of seconds or milliseconds: the first 1183 applications (number of vouchers for this call) were made within the first 2 seconds after 13:00, and over 3.500 municipalities applied within the first 5 seconds. Almost all countries, except for Iceland, have reached their pool of 15 vouchers.

The WiFi4EU Portal was closed down approximately 4 hours after its opening, for the reasons explained above, and is currently inactive.

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According to Article 125(1) of the Financial Regulation¹, grants are subject to the principles of transparency and equal treatment. These principles are implemented through the publication of calls for proposals (see Article 128(2) of the Financial Regulation), which must be based on objective and non-discriminatory award criteria.

¹ Regulation (EU, Euratom) No 966/2012 of the European Parliament and of the Council of 25 October 2012 on the financial rules applicable to the general budget of the Union (OJ L 298, 2012, p. 1).

Pursuant to Article 135(2) of the Financial Regulation, where the award procedure proves to have been subject to substantial errors, irregularities or fraud, the authorising officer responsible shall suspend the procedure and may take whatever measures are necessary, including the cancellation of the procedure.

According to the call for proposal for the WiFi4EU First Pilot Call (Section 7), the grants are awarded on a 'first come, first served' basis, using the timestamp of the application.

The use of such criterion necessitates the adoption of the appropriate arrangements in order to ensure that all applicants have an equal opportunity to apply as early as possible after the opening of the call.

As regards the present call, the opening of the call was supposed to be announced with reference to a common, synchronised signal. According to the DG CNECT's explanation, the application portal comprised a technical feature, which was supposed to activate the apply button on the screen of each applicant's computer precisely at the opening time for the call (the button would turn 'green' at 13:00:00 CEST on 15 May 2018). The applicants have been informed about this technical feature in advance. However, due to a technical error, the 'apply' button was activated on the basis of the time set on each applicant's computer, instead of the time on the central server.

The Legal Service observes that, as a consequence of that technical error, the 'apply' button was activated at different time for different applicants. Since the time of application was the main award criterion used for this call, that difference potentially gave rise to unequal treatment of individual applicants in relation to the main award criterion. The technical error must therefore be considered as substantial.

Pursuant to Article 135(2) of the Financial Regulation, in case of substantial error, the authorizing officer is obliged to suspend the procedure and take necessary measures. With regard to the scope of such measures, the Legal Service notes that the error in question has an impact on the assessment of the main award criterion, as well as on the equal treatment of the applicants, and that it cannot be remedied in the context of the present call. In such a case, the only appropriate measure is the cancellation of the award procedure and publication of a new call.

As regards the conditions for cancellation, the Legal Service considers that Article 135(2) of the Financial Regulation must be applied in accordance with the requirements set out in Article 114 of that Regulation with regard to the cancellation of procurement procedures: the decision to cancel the procedure must be justified and brought to the attention of all applicants as soon as possible.

Moreover, in its note DG CNECT specifically enquires about the legal risks, should the call be declared valid.

The Legal Service observes that, in case of the adoption of an award decision on the basis of the present call, unsuccessful applicants will have the right to lodge an action for annulment, as well as an action for damages. Given the large number of unsuccessful applicants, the possibility of a legal challenge is very high.

As regards the success of such potential legal actions, the Legal Service recalls that the principle of equal treatment is a general principle of Union law enshrined in Articles 20

and 21 of the Charter.² As regards the award of grants by the Union, this principle is reflected in Article 125(1) of the Financial Regulation, according to which grants are subject to that principle.

In the context of the present call, it is highly likely that the judicial scrutiny would establish that the technical error attributable to the system has influenced the applicants' opportunities to compete in relation to the main award criterion and hence that candidates were treated unequally. This consideration applies in particular to (i) the applicants, who have submitted their applications prematurely, because they relied on the fact that the 'apply' button was active on their computers, as well as (ii) the applicants who could not apply immediately after the opening of the call, because the clock on their computer might be set earlier than the one on the central server. In addition, since the portal was closed down and is inactive, some potential applicants will not be able to apply at all.

Contrary to what is suggested by DG CNECT in its note, there are no convincing arguments to defend the legality of the call. The applicants cannot be reasonably expected to have synchronised their computer clocks in anticipation of the call. First, the applicants have been informed that they will be alerted of the opening of the call by the fact that the button would 'turn green', and therefore could rely on that fact. Secondly, an implicit requirement to synchronise computer clocks to seconds or milliseconds would, in any case, be disproportionate.

Therefore, it is very likely that the potential award decision based on the present call would be found to infringe the principle of equal treatment and, with regard to the early applicants who have relied on the fact that the 'apply' button would be activated on time, the principle of the protection of legitimate expectations.

The Legal Service would like to stress the – potentially very high – risk of cumulative damages awards in such legal actions, the legal costs involved, as well as the overall negative effect of such actions on the Commission's reputation.

For the sake of completeness, insofar as DG CNECT discusses the reputational consequences of cancelling the call, indicating that this would raise suspicions as to the robustness of the technical system used for the call, the Legal Service would like to stress that this consideration is legally and materially incorrect.

The Commission is bound by the principle of transparency and, where relevant, should inform the applicants about substantial errors affecting the award procedure. The right to receive such information can be enforced by the applicants, by requesting public access to Commission's documents in accordance with Regulation (EC) No 1049/2001. Moreover, in any case, according to the information provided by DG CNECT, the technical error in question has already been brought to the attention of the public. In these circumstances, the possibility of not cancelling the call, which is contemplated by DG CNECT, besides being legally defective and very likely leading to successful legal challenges, would in itself involve significant risk to the Commission's reputation.

² See judgment of the Court of 11 July 2013, Ziegler/Commission (C-439/11 P, EU:C:2013:513, paragraph 132).

For those reasons, the Legal Service:

1. Draws the attention to the obligations of the authorising officer under Article 135(2) of the Financial Regulation.
2. Considers, on the basis of the information provided, that the procedure is affected by an irreparable substantial error, and therefore the call must be cancelled.

The Legal Service remains at your disposal for assistance in this matter.



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