

## INFRASTRUCTURE ANALYTICAL GRID N° 1<sup>1</sup> – BROADBAND NETWORK INFRASTRUCTURES

*Disclaimer: The contents seek to reflect the current rules and decisional practice and do not prejudge possible developments in the State aid enforcement practice and the application of public procurement rules. In any case DG COMP services are available to provide further guidance on the need for a formal notification. Such guidance may be given in the course of a pre-notification procedure.*

### **General principles**

1. This analytical grid covers the construction of broadband infrastructures. Public funding can be granted to the complete infrastructure roll-out or to part of the infrastructure only (for instance for constructing backhaul networks or basic physical infrastructure elements, such as ducts).
2. According to the established jurisprudence of the Union Courts, whenever an entity is engaged in an economic activity, regardless of its legal status and the way in which it is financed, it can be considered as an undertaking for the purposes of EU competition law. The construction or upgrade or extension of infrastructure which is commercially exploited constitutes an economic activity. Therefore the entity carrying out such an activity, regardless of whether it is public or private, is considered as an undertaking for the purposes of EU State aid law and its funding may fall within the ambit of State aid rules.

### **Instances in which the presence of State aid is excluded**

#### **No economic activity: construction of a broadband network for non-economic use**

3. If a broadband network is rolled out exclusively for non-commercial purposes not favouring any undertaking (e.g. a network to provide connectivity services to public bodies not engaged in economic activity<sup>2</sup>), then the funding for such a project does not involve State aid. However, if such a network (for instance its extra capacity) is made available for use by commercial broadband investors or other operators, State aid is likely to be involved. Similarly, if the network is made available later for commercial use, any further construction/upgrade may involve State aid.

#### **No potential effect on trade between Member States: de minimis**

4. Support granted under the *de minimis* Regulation is not regarded as State aid, if no more than EUR 200 000 is granted to a single undertaking over a period of three years and the other conditions are also respected<sup>3</sup>.

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<sup>1</sup> This is a working document drafted by the services of the European Commission and it does not express an official position of the Commission on this issue, nor does it anticipate such a position. It is not intended to constitute a statement of the law and is without prejudice to the interpretation of the Treaty provisions on State aid by the Union Courts.

<sup>2</sup> See for instance Commission decision of 30 May 2007 in case N 46/2007 – UK - Welsh Public Sector Network Scheme, OJ C 157, 10.07.2007, p. 2, [http://ec.europa.eu/competition/state\\_aid/cases/218491/218491\\_683319\\_19\\_2.pdf](http://ec.europa.eu/competition/state_aid/cases/218491/218491_683319_19_2.pdf).

<sup>3</sup> Commission Regulation (EU) No 1407/2013 of 18 December 2013 on the application of Articles 107 and 108 of the Treaty on the Functioning of the European Union to *de minimis* aid, OJ L 352, 24.12.2013, p. 1.

### **No economic advantage: Investments in compliance with the Market Economy Operator Principle**

5. If it is proven that the State acted under the same terms and conditions as a commercial investor when providing the necessary funding, then State aid is not involved. This should be demonstrated by: (i) significant *pari passu* co-investments of commercial operators, i.e. on the same terms and conditions as the public authorities; and/or (ii) the presence (ex ante) of a sound business plan (preferably validated by external experts) demonstrating that the investment provides an adequate rate of return for the investors – which is in line with the normal market rate of return that would be expected by commercial operators on comparable projects, taking into account all the relevant circumstances. Note, however, that the existence of accompanying or prior State aid measures concerning the same project might invalidate the conclusion that a similar measure would also have been undertaken by a market economy investor.

### **No economic advantage: the operation of the infrastructure is entrusted as a service of general economic interest (SGEI) in line with the Altmark criteria**

6. The deployment and the operation of a broadband infrastructure can qualify as a SGEI. Broadband deployment as a SGEI should normally be based on the provision of a passive<sup>4</sup>, technologically neutral<sup>5</sup> and open<sup>6</sup> infrastructure that provides universal service coverage for the given area. Any compensation should be limited to the related wholesale access services, and should not include retail communication services<sup>7</sup>. The existence of an economic advantage may be excluded, if: (i) the project is necessary for the provision of broadband services that can be considered as genuine SGEI for which the public service obligations have been clearly defined; (ii) the parameters of compensation have been established in advance in an objective and transparent manner; (iii) there is no compensation paid beyond the net costs of providing the public service and a reasonable profit; and (iv) the SGEI has been either assigned through a public procurement procedure that ensures the provision of the service at the least cost to the community or the compensation does not exceed what an efficient company would require<sup>8</sup>.

