STATE AID FOR THE DEPLOYMENT OF BROADBAND NETWORKS

Centrum für Europäische Politik

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MAIN ISSUES

Objective of the Guidelines: The Commission sets up non-binding conditions for approving the authorisation of State aid for the deployment of broadband networks.

Parties Affected: Operators of all kinds of telecommunication networks, providers of broadband services and broadband customers, in particular of rural areas.

Pros: In principle the Commission recognises that State aid distorts competition.

Cons: (1) In the longer term, State aid has a negative impact on the willingness of private investors to invest in the deployment of broadband networks.
(2) The geographically highly differentiated provision of State aid contradicts almost all Member States' current regulatory practices, which apply to national telecommunication markets.

CONTENT

Title

Community Guidelines for the **application of State aid rules in relation to rapid deployment of broadband networks** in the Commission's draft version of 19. May 2009

Brief Summary

- **Background**
  - With its Guidelines the Commission sets out the conditions which permit national State aid for investments in basic broadband networks and in "next generation access networks" (NGA).
    - There is no recognised definition of basic broadband networks. The Commission has acknowledged a minimum speed of 512 kbit/s downstream and 128 kbit/s upstream as being sufficient (Decision N 508/2008 of 10. December 2008). It expects that basic broadband networks will be replaced by NGA networks "in the longer term" (No. 61).
    - The Commission defines NGA networks as broadband networks of the following technical type:
      - fibre-based cable networks to existing street cabinets offering speeds of a minimum of 40 Mbps downstream and 15 Mbps upstream;
      - cable networks delivering speeds of 50 Mbps and beyond;
      - connections to newly built offices and homes through fibre-based cables offering speeds of 100 Mbps and beyond.
  - The Commission considers broadband connectivity a "key component" for the development, introduction and usage of communication technologies in the economy and society. Its aim is to achieve "100% high speed internet coverage for all citizens by 2010" (No. 1).
  - A number of Member States have already announced plans to support investment not only in basic broadband infrastructure but also in the accelerated deployment of NGA networks.
  - However, State aid must be compatible with EU Competition Law under Art. 87 (3) TEC; this compatibility is subject to the Commission's assessment.

- **The presence of State aid**
  - State aid means support measures
    - granted out of State resources,
    - which create an economic advantage for companies that distorts or threatens to distort competition and
    - which affect intra-Community trade. (Art. 87 (1) TEC).
  - The term State aid does not involve public investments made on the same basis as private investors.
  - Neither are compensation payments for a "service of a general economic interest" (Art. 86 (2) TEC) regarded as State aid, as far as the requirements prescribed by the European Court of Justice are complied with (C-280(00, Altmark Trans).
  - State aid is neither present where public authorities of the Member States undertake civil works and – without discriminating in favour of single sectors or branches – thus provide an opportunity to "all potential users" to use it to deploy own network infrastructures (No. 56).

- **A balancing Test for State aid**
  State aid is admissible only if it is "aimed at a well-defined objective of common interest" and if it is a suitable, necessary and – in consideration of the distortion of competition and limiting of trade – appropriate means for achieving this aim (No. 29).

- **Conditions for supporting the deployment of basic broadband networks**
  – The Commission differentiates between "white", "black" and "grey areas" in basic broadband networks:
    - "White areas" are areas where no broadband services are available and where there are no plans to develop such services in the near future.
    - "Black areas" are areas where at least two providers operate their own broadband networks and provide broadband services under competitive conditions.
    - "Grey areas" are areas where only one broadband network operator is present and there is little prospect of a second infrastructure being built.
  – To date the Commission has taken an "overwhelmingly favourable view" towards measures supporting broadband coverage in "white areas", but has rejected any State aid measures for "black areas" (No. 9).
  – In "grey areas" the Commission deems State support of parallel networks admissible in principle, if the network provision is still a "de facto monopoly" provided that (No. 40)
    - the services offered to end customers are "overall not adequate",
    - the established network operator does not offer network access to competitors ("third parties"),
    - other service providers are thereby all but excluded from entering the market and
    - said problems cannot be solved through regulatory market interventions ("ex ante regulation").

