

## **INFRASTRUCTURE ANALYTICAL GRID FOR BROADBAND NETWORK INFRASTRUCTURE**

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### **I. PRINCIPLES FOR BROADBAND INFRASTRUCTURE**

- (1) This analytical grid covers the financing of the construction, maintenance, operation and use of broadband infrastructure. Public funding can be granted to the complete infrastructure roll-out or to part of the infrastructure only (for instance, backhaul networks or basic physical infrastructure elements, such as ducts).
- (2) Broadband infrastructure is used to enable the provision of telecommunication connectivity to end-users. Providing connectivity to end-users against payment is an economic activity. Broadband infrastructure is in many instances built without any State funding, which is evidence of significant market financing, and in many geographical zones several networks of different operators compete. Broadband infrastructures are part of large, interconnected and commercially exploited networks. For these reasons, public funding of broadband infrastructure for the provision of connectivity to end-users is generally subject to State aid rules, as set out in the Guidelines for the application of State aid rules in relation to the rapid deployment of broadband networks<sup>1</sup>.
- (3) In the Broadband sector, the aid is usually granted directly to investors of the network, which in most cases are chosen by means of a competitive tender process. When the State's contribution is not provided on normal market terms and consequently qualifies as State aid the use of a competitive selection process ensures that any aid is limited to the minimum amount necessary for the particular project. However, it does not eliminate the aid, as the public authority will still provide a subsidy to the winning bidder (for instance, in terms of 'gap funding' or in-kind contribution) and the purpose of such a procedure is precisely the selection of the aid beneficiary<sup>2</sup>. The financial support received will enable the successful bidder to conduct this commercial activity on conditions which would not otherwise be

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<sup>1</sup> 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. The Guidelines explain that the broadband sector is characterised by specific features, in particular by the fact that a broadband network can host several operators of telecommunication services and can therefore provide an opportunity for the presence of competing operators.

<sup>2</sup> See paragraphs 12 and 78 (c) and (d) of the Broadband Guidelines.

available on the market. Besides the direct beneficiary of the aid, third-party operators receiving wholesale access to the subsidised infrastructure may be indirect beneficiaries.

## II. INSTANCES IN WHICH THE EXISTENCE OF STATE AID IS EXCLUDED

(4) Please note that the following sections present a comprehensive, but not exhaustive, number of separate instances in which the existence of State aid may be excluded. These instances may apply to the owner/developer, operator/concessionaire or user levels, but also to these levels combined (e.g. integrated developer and operator).

### 1. **No economic activity: infrastructure not meant to be commercially exploited as well as administrative and regulatory measures**

(5) The funding of infrastructure that is not meant to be commercially exploited is in principle excluded from the application of State aid rules. This concerns for instance infrastructure that is not used for offering goods or services on a given market, such as infrastructure used to connect only **public authorities** through "closed networks" (networks which are not used for any commercial exploitation) to satisfy their needs. Such activities are not of an economic nature and their funding consequently falls outside the scope of State aid rules, as does, accordingly, the public funding of the related infrastructure<sup>3</sup>. Therefore, the public funding of such "closed networks" falls outside the scope of State aid rules<sup>4</sup>. However, if such a network (for instance its extra capacity) is made available for use by commercial broadband investors or other operators, the public financing of the infrastructure may constitute State aid. Similarly, if an initially "closed network" is subsequently made available for commercial use, State aid may be involved.

(6) Member States may also choose several types of administrative and regulatory measures in order to accelerate the deployment of broadband and in particular NGA networks besides providing direct funding to companies. These measures do not necessarily involve State aid within the meaning of Article 107(1) TFEU. Member States may decide in accordance with the EU regulatory framework for electronic communications<sup>5</sup>, for instance, to facilitate the acquisition process of rights of ways, to require that network operators coordinate their civil engineering works and/or that they share part of their infrastructure. In the same vein, Member States may also require that for any new constructions (including new water, energy, transport or sewage networks) and/or buildings a connection suitable for NGA should be in place. Third parties may also place at their own cost their passive network infrastructure when general civil engineering works are carried out in any event. This opportunity should be offered in a transparent and non-discriminatory way to all interested

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<sup>3</sup> See Case C-288/11 P *Mitteldeutsche Flughafen and Flughafen Leipzig-Halle v Commission*, EU:C:2012:821, paragraph 42.

