

# On the right track with broadband

GUIDE FOR  
MUNICIPALITIES,  
PROVINCES AND  
HOUSING ASSOCIATIONS

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PROVINCES AND  
HOUSING ASSOCIATIONS

A joint guide from the:



Ministerie van Economische Zaken



Ministerie van  
Binnenlandse Zaken en  
Koninkrijksrelaties



Vereniging van  
Nederlandse Gemeenten



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# Foreword

Central governments and the municipalities and provinces all want to promote broadband. Together, our ambition is to make the Netherlands a broadband front runner in Europe and in the world.

This document has been put together to provide you with a practical guide on how to initiate broadband, dynamically and responsibly. In this publication, a number of rules will be described, together with the approach taken to them in practice.

The above-mentioned rules include European and national rules on the role and position of the government in respect of broadband activities. For example, the European Commission has recently issued a number of important statements on the provision of (state) aid to broadband projects. These statements have provided more clarity on the scope that exists for authorities in relation to broadband activities. An analysis of these statements has been included in this publication.

At a national level, the Cabinet has made a number of recommendations on how broadband can be promoted, taking into consideration the healthy competitive market. In this guide, these recommendations will be illustrated on the basis of appropriate examples from the field. Information on these initiatives may be relevant for projects you may be considering. Incidentally, it has not been our intention to provide an exhaustive summary of all of the various initiatives.

The starting point for this publication is that we learn together and by 'doing'. The market, legislation and regulations may change. Therefore, the information from this publication will regularly be updated on the internet (on our websites, for example).

This guide is particularly intended to inspire you to get on the right track with your own broadband ambitions and those we share!



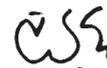
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# General introduction



The presence and use of broadband infrastructures are regarded as essential factors for economic growth and for the knowledge economy. This opinion is shared broadly by municipalities, provinces, housing associations, central government and the European Commission.

To put it briefly, broadband can be defined as a permanent connection to electronic communication networks. However, descriptions of what broadband actually entails vary. These descriptions are sometimes of a functional nature (what broadband can be used for) and sometimes technical (what the capacity of the connection is). Due to rapid technological developments, this term is dynamic. Many definitions used for broadband originate from the European Commission and from the Broadband Paper [Breedbandnota].

## European Commission definition:

*'(...) broadband will refer to a wide range of technologies that have been developed to support the delivery of innovative interactive services, equipped with an always-on functionality, providing broad bandwidth capacity that evolves over time, and allowing the simultaneous use of both voice and data services<sup>1</sup>.'*

## Broadband Paper definition (2004):

*'Broadband is a connection that is suitable for high-quality image and sound applications, suitable for the exchange of substantial data files, by means of a permanent connection.'*

The European Commission has set out its ambitions and policy actions on broadband in the Lisbon Agenda. Central government has set this out in the Broadband Paper. Municipalities, provinces and housing associations are also initiating the promotion of broadband services and networks. Under the right conditions, these parties can give an important impulse to the development of broadband. The policy pursued by this Cabinet focuses on the creation of the right preconditions and on the improvement of the operation of free competitive market for electronic communication infrastructure; primacy for the development of networks lies with market parties. This guide

<sup>1</sup> eEurope 2005, 26 May 2004

<sup>2</sup> Housing associations are private institutions. Their assets are intended for social activities in the interest of public housing.

is intended to support policy staff and administrators from municipalities, provinces and housing associations, and enable them to get on the right track with broadband.

All initiatives must fall within the frameworks of European and national legislation and regulations. This guide offers an analysis of European and national legislation and regulations, state aid and procurement procedures and recent statements by the European Commission in relation to these subjects.

This guide will also look at the recommendations made by the Cabinet on how broadband can be promoted, taking into account the healthy competitive market<sup>3</sup>. These recommendations have been translated into issues and step-by-step plans. The recommendations are illustrated on the basis of appropriate examples from the field.

