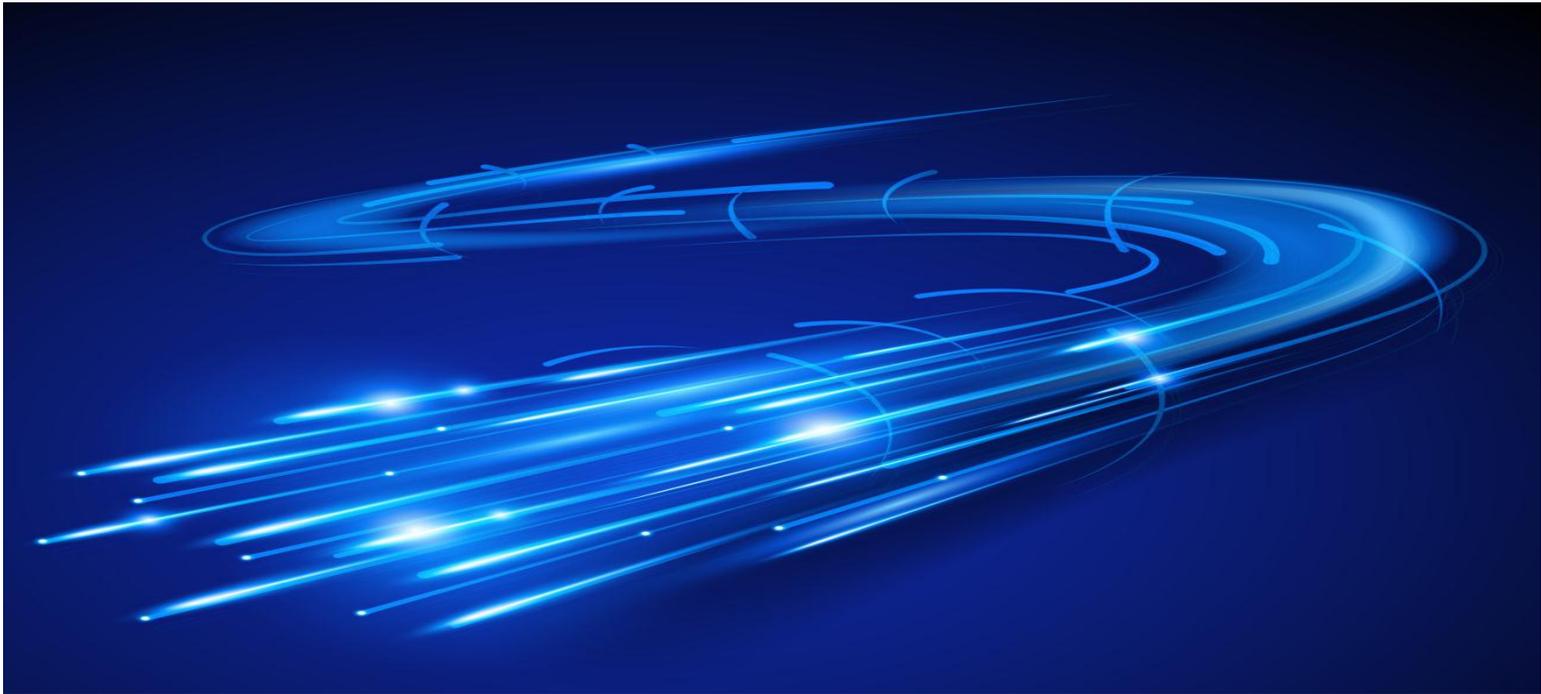




The broadband State aid rules explained

An eGuide for Decision Makers



EXECUTIVE SUMMARY

A study prepared for the European Commission

DG Communications Networks, Content & Technology

*Digital
Agenda for
Europe*

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Executive summary

Objective and key focus of the Guide

1. Fast and widely available broadband is a key ingredient for growth and prosperity. Yet, a substantial number of citizens and companies do not have sufficiently fast broadband at their disposal, because the market fails to deliver. The present Guide is targeting on you as a public sector decision maker thinking if and how to deploy a broadband project. We anticipate that you are already aware that broadband connectivity is of strategic importance for growth and innovation in all sectors of the economy and for social and for territorial cohesion. Therefore you have come to the conclusion to improve the current status of broadband infrastructure deployment and the provision of broadband services, respectively, in your area. Your concrete activities might be seen as “State aid”. State aid is subject to certain rules which help that public money is spent only when there is a market failure. This Guide will inform you on the principles of the European Commission’s assessment of public support to broadband deployment projects on the basis of the (new) “Broadband State aid Guidelines” (published in January 2013) and (briefly) on other State aid rules. It shall help you to deploy your envisaged broadband infrastructure faster and easier and thereby support prosperity for citizens and enterprises.