<sup>4</sup> See Commission decision of 30 May 2007 in case N 46/2007 – UK – Welsh Public Sector Scheme. OJ C 157, 10.07.2007, p.2.

<sup>5</sup> See Directive 2014/61/EU of the European Parliament and of the Council of 15 May 2014 on measures to reduce the cost of deploying high-speed electronic communications networks, OJ L 155, 23.5.2014, p. 1

operators and should in principle be open to all potential users and not just electronic communications operators (i.e. electricity gas, water utilities, etc.)<sup>6</sup>.

## **2. Broadband infrastructure used for both economic and non-economic activities**

- (7) If broadband infrastructure is used for **both economic and non-economic activities**, public funding thereof will fall under the State aid rules only insofar as it covers the costs linked to the economic activities<sup>7</sup> in question. In such cases, Member States have to ensure that the public funding provided for the non-economic activities cannot be used to cross-subsidize the entity's economic activities. This can notably be ensured by limiting the public funding to the net cost (including the cost of capital) of the non-economic activities, to be identified on the basis of a clear separation of accounts.<sup>8</sup>

## **3. No potential effect on trade between Member States**

- (8) The effect on trade between Member States for the purposes of Article 107(1) TFEU must be established on a case-by-case basis apart from cases covered by the *de minimis* Regulations.
- (9) 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 laid down in the *de minimis* Regulation are also respected<sup>9</sup>.

## **4. No economic advantage at the level of the owner/developer of the infrastructure**

- (10) If it is proven that the State acted under the same terms and conditions as a private investor in a comparable situation when providing the necessary funding for the development of broadband infrastructure, then State aid is not involved. This can be assessed on the basis of: (i) significant *pari passu* co-investments of private operators<sup>10</sup>, i.e. on the same terms and conditions (and therefore with the same level of risks and rewards) as the public authorities who are in a comparable situation<sup>11</sup>; and/or (ii) a (*ex ante*) sound business plan (preferably validated by external experts) demonstrating that the investment provides an adequate rate of return for the investor(s), in line with the normal market return that would be reasonably expected by operators on similar projects taking into account the level of risk and future

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<sup>6</sup> See points 28 and 29 of the Broadband Guidelines and Commission decision of 08 February 2010 in case N 383/09 — Germany — *Amendment of N 150/08 Broadband in the rural areas of Saxony*. This case concerned a situation where general civil engineering works, like road maintenances, did not constitute State aid. The measures taken by the German authorities constituted 'general civil engineering works' which would have been carried out by the State for maintenance purposes in any event. The possibility of placing ducts and broadband infrastructure when carrying out road maintenance — and at the costs of the operators — was announced publicly and not limited to or geared towards the broadband sector. However, it cannot be excluded that public funding of such works falls within the notion of aid of Article 107(1) TFEU if they are limited to or clearly geared towards the broadband sector.

<sup>7</sup> See case SA.28969 Optical fiber Catalonia. JOCE C/259/2010 25.09.2010. See also paragraph 205 of the NoA.

<sup>8</sup> See paragraph 206 of the NoA.

<sup>9</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.

<sup>10</sup> See Commission Decision of 11 December 2007 in case C-53/2006 - The Netherlands - *Citynet Amsterdam*.

<sup>11</sup> For more details, see paragraphs 86 to 88 of the NoA.

expectations<sup>12</sup>. Note, however, that the existence of consecutive State interventions concerning the same broadband infrastructure project might invalidate the conclusion that a similar measure would also have been undertaken by a market economy investor.<sup>13</sup>

- (11) The conformity of a public investment with market terms has to be demonstrated<sup>14</sup>, for instance by means of a significant participation of private investors or the existence of a sound business plan showing an adequate return on investment. Where private investors take part in the project, it is a sine qua non condition that they would have to assume the commercial risk linked to the investment under the same terms and conditions as the public investor.<sup>15</sup>

## **5. No economic advantage at the level of the operator/*concessionaire***

### ***5.1. The operation of the broadband infrastructure entrusted as a service of general economic interest (SGEI) in line with the Altmark criteria***

- (12) 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>16</sup>, technologically neutral<sup>17</sup> and open<sup>18</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>19</sup>.
- (13) The existence of an economic advantage at the level of the operator (*concessionaire*) may be excluded, if: (i) the infrastructure project is necessary for the provision of services that can be considered as genuine services of general economic interest (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>20</sup>.