Throughout this report, practice-based examples have been used to illustrate how municipalities have responded to the recommendations. Therefore, the practice-based examples given are illustrative of the recommendation in question, not, by definition, for the other recommendations too.

The starting point for the European Commission regulations and the Cabinet's recommendations is that they promote a healthy competitive market. This is essential for the development of the telecommunications market and for economic growth in general. In addition, a good competitive market also secures equal opportunities for all parties and optimal freedom of choice for consumers. This is very important for the achievement of our shared ambition, which is to make the Netherlands a broadband front runner. The Netherlands can largely thank its present lead in the field of broadband connections to competition on and between networks.

<sup>3</sup> Government position on the ICM report providing a number of recommendations on broadband activities by public organisations [Aanbevelingen breedbandactiviteiten publieke organisaties] (26 643, no. 57). This report looks in more depth at possible market disruptions accompanying municipal initiatives.

# Structure

**Chapter 1** focuses on the relationship between European regulations and broadband, particularly in terms of state aid and tendering issues.

Section 1.1 describes the importance of European law and its relationship with various broadband projects. Section 1.2 discusses general European rules on tendering and state aid, including the risks accompanying the infringement of these rules. Housing associations will be discussed in a separate text frame. Section 1.3 looks at how European rules are applied to broadband projects. Using the questions in this Section, readers can determine whether state aid could apply for their projects, and whether or not it is necessary to notify the European Commission about a particular project. Procurement rules will be discussed where these are relevant for the state aid assessment.

**Chapter 2** uses a number of practice-based examples to discuss issues that are important to consider when developing a broadband project. Some of the descriptions of state aid and tendering from Chapter 1 also return in this Chapter. However, in this chapter, these subjects will be discussed from a practice perspective.

The issues outlined in this chapter are derived from the Inter-departmental Competition Committee [Interdepartementale Commissie Marktordening

(ICM)] report published in 2004 on recommendations for broadband activities by public organisations [Aanbevelingen breedbandactiviteiten publieke organisaties], and the Government position on this report<sup>4</sup>.

Section 2.1 introduces the issues concerned, how the practice-based examples can be interpreted and which general models municipalities use. Section 2.2 explains a number of issues and illustrates them on the basis of practice-based examples. This Section concludes with a step-by-step plan per issue. Section 2.3 contains a comprehensive table that provides a structured representation of the various issues, practice-based examples and models. The role played by housing associations will be discussed separately.

Appendix 1 contains a flowchart, which can be used for questions relating to state aid.

Appendix 2 contains references and background information, including references to European and national broadband initiatives.

Appendix 3 contains an index, which includes a keyword list.

<sup>4</sup> Government position on the ICM report on recommendations for broadband activities for public organisations [Aanbevelingen breedbandactiviteiten publieke organisaties] (26 643, no. 57). This ICM report looks in more depth at possible market disruptions resulting from municipal initiatives.



# Broadband and Europe: tendering and state aid

## 1.1 Introduction



Many Dutch municipalities<sup>5</sup> are working on broadband projects. Since these usually involve (a substantial amount of) state funds, the European Commission has raised questions (not just with the Netherlands, incidentally) about the financing of these projects. Even before the Commission received the first answers to its questions, a practical case showed what the consequences could be if the rules on state aid are not observed during a broadband project. Following a complaint from a cable company, a court ruling forced the municipality to halt its project. In its judgment, the court ruled that clarity must

first be provided on the state-aid aspects of this project. The municipality in question has now notified Brussels of its project and is waiting for a response. This case underlines the alertness of private parties as soon as local authorities become involved in broadband initiatives. This situation has led to unrest among municipalities (and, increasingly, amongst provinces and housing associations too), which fear that projects (proposed by them) will be delayed or perhaps even have to be abandoned.