The rationale of (broadband related) State aid considerations

2. A guiding principle in the European Union is that any State intervention should limit as much as possible the risk of crowding out or replacing private investments, of altering commercial investment incentives and ultimately of distorting competition. Applying the principle to the deployment of broadband infrastructure, it needs to be ensured that public funds are carefully used and that your aid is complementary and does not substitute or distort investments of market players. To put it another way: Your envisaged broadband deployment activity should be targeted at market failures. State aid for broadband should, therefore, not be used in areas where market operators plan to invest or have already invested. The decision whether a concrete governmental intervention is compatible or unlawful aid is taken solely by the European Commission.

Broadband deployment: technologies, business models and financing options

3. A great number of access technologies are capable of providing broadband communications. These technologies differ very much in particular with regard to pure technological (e.g. wired vs. wireless), performance (e.g. maximum bandwidth available), and economic parameters (e.g. costs of deployment). You have the choice as to the selection of a suitable technology that fits your concrete requirements, State aid rules are technology neutral.

4. You also have choice as to potential business models for your broadband project. Examples are explained in the Guide in Section 2.2.

5. There are several different ways how you can directly or indirectly support the financing of your broadband project. Examples are: (1) European funds such as the European

Agricultural Fund for Rural Development and/or the European Regional Development Fund (normally this requires co-funding from the Member State); (2) direct monetary grant to an entity to build, manage and commercially exploit your envisaged broadband network; (3) tax rebates; (4) loans with a below-market rate of interest (“soft loan”) or “guarantees”; (5) provision of particular „physical resources“ you are owning to third parties which are necessary inputs for broadband deployment (e.g. ducts); (6) public procurement policy, e.g. becoming an “anchor client” of an entity that is deploying broadband infrastructure in your area. All of these ways are potentially subject to State aid approval.

Basic broadband, NGA networks, backhaul networks

6. The Broadband Guidelines distinguish basic broadband and NGA networks. Basic broadband networks are based on the existing fixed or wireless networks including (ADSL, ADSL2+ networks), non-enhanced cable (e.g. DOCSIS 2.0), 3G mobile networks (UMTS) and satellite systems. On the other hand, NGA networks rely wholly or partly on optical elements and are capable of delivering broadband access services with enhanced characteristics. NGA networks currently comprise fibre-based access networks (e.g. FTTB, FTTH, FTTC/VDSL), advanced upgraded cable networks (HFC/DOCSIS 3.0), and certain advanced wireless access networks. As technology evolves, this enumeration might change in the future.

Distinction of deployment areas in white, grey, black areas

7. The Broadband Guidelines are based on a classification of your area according to its existing or expected future broadband infrastructure deployment status, thereby defining the market situation both for basic and for NGA broadband networks.

8. Basic broadband networks: In *white* areas no provider of broadband access services currently is operating and there is no such provider to be expected in the coming three years either. In this case, a public intervention is likely to be in line with the common interest and therefore State aid is likely to be compatible. In *grey* areas there is one (infrastructure-based) provider already active, however, another network is unlikely to be developed in the next three years. In this case, a more detailed analysis and a thorough compatibility assessment will be necessary. In *black* areas there are or there will be in the next three years at least two basic broadband networks of different operators. Broadband services therefore are provided under competitive conditions (infrastructure-based competition) and it can be assumed that there is no market failure. Accordingly, there is very little scope for State intervention to bring further societal benefits by subsidizing another basic broadband network. However, it may well be possible to support an NGA network in black basic broadband areas.