### **SGEI de minimis Regulation<sup>9</sup>**

7. Public funding granted for the provision of a SGEI not exceeding EUR 500 000 over three years is not regarded as State aid, provided the other conditions of the SGEI *de minimis* Regulation are also fulfilled.

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<sup>4</sup> The passive infrastructure is basically the physical infrastructure of the networks: such as ducts, dark fibre, cabinets.

<sup>5</sup> A network should be technologically neutral and thus enable access seekers to use any of the available technologies to provide services to end users.

<sup>6</sup> Open, non-discriminatory wholesale access shall be granted to third party operators.

<sup>7</sup> See Communication from the Commission EU Guidelines for the application of State aid rules in relation to the rapid deployment of broadband networks (“Broadband Guidelines”), OJ C 25, 26.1.2013, p. 1, paragraph 2.

<sup>8</sup> See Case C-280/00 Altmark Trans and Regierungspräsidium Magdeburg EU:C:2003:415 and Communication from the Commission on the application of the European Union State aid rules to compensation granted for the provision of services of general economic, OJ C 8, 11.1.2012, p. 4.

<sup>9</sup> Commission Regulation on application of Articles 107 and 108 of the Treaty on the Functioning of the European Union to *de minimis* aid granted to undertakings providing services of general economic interest, OJ L 114, 26.4.2012, p. 8.

## **Instances in which there is no need to notify for State aid clearance, but other requirements could apply**

8. Possible State aid may be considered compatible with the internal market and can be granted without notification in the following instances:

### **General block exemption regulation (GBER)<sup>10</sup>**

9. The measure may be exempted from notification if it is granted in conformity with the conditions of the GBER. In particular, Article 52 GBER allowing investment aid for broadband infrastructure up to EUR 70 million total costs per project can apply. Article 14 GBER allowing regional aid for broadband network development can also apply, provided that the investment takes place in an assisted area, that aid intensities established in the regional aid map are not exceeded, and that all the conditions set by Article 14 are complied with. Note that in both cases all the provisions of Chapter 1 of the GBER must also be complied with.

### **Service of General Economic interest: SGEI Decision<sup>11</sup>**

10. If the deployment and the operation of a broadband infrastructure is necessary for the provision of a SGEI, it may be considered as part of the SGEI mission. State aid for the compensation of such a SGEI up to 15 million per year (average over the whole duration of the entrustment<sup>12</sup>), may be exempted from notification on the basis of the **SGEI Decision**, provided that the criteria of that Decision are met: definition and entrustment of the SGEI, parameters of compensation established ex ante in a transparent manner, amount of compensation not exceeding the costs for the provision of the SGEI and a reasonable profit, claw back mechanism ensuring the absence of overcompensation<sup>13</sup>.

### **If aid can be granted under an existing State aid scheme**

11. If the Commission has approved a scheme allowing aid for broadband infrastructure, Member States may grant aid in conformity with the conditions established in the relevant Commission decision. The list of all Commission decisions taken under the State aid rules concerning broadband is available at the following website: [http://ec.europa.eu/competition/sectors/telecommunications/broadband\\_decisions.pdf](http://ec.europa.eu/competition/sectors/telecommunications/broadband_decisions.pdf).

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<sup>10</sup> Commission Regulation (EU) No 651/2014 of 17 June 2014 declaring certain categories of aid compatible with the internal market in application of Articles 107 and 108 of the Treaty, OJ L 187, 26.6.2014, p. 1.

<sup>11</sup> Commission Decision 2012/21/EU of 20 December 2011 on the application of Article 106(2) of the Treaty on the Functioning of the European Union to State aid in the form of public service compensation granted to certain undertakings entrusted with the operation of services of general economic interest, OJ L 7, 11.01.2012, p. 3.

<sup>12</sup> Initial support for investment on necessary infrastructure may be averaged as (annual) compensation for the duration of the entrustment as SGEI compensation: normally 10 years, unless justified by the amortisation of investments (those infrastructures may be depreciated for more than 10 years).

<sup>13</sup> See Section 2.3 of the Broadband Guidelines on "State aid for broadband deployment as a SGEI".

### **Instances in which notifying for State aid clearance is necessary**

12. If the measure constitutes State aid and does not meet the conditions allowing an exemption from notification (see section above), a notification to the Commission for State aid clearance is required.