- **Conditions for supporting the deployment of NGA networks**
  – Also in the case of NGA networks the Commission distinguishes between "white", "black" and "grey" areas.
    - "White NGA areas" are areas where NGA networks do not exist and are not likely to be built within the following five years.
    - "Black NGA areas" are areas where at least two providers operate NGA networks or will be operating within the following five years.
    - "Grey NGA areas" are areas where only one NGA network is in place and there are no plans by another operator to deploy one in the following five years.
  – The conditions for the deployment of NGA networks being supported by State aid are:
    - The grant of State aid for "white areas" is always admissible if no basic broadband networks are in place. Where only one single operator provides basic broadband networks the grant of State aid depends on whether or not the existing services are "sufficient to satisfy the needs of citizens and business users". (No. 67, 68)
    - State aid is excluded where more than one NGA operator ("black NGA area") or several basic broadband networks compete.
    - As with basic broadband networks, State aid for "grey NGA areas" is subject to inadequate services to end customers and the factual impossibility of competition. In particular, it must be assessed whether the NGA network of an established operator supports new services and whether network components were built on the basis of existing ducts not accessible by other network operators.

- **Special Requirements**
  – In granting State aid for the deployment of broadband networks the following rules must be observed (No. 45):
    - On the basis of "detailed mapping", Member States must clearly identify the geographic areas to be covered by the State aid measures for deploying broadband networks.
    - Before granting State aid, an open and non-discriminatory tender process must be held.
    - The bidder with the "lowest amount of State aid requested" offering similar quality should "in principle" receive the offer.
    - Unless there are any objective justifications to excluding certain technologies, all types of broadband networks must be admitted (e.g. xDSL, cable, WiMAX, WiFi, satellite and mobile technologies).
    - In order to avoid the "unnecessary and wasteful duplication of resources" Member States should, "where possible", encourage bidders to share existing infrastructures.
    - Third parties must have wholesale access to subsidised broadband infrastructure for at least seven years.
    - The subsidised network operator must not demand wholesale prices which exceed end customer prices to such an extent that competitors are crowded out or competition becomes impossible ("price squeeze").
    - Member States should ensure that a reverse payment mechanism for State aid is agreed upon in case the demand for broadband grows beyond anticipated levels.
  – The following additional rules apply to undertakings mandated with the deployment of NGA networks:
    - Beneficiaries of State aid for the deployment of NGA networks should be obliged to provide third parties with wholesale access to ducts and/or street cabinets for at least seven years.

- State aid for the deployment of fibre-based networks should be granted only if the network operator uses a “multiple fibre“ network architecture which enables other users to offer their own services irrespective of the network owner.

Changes Compared to the Status Quo

With the Guidelines the Commission binds itself to assessing future State aid for the deployment of traditional broadband and NGA networks. However, the ECJ, which can be appealed after a decision on the eligibility of support measures has been taken, is not bound by the guidelines.

Statement on Subsidiarity

The Commission does not address the question of subsidiarity.

Political Context

Both the Commission and many Member States have announced the support of broadband deployment as part of their economic recovery packages. These subsidies “can help support the economy in the short run and over the longer term create essential infrastructures for sustainable economic growth.” (No. 2)
The Commission states that several Member States no longer wish to limit State aid to NGA deployment in sparsely populated areas, as has been the case with the traditional broadband networks. These Member States assume that in view of the high costs, even in certain urban zones NGA networks will be built with State aid solely. Moreover, by subsidising the deployment of NGA networks, several Member States try to avoid a delayed roll-out of these networks in certain (financially less attractive) territories. (No. 51)

Options for Influencing the Political Process

Leading Directorate General:	DG Competition
Consultation procedure:	The draft of the guidelines was discussed in a public consultation which expired on 22. June 2009. The final Guidelines are due for publication on 22. July 2009.

