

Review

EU, Competition and Trade - State Aid



Commission approves new Guidelines for Broadband Networks

BACKGROUND

Following extensive consultation with stakeholders and Member States, the European Commission has now adopted new Guidelines on the application of State aid rules in relation to the deployment of broadband networks (the 'Guidelines'). The Guidelines have been developed to provide a clear and transparent framework for Member States and public authorities to ensure that they remain compliant with the EU's State aid provisions. This will in turn provide certainty for private companies, whose support is needed to invest substantial additional funds.

At the heart of the Guidelines is the Commission's policy on the public financing of broadband, which aims to provide sufficient incentive to market operators to provide broadband services in areas where providers would not ordinarily provide these services. The aim is for State aid to complement, rather than 'crowd out' private investment in order to achieve rapid deployment of broadband coverage. However, measures should not seek to inject artificial competition into areas where consumers, historically, had no choice.

Very few changes have been made to the draft Guidelines, which were published in June 2009 (as discussed in Hammonds' June 2009 EU Competition and Trade Review, Guidelines on Broadband). The Guidelines build on existing jurisprudence, developed over 40 Commission decisions. The Guidelines are divided into two main sections: firstly, they contain specific provisions regarding the development of traditional broadband networks; and secondly, deal with public financing of very high speed 'next generation access networks' ('NGAs').


DETERMINING THE NEED FOR STATE INTERVENTION

The Guidelines provide a detailed explanation of how and where public funds should be employed to develop traditional networks by distinguishing between areas that do and do not justify State intervention. The following methodology is used:

- **Black areas:** have at least two broadband network operators and as such, the market is likely to be competitive. State intervention may lead to harmful distortion of the market and the Commission will therefore look unfavourably on State aid used to encourage development in Black areas.
- **White areas:** are underserved by broadband networks. The Commission will support State aid in these, often rural, areas which will promote social cohesion and address market failures.
- **Grey areas:** have a single market network operator but certain users may still have inadequate broadband service. Although market failure in these areas may still be a problem, granting State aid may also result in market distortion. Further detailed analysis of the market will therefore be required.

Similar distinctions are made between White, Black and Grey areas for NGA networks, but Member States and public authorities are required to consider not only the existing NGA infrastructure in a particular area, but also any definite plans by telecoms operators to develop networks within the next 3 years. When the draft Guidelines were released for consultation, stakeholders were concerned that this would encourage private investors to make unrealistic promises about their development plans, in order to foreclose the development of State funded networks. The Guidelines themselves set out the nature of any investment to be taken into account and allow the public authority to request a business plan or detailed calendar deployment plan, amongst other things, to evidence intentions.

New Guidelines
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The Commission has also provided guidance in relation to areas that may consist of both Black and White zones. In these circumstances, Member States may be able to use the Services of a General Economic Interest (SGEI) rules to justify network development, provided aid is only granted for use in the White zones and the provider connects the Black zones on commercial terms. In order to use the SGEI provisions, the public authority will have to comply with specific additional conditions and connect all businesses and households in order to minimise any potential distortion of competition.

CONDITIONS TO SAFEGUARD COMPETITION

Where intervention is considered appropriate due to lack of coverage in a particular area, the Guidelines require the Member State or public authority to consider whether State aid is the most appropriate method to address the market failure. State intervention should only be implemented as a last resort and in certain cases, there may be a more suitable solution, such as ex-ante regulation or demand side remedies.

The Guidelines provide detailed conditions to enable the Commission to assess the proportionality of any such intervention, aiming to minimise any potential distortion of competition. If any of these conditions is absent the likelihood is that the aid is not compatible with the common market and the Commission would need to undertake an in-depth assessment of the circumstances under which it was given.


The conditions are as follows:

- **Detailed mapping and coverage analysis:** to assist in determining whether the area is White, Black or Grey. By scrutinizing the network structure, nature of the market and current investment plans, Member states can identify the specific areas that require support.
- **Open tender process:** to ensure transparency and recognise the importance of treating all bidders equally. The aim is to achieve the most economically advantageous offer and minimise the amount of aid required.
- **Technological neutrality:** Given the diversity of available mediums for broadband provision, priority should not be given to one platform without objective justification.
- **Existing Infrastructure:** should be utilised wherever possible to avoid unnecessary and wasteful duplication.
- **Wholesale access:** Third party access to subsidised broadband infrastructure is a necessary component of compatible aid.
- **Benchmarking pricing exercise:** will ensure effective wholesale access by avoiding excessive prices or predatory pricing and price squeezing.
- **Claw-back mechanism to avoid over compensation:** This provides a reverse payment mechanism to ensure that a selected bidder isn't over-compensated if demand grows beyond anticipated levels in the target area.

SPECIFIC PROVISIONS TO ENCOURAGE AND SUPPORT THE DEVELOPMENT OF NGA'S

The second section of the Guidelines relates specifically to NGAs, the deployment of which is still in nascent stage. The Commission recognises the qualitative benefits of NGA networks and the positive impact that these will have on the economy. In order to allay concerns that an 'NGA divide' will develop, the Guidelines confirm that direct intervention may be acceptable in areas viewed as unprofitable by network operators, although this does not permit any derogation from State aid rules. Due to the lack of jurisprudence in this area, it is difficult to anticipate how the Guidelines will operate in practice.

Network operators are often unwilling to roll-out NGAs, due to the associated risk and expense, unless they already have a significant traditional broadband customer base. This creates an additional difficulty because the Commission may need to address State aid for NGAs even in areas where access to traditional broadband is already available and market conditions are favourable. In order to promote NGAs, the Guidelines allow Member States to accelerate NGA roll-out in innovative ways, for example, assisting with and facilitating any civil works required to develop the network. However, such intervention may still constitute State aid and is therefore subject to notification and a compatibility assessment under the Guidelines by the Commission.



The Guidelines also provide that the application of State aid in an NGA Grey area, which exists where there is only one NGA provider (regardless of the number of traditional providers), will require significant scrutiny. To ensure proportionality, the Commission will apply the same analytical considerations as for traditional broadband and a balancing test to determine 'the positive impact of the aid measure in reaching an objective of common interest against its potential negative side effects such as distortion of trade and competition'.

CONCLUSION

The Guidelines provide welcome clarity for commercial operators, by establishing greater certainty as to the circumstances under which public funding will be applied to assist in the development of broadband networks. Where notification is required, the Guidelines will assist the Commission in its assessment, speeding up the approval process, facilitating broadband roll-out, and in turn helping the EU to meet its economic targets.

FURTHER INFORMATION

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