### **Broadband Guidelines<sup>14</sup>**

13. The compatibility of State aid for broadband infrastructure is normally assessed on the basis of the Broadband Guidelines. In general, the Broadband Guidelines distinguish target areas according to current level of coverage with broadband infrastructure. If no comparable broadband infrastructure is available ("white areas"), State aid is allowed if the relevant compatibility conditions are met. In areas where several broadband infrastructures are already deployed or planned to be deployed by commercial operators in the next three years ("black areas"), the Commission views aid measures negatively. The most common compatibility conditions are detailed in paragraph 78 of the Broadband Guidelines. One of the guiding principles set out in the Broadband Guidelines is that, whenever the granting authorities select a third-party operator to deploy and operate the subsidised infrastructure, the selection process shall be conducted in line with spirit and the principles of the EU Public Procurement Directives<sup>15</sup>.

### **Regional Aid Guidelines (RAG)<sup>16</sup>**

14. Broadband infrastructure projects may also be supported in assisted areas on the basis of the Regional Aid Guidelines (RAG), if not falling under the specific provisions for regional aid under the GBER. In that case, aid to broadband infrastructure may qualify as aid for an initial investment within the meaning of the RAG and it will be assessed on the basis of the compatibility conditions set out in the RAG<sup>17</sup>.

### **Service of General Economic Interest: SGEI Framework<sup>18</sup>**

15. The compatibility of State aid for broadband infrastructure which is necessary for the provision of an SGEI and that exceeds EUR 15 million per year may be assessed on the basis of the SGEI Framework. The considerations set out in point 6 on the quality of the definition of the public service obligation for broadband deployment regarding passive, open and technologically neutral infrastructures providing universal coverage will apply. In addition, the SGEI Framework includes a number of further compatibility conditions that must be complied with.

### **Projects that in principle should not be supported**

16. Projects that involve State aid but do not comply with the relevant State aid rules (GBER, Broadband Guidelines, RAG, or SGEI) should not be supported. In those cases, serious distortions

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<sup>14</sup> See footnote 8.

<sup>15</sup> See paragraph 78(c) of the Broadband Guidelines. See also the clarifications provided in footnote 96 for situations where a public authority decides to deploy and manage the network directly.

<sup>16</sup> Guidelines on regional State aid for 2014-2020, OJ C 209, 23.07.2013, p. 1.

<sup>17</sup> Note that RAG contains specific requirements for broadband infrastructure.

<sup>18</sup> European Union framework for State aid in the form of public service compensation, OJ C 8, 11.1.2012, p. 15.

of competition cannot be excluded. In particular, and in broad terms, projects should not be supported that do not comply with the generally required conditions, which include amongst others:

- Award made on the basis of a transparent, open and non-discriminatory competitive selection process;
- The project must conform with the principle of technological neutrality, both at the level of project selection and at the level of commercialisation (wholesale), allowing for different technologies to compete;
- The project must offer the widest open and non-discriminatory access to the publicly-funded infrastructure;
- The project takes place in areas where there is no infrastructure of the same category (either basic broadband or next generation access (NGA) network) and where no such infrastructure is likely to be developed on commercial terms in the near future.

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*References:*

- [Commission Regulation \(EU\) No 651/2014](#) of 17 June 2014 declaring certain categories of aid compatible with the internal market in application of Articles 107 and 108 of the Treaty, OJ L 187, 26.6.2014, p. 1.
- [Commission Decision 2012/21/EU](#) of 20 December 2011 on the application of Article 106(2) of the Treaty on the Functioning of the European Union to State aid in the form of public service compensation granted to certain undertakings entrusted with the operation of services of general economic interest, OJ L 7, 11.01.2012, p. 3.
- [European Union framework for State aid in the form of public service compensation](#), OJ C 8, 11.1.2012, p. 15.
- [Communication from the Commission on the application of the European Union State aid rules to compensation granted for the provision of services of general economic interest](#), OJ C 8, 11.1.2012, p. 4.
- [Guidelines on regional State aid for 2014-2020](#), OJ C 209, 23.07.2013, p. 1.
- [EU Guidelines for the application of state aid rules in relation to the rapid deployment of broadband networks](#), OJ C 25, 26.01.2013, p. 1.

***A comprehensive list of Commission decisions taken under State aid rules concerning broadband:***

- [http://ec.europa.eu/competition/sectors/telecommunications/broadband\\_decisions.pdf](http://ec.europa.eu/competition/sectors/telecommunications/broadband_decisions.pdf)