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<sup>12</sup> For more information see in this respect chapter 4.2 and in particular paragraphs 101 to 105 of the NoA.

<sup>13</sup> See in this respect also paragraph 81 of the NoA.

<sup>14</sup> See Commission Decision of 11 December 2007 in case C-53/2006 - The Netherlands - *Citynet Amsterdam*.

<sup>15</sup> See point 17 of the Broadband Guidelines.

<sup>16</sup> The passive infrastructure is basically the physical infrastructure of the networks: such as ducts, dark fibre, cabinets.

<sup>17</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>18</sup> Open, non-discriminatory wholesale access shall be granted to third party operators.

<sup>19</sup> See section 2.3 of the Broadband Guidelines.

<sup>20</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.

## **5.2. SGEI de minimis Regulation<sup>21</sup>**

- (14) 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.

### **6. No economic advantage at the level of the user**

- (15) In case the user(s) are undertakings (as opposed to residential users), and the operator of broadband infrastructure has received State aid or its resources constitute State resources, an economic advantage at the level of the business user(s) can be excluded (i) if the broadband infrastructure is not dedicated for the use by a specific user, (ii) all users enjoy equal and non-discriminatory access to the infrastructure and (iii) the infrastructure is made available to the users on market terms<sup>22</sup>.

### **III. INSTANCES IN WHICH THERE IS NO NEED TO NOTIFY FOR STATE AID CLEARANCE, BUT OTHER REQUIREMENTS COULD APPLY**

- (16) State aid may be considered compatible with the internal market and can be granted without notification in the following instances:

#### **1. General Block Exemption Regulation (GBER)<sup>23</sup>**

- (17) The measure may be exempted from notification if it is granted in conformity with the conditions of the GBER. In particular, Article 52 GBER can apply, allowing investment aid for broadband infrastructure up to EUR 70 million total costs per project. Article 14 GBER allowing regional aid for broadband network development may also apply. The provisions of Chapter 1 of the GBER in addition to the specific provisions in Article 52 GBER or Article 14 GBER respectively must be complied with.

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<sup>21</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.

<sup>22</sup> Third-party operators receiving wholesale access to the subsidised infrastructure may be indirect beneficiaries. In the broadband sector, it is likely that the benefit of the subsidy is at least partially passed on to third-party operators even if they pay a remuneration for the wholesale access. Indeed, wholesale prices are often regulated. Price regulation leads to a lower price than the one which the wholesaler could otherwise achieve on the market (which could be a monopoly price if there is no competition with other networks.. Where prices are not regulated the wholesaler will be required to benchmark his prices on the average prices paid in other comparable, more competitive areas, which is likely to lead to a price lower than the one which the wholesaler could otherwise have achieved on the market.

<sup>23</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, as amended by Regulation (EU) No 2017/1084 Amending Regulation (EU) No 651/2014 as regards aid for port and airport infrastructure, notification thresholds for aid for culture and heritage conservation and for aid for sport and multifunctional recreational infrastructures, and regional operating aid schemes for outermost regions and amending Regulation (EU) No 702/2014 as regards calculation of eligible costs, OJ L 156, 20.6.2017, p. 1–18.

## **2. Service of General Economic interest: SGEI Decision<sup>24</sup>**

- (18) 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>25</sup>), may be exempted from notification on the basis of the SGEI Decision, provided that the criteria of that Decision are met, in particular: 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>26</sup>.

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

- (19) 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)

## **IV. INSTANCES IN WHICH NOTIFYING FOR STATE AID CLEARANCE IS NECESSARY**

- (20) If the measure constitutes State aid and it does not meet the conditions allowing an exemption from notification, State aid clearance following a notification to the Commission is required.

### **1. Broadband Guidelines<sup>27</sup>**

- (21) The compatibility of 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 broadband infrastructure of the same category (i.e. basic or NGA/NGN) is present or planned in the near future ("white areas"), State aid is generally authorised if the relevant compatibility conditions are met.
- (22) Areas where there is already one broadband network infrastructure of the same category present or planned in the near future -generally, the next three years- ("grey areas") could also be eligible for State support, under certain conditions, demonstrating in particular that

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<sup>24</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>25</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>26</sup> See Section 2.3 of the Broadband Guidelines on "State aid for broadband deployment as a SGEI".