ASSESSMENT

Economic Impact Assessment

Ordoliberal Assessment

State aid measures are State subsidies and are therefore particularly problematic from an ordoliberal viewpoint. They can even impede the deployment of basic broadband networks and NGA Networks by manipulating private investment decisions. On the one hand subsidies **provide** private investors already planning to deploy a network with **incentives to delay these investments and** to actively solicit subsidies. On the other hand, State aids **penalise investors who have already invested in the deployment of networks**. In anticipation of a certain return on invested capital they have taken a risk and are now confronted with subsidised competitors; this has a negative impact on the profitability of existing networks. This, in turn, lowers the willingness of these network operators to make new investments in the future.
At least, the Commission is aware of these negative effects of State aid measures and clearly states them in its Guidelines. Also, the concrete conditions for granting State aid reflect insights into the economics of networks. For instance, the Commission is right in arguing that the support of “black areas” is ineligible – competition is already working there. Also, **the Commission’s opinion** that **a high-quality basic broadband infrastructure can be a substitute for NGA networks is to be welcomed.** It is only logical that just a missing NGA network is not sufficient to allow for State aid if basic broadband coverage is already in place. However, the Commission should also apply such consistent network economics **in “grey NGA areas”**. Whether or not networks were built on the basis of a “privileged use” of ducts is irrelevant here. **It is not the deployment of a parallel network that should be subsidised but the established network operator who should be obliged to provide competitors with access to ducts**.
However, the Commission deems subsidies generally justified if the “well-defined objective of common interest” – i.e. achieving 100% high speed internet coverage for all citizens – cannot be reached without such subsidies. However, there is often little demand for broadband services in rural areas where a basic broadband supply is available. It is therefore questionable if the deployment of networks in sparsely populated areas should be subsidised at all.
The geographically differentiated subsidy strategy for “grey areas" as intended by the Commission makes little sense if it is not accompanied by a system change in the regulation of telecommunication markets. For the Commission makes State aid dependent on whether or not in a geographically defined area there is sufficient potential for competition or whether a lack of competition can be compensated through ex ante regulation. However, currently national regulatory authorities regulate almost only national markets and do not take into account local market characteristics. With its “area theory”, the Commission assumes that the granting of State

aid is necessary in certain geographic areas because the existing regulation in these markets does not suffice to solve competition problems. Hence, it **implies that a regulation oriented at national markets is inadequate**. Also for an economic point of view, the commission's geographically differentiated approach should go hand in hand with a change towards a geographically differentiated regulation: **Subsidies change** the market structure of each "area" to which they are applied. By deploying or duplicating networks **the market power of existing operators** is changed. **This should be considered in ex ante regulation**. However, such precise geographical regulation is rather unlikely as it requires an extremely detailed and thus complex market analysis.

Since the necessary system change does not appear realistic, the deployment of broadband networks should not be subsidised.

Impact on Efficiency and Individual Freedom of Choice

In free market economies the free formation of prices is a precondition for only those investments to be made that are economically viable. State aid for investments in the deployment of broadband distorts prices, which can lead to the inefficient use of taxpayers' money for projects which for financial reasons would otherwise not have been realised .

It is particularly **questionable why the deployment of basic broadband networks is to be subsidised at all if –** according to the Commission **– they will be replaced by NGA networks "in the longer term"** (No. 61).

Impact on Growth and Employment

Whether or not, as the Commission argues, the spill-over effects generated by the deployment of broadband or NGA networks enhance growth in other economic sectors is uncertain. In fact, what it actually depends on is whether or not there really is an increase in demand for the services offered by these networks.

Impact on Europe as a Business Location

A deployed broadband infrastructure constitutes an advantage to certain production and marketing processes, which makes Europe more interesting in terms of investments.

Legal Assessment

Legal Competence

Pursuant to Art. 87 (3) TEC the Commission is entitled to assess and decide on the compatibility of State aid with EU law in single cases. To that end it is justifiable that the Commission publishes non-binding Guidelines to present its criteria, according to which it will take such decisions in the future.

Subsidiarity

Unproblematic.

Proportionality

As State aid always distorts competition the detailed description of cases presented in the Guidelines are not unproportional.

Compatibility with EU Law

Unproblematic.

Compatibility with German Law

Unproblematic.

Alternative Policy Options

State aid should be rejected if not combined with a geographically differentiated treatment of markets underlying ex ante regulation.

Possible Future EU Action

Not foreseeable.

Conclusion

In principle, the Commission accepts that State aid distorts competition. Subisidies affect adversely the conditions for planned private investments. The deployment of state-aided parallel networks damages the profitability of existing networks and has a negative impact on investors' willingness for new investments. Furthermore, there is a contradiction in the Guidelines between the regulation of mainly national markets and the geographically highly differentiated allocation of State aid. This tension could only be removed if geographically differentiated regulatory obligations were imposed on network operators. Since such a system change is currently unlikely, State aid for the deployment of broadband networks should be rejected.