9. NGA networks: In a “*white NGA*” area no NGA network at present exists and is not likely to be built within the next three years by private investors. In this case your area is in principle eligible for State aid to NGA. Your area is considered to be a “*grey NGA*” area if only one NGA network currently is in place or is being deployed in the coming three years and there are no plans by any operator to deploy a further NGA network in the coming three years. Under such circumstances the European Commission will carry out a more detailed analysis in order to verify whether State intervention really is needed. You can take for granted that

the deployment of a second broadband infrastructure which is to compete with the existing one as such is not a sufficient argument to accept your aid. Rather, the second network needs to provide a substantial improvement in terms of e.g. competitive prices and higher speeds. In a “*black NGA*” area at least two NGA networks of different operators already exist or they will be deployed in the coming three years. In this case, you risk that the Commission will conclude that your support for an additional publicly funded, equivalent NGA network is incompatible with the internal market targets. In practice that means that the project is either modified or withdrawn. Prohibition decisions for broadband State aid are extremely rare. Yet, there might be an exception for your concrete project: your intervention could be allowed if your NGA network constitutes a step change and is able to provide ultra-fast speeds well above 100 Mbps.

Criteria applied by the European Commission to evaluate a broadband State aid case

10. Every aid measure has to comply with specific “compatibility conditions”, i.e. your measure should achieve an objective of common interest, address a market failure, be appropriate as a policy instrument, have an incentive effect, be limited to the minimum necessary, entail limited negative effects, and be “transparent”. Meeting these principles is necessary, i.e. failure to comply with one of the conditions will result in declaring the aid incompatible with the internal market.

11. A crucial issue for the assessment of your broadband project is whether and to what extent your network is able to ensure a “step change” in terms of broadband availability. Such a step change is present if your public intervention entails significant new investments regarding broadband infrastructure and if this infrastructure brings significant new capabilities to the market in terms of broadband service availability and capacity, speeds and competition. New capabilities regarding service availability, capacity and speed are e.g. likely to be present if your project focuses on an upgrade from a basic to an NGA broadband network. Likewise, certain upgrades of an NGA network such as the extension of fibre connectivity nearer to the end-user might substantiate a step change, e.g. if it entails an increase of speed from, say, 30 Mbps to 100 Mbps. New capabilities as to competition are e.g. unleashed if your project allows for effective (wholesale) access at different levels of the infrastructure and/or unbundling. You have to address the step change issue by comparing your planned network capabilities to those of existing as well as concretely planned network roll-outs. Substantiating the step change caused by your concrete measure is a key requirement for the notification of your project. You should be aware that it is not sufficient to just claim that there is a step change. Rather, you should take substantial effort to demonstrate the added value of your network funded by State aid and you must provide concise reasons as well as sound and pertinent empirical evidence.

12. A suite of necessary conditions must be fulfilled to demonstrate the proportionality of your measure encompassing to conduct a detailed mapping and analysis of coverage as well as a public consultation, to specify your tender in a “technologically neutral” manner, to base your decision on a competitive selection process, and to select the most economically advantageous offer, to make use of existing infrastructure, to meet certain requirements as to wholesale access and to take care that specific requirements regarding wholesale access

pricing are met, to fulfill specific duties regarding monitoring of your broadband project and to be prepared that a “clawback mechanism” might apply, and to fulfill specific duties in order to meet transparency and reporting requirements.

13. If all of these necessary conditions are met, the European Commission balances the positive effects of the aid measure against the potential negative effects (“balancing test”). Your broadband measure should be designed in a way that the overall balance of the effects of the measure is positive.

14. The public consultation may lead to unclear or insufficient information on the existing infrastructures or possible incorrect broadband investment announcements by operators which may wish to block state aid without really wanting to invest in the near future. There are rules how to cope with this. In case of incomplete or unclear information you should contact the respective institution(s) in your country. In case your consultation yields neither replies from existing providers nor from entities with investment plans at all, you can normally go ahead, provided the consultation was carried out properly and the main stakeholders knew about it. The announcements you receive regarding upcoming broadband investments should be adequate to substantiate the commitments from the private investor(s). Such commitments should ensure that significant progress in terms of coverage will be made and they may include suitable milestones which would have to be achieved during the 3-year period and reporting on the progress made. If a milestone is not achieved, you may then go ahead with your deployment plans. This rule applies both for basic and for NGA networks. If you are uncertain about the real validity of the investment plans you receive you could also contact the respective institution(s) in your country.

Measures not constituting State aid

15. Specific measures are very well suited to support broadband deployment, yet, usually they are not constituting State aid.