<sup>27</sup> See footnote 1.

the subsidized network will ensure a "step change" and that the relevant compatibility conditions are met. A "step change" can be demonstrated if as the result of the public intervention the selected bidder makes significant new investments in the broadband network and the subsidised infrastructure brings significant new capabilities to the market in terms of broadband service availability and capacity, speeds and competition. The step change shall be compared to that of existing as well as concretely planned network roll-outs.<sup>28</sup> Grey areas are eligible for State support if it is proved that (i) no affordable or adequate services are offered to satisfy the needs of citizens or business users and that (ii) there are no less distortive measures available (including ex ante regulation) to reach the same goals.<sup>29</sup>

- (23) In areas where at least two broadband infrastructures of the same category exist or are planned to be deployed by commercial operators in the near future – generally the next three years ("black areas"), it can be assumed that there is no market failure and the deployment with State aid of an additional broadband network with comparable capabilities will, in principle, lead to an unacceptable distortion of competition and the crowding out of private investors. However, the Commission accepts that in some cases there may be a demonstrated market failure that could justify interventions in black areas. As regards black NGA areas, the Commission could exceptionally allow public intervention for the deployment of networks able to provide ultra-fast speed well above 100 Mbps and only if stricter requirements are fulfilled<sup>30</sup>.
- (24) When assessing national plans to support very high-capacity networks, the Commission will take into account the needs and objectives identified by the Commission in its Communication "Towards a European Gigabit Society"<sup>31</sup> and the underlying evidence of long-term demand for such networks that could be under-served by the market.
- (25) The main compatibility conditions are detailed in points 78 and 80 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>32</sup>.

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<sup>28</sup> See paragraph 51 of the Broadband Guidelines.

<sup>29</sup> See paragraph 69 of the Broadband Guidelines.

<sup>30</sup> See section 3.6. on Aid to ultra-fast broadband networks of the Broadband Guidelines.

<sup>31</sup> Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, Connectivity for a Competitive Digital Single Market - Towards a European Gigabit Society SWD(2016) 300 final.

<sup>32</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.

## 2. Regional Aid Guidelines (RAG)<sup>33</sup>

- (26) 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>34</sup>.

## 3. Service of General Economic Interest: SGEI Framework<sup>35</sup>

- (27) 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 Broadband Guidelines include section 2.3 which illustrates the application of some of the principles clarified in the SGEI Framework to broadband financing<sup>36</sup>. The considerations set out in point 6 of the SGEI Framework 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. Under the SGEI Framework, which is based on Article 106(2) TFEU, an aid measure should comply with the following main conditions: (i) entrustment of a clearly defined and genuine SGEI, (ii) compliance with Directive 2006/111/EC<sup>37</sup>, (iii) compliance with EU public procurement rules, (iv) absence of discrimination, (v) a mechanism to avoid any overcompensation and (vi) transparency.

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### References:

- [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.
- [Commission Notice on the notion of State aid as referred to in Article 107\(1\) of the Treaty on the Functioning of the European Union](#), OJ C 262, 19.7.2016, p. 1.
- [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 Regulation \(EU\) 2017/1084](#) of 14 June 2017 amending Regulation (EU) No 651/2014 as regards aid for port and airport infrastructure, notification thresholds for aid for

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<sup>33</sup> Guidelines on regional State aid for 2014-2020, OJ C 209, 23.07.2013, p. 1.

<sup>34</sup> Note that the RAG contains specific requirements for broadband infrastructure. See point 12 of the RAG as regards regional investment aid to broadband networks.

<sup>35</sup> European Union framework for State aid in the form of public service compensation, OJ C 8, 11.1.2012, p. 15.

<sup>36</sup> See footnote 22.

<sup>37</sup> Directive 2006/111/EC on the transparency of financial relations between Member States and public undertakings as well as on financial transparency within certain undertakings, OJ L 318, 17.11.2006, p. 17.

culture and heritage conservation and for aid for sport and multifunctional recreational infrastructures, and regional operating aid schemes for outermost regions and amending Regulation (EU) No 702/2014 as regards the calculation of eligible costs, OJ L 156, 20.6.2017.

- [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.
- [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.

***Indicative list of Commission decisions taken under State aid rules concerning broadband infrastructure:***

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