16. If you are rolling-out a broadband network for non-commercial purposes, i.e. if you are constructing a network or procuring broadband services only to satisfy your own needs, such a measure - under certain circumstances - might not constitute State aid. You might, however, come to the conclusion that the network established for your purposes should be marketed also to third parties, i.e. outside public institutions. Such a network opened for the use of broadband investors or operators is likely to be classified as State aid, and an approval of such project is often no problem.

17. Your project might meet the “market economy investor principle” (MEIP). Broadly speaking, this principle states that if you are placing capital, directly or indirectly, at the disposal of an undertaking and such support corresponds to “normal” market conditions it cannot be regarded as State aid. In other words, the State should share the same risks and opportunities as the private investor.

18. Under specific conditions the deployment of broadband networks and the provision of broadband access to end users can be viewed as a service of general economic interest (SGEI). However, normally it is not up to the local decision makers to decide alone on an

SGEI status. If the SGEI conditions are fulfilled the public financing of broadband deployment is perceived to be (1) no State aid or (2) compatible aid. Yet, it needs to be underscored from the outset that getting an approval of an SGEI for your broadband project is one of the more complicated ways to proceed. You should therefore contact a relevant broadband State aid institution in your country.

Measures constituting State aid but for which no notification is required

19. There are several measures constituting State aid but for which no notification is required.

20. In many cases it might turn out that your envisaged broadband project fits into an already existing framework scheme under the Broadband Guidelines within your country. The advantage of making use of such a scheme is that it has already been assessed in terms of State aid requirements. Thus, you avoid duplication of efforts and resources, i.e. in particular there is no need for you to notify your concrete measure.

21. The “de minimis” rule might lead to a great simplification for you: The granting of “small” amounts of support for your broadband project is exempted from the notification obligation. You can use the “de minimis” rule if the total amount of grants for the same eligible costs over any period of three fiscal years does not exceed EUR 200,000 per beneficiary. The amount does not need to be a cash grant and can in principle also be in kind (e.g. in the form of ducts), a reimbursable grant or even a participation in a company. Also loans are possible under the “de minimis” rules. Overall, it is fair to state that broadband aid falling under “de minimis” is first and foremost relevant for “small” (e.g. regional and local) entities. You should approach the national or regional State aid authorities in your country regarding the applicability of the “de minimis” regime for your concrete project.

22. Depending on the concrete outcome of the current consultation the revised General Block Exemption Regulation (GBER) (likely to be adopted before the summer of 2014) might make your life much easier as to the assessment of State aid provided your project focuses on a white area. Hence, verify the new rules if your project will start in the second half of 2014 or later.

23. As an alternative to a notification under the Broadband Guidelines, you can also receive State aid approval for broadband projects under the Regional (State) aid Guidelines. While the Regional aid Guidelines reflect the spirit of the Broadband Guidelines, they may often be easier to implement. So you should carefully consider if you may wish to choose the Regional aid Guidelines as the legal base for State aid to broadband.

Other types of support

24. You might be able to lower civil engineering costs of broadband deployment: Whenever civil engineering works are carried out in your area (e.g. for purposes of gas, water, or electricity provision) you therefore should take the opportunity to coordinate such activities and to deploy ducts. If a public entity is digging anyhow and broadband and utility providers such as water or gas companies take the opportunity to place their ducts (at their own costs)

it normally does not fall under the scope of State aid. But State aid rules apply if the work is done specifically to build broadband ducts

25. Moreover, you might be able to actively improve demand side conditions. One potential form of demand side support is the use of vouchers, either to cover (part of) the end users' costs of installation or purchase of broadband devices, or of the monthly subscription. In case you want to use this instrument you first should check whether you fall under the "de minimis" rule. Alternatively, vouchers for SMEs might be block exempted as SME aid or aid to innovative enterprises. If this holds true of your broadband project you are likely to be fine because there are no further State aid requirements you need to meet. In order to be on the safe side you should approach a suitable institution in your country and ask them to check your envisaged measure for legal certainty.

Efficient execution of your broadband project

26. You should inform yourself at the very beginning of your project on the relevant information sources in your country (e.g. the National Regulatory Agency; the relevant Ministry; respective broadband competence centers; managing authorities for regional funds) and their websites. Equally helpful is the list of past broadband State aid decisions (see Annex A-1), and a broadband investment Guide with a wider focus than the present State aid Guide available on the website of the Regional Department of the European Commission (DG Regio). In any case, ask the national information sources whenever you need support first; they will help you.

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