This chapter will seek to remove some of this unrest by creating clarity on European rules and their correct application. Brussels does not oppose broadband projects, provided they comply with regulations on state aid and

<sup>5</sup> In the interests of the readability of this guide, the term 'municipalities' is often used, whereas in many cases provinces or housing associations may in fact be involved. However, where special differences apply, specific reference will be made to provinces and housing associations.

tendering. This chapter will help authorities determine whether they are making sufficient allowance for the frameworks on which agreements have been made in a European connection.

Investigations by the European Commission, whether formal or informal, start with a number of questions addressed to the member state. Ultimately, these questions will have to be answered by the parties that initiated the broadband project.

#### **WHICH EUROPEAN BRANCHES OF LAW WILL APPLY?**

From the point of view of regulations, the most important European issues in relation to broadband projects concern tendering and state aid. Investigations by the European Commission focus primarily on these areas.

#### **HOW DOES THE EUROPEAN COMMISSION DEFINE THE TERM 'BROADBAND'?**

The description below, which has been taken from the European Commission's eEurope action plan for 2004, indicates the European Commission's definition of the term 'broadband':

*(...) broadband will refer to a wide range of technologies that have been developed to support the delivery of innovative interactive services, equipped with an always-on functionality, providing broad bandwidth capacity that evolves over time, and allowing the simultaneous use of both voice and data services.*

Thus, according to the Commission, broadband can be used for a wide range of interactive services, and, to do so, offers a permanent connection with a large (and growing) capacity, making it possible to send and receive data quickly and simultaneously.

#### **WHAT IS THE EUROPEAN COMMISSION'S POSITION ON BROADBAND?**

Broadband is vital! The European Commission believes that broadband is an essential condition for the achievement of ambitions in the field of economic growth and development. Agreements on the achievement of these ambitions

have been made in the so-called Lisbon Agenda<sup>6</sup>. Therefore, the Commission actively promotes broadband initiatives in the member states. As a consequence, governments throughout the European Union are involved with broadband in some form or other.

However, the European Commission is also the guardian of the free European market. When authorities enter this market, this may disrupt free competition. This may be the case, for example, when state aid is granted. The Commission is continually striving to find the right balance between the promotion of broadband and the protection of the free market. In all of their broadband plans, municipalities, provinces and housing associations must remember the need to persuade the Commission of the usefulness of and (social and economic) need for state support for broadband.

#### **WHAT ROLE DOES DUTCH BROADBAND POLICY PLAY IN THIS CHAPTER?**

Broadband is a politically-sensitive subject. Municipalities and provinces are eager to offer broadband access to their citizens and businesses and are putting a range of different initiatives in place for this reason. Central government wants to promote these initiatives, but it also wants to promote a healthy competitive market, and create the preconditions necessary in this respect. Authority initiatives must correspond with the frameworks for the preconditions for a healthy competitive market. This chapter discusses this material from the point of view of European law.

#### **DOES THIS CHAPTER ALSO DISCUSS THE ROLE OF HOUSING ASSOCIATIONS?**

Not specifically. This chapter will focus primarily on municipalities and provinces. However, housing associations must also comply with European rules. The frame on page 22 discusses the factors relevant for housing associations when confronted with European law.

<sup>6</sup> This is the strategy agreed upon by the European heads of government, with the object of making Europe the most competitive economy in the world.

## 1.2 Tendering and state aid: the general rules

### 1.2.1 TENDERING

#### WHY IS TENDERING NEEDED?

The European procurement directives have been formulated for a number of reasons, including the promotion of free and fair competition within the European Union and the creation of an internal market. These rules ensure that each company in Europe has the same opportunity to win lucrative public procurements. The Netherlands has included each of the European procurement directives in a Dutch framework act. As a result, the European procurement directives apply directly to Dutch provinces and municipalities. For their possible applicability to housing associations, see the frame on page 22.

#### WHAT DOES EUROPEAN PROCUREMENT LAW ENTAIL?

The most important procurement legislation is formed by the four European directives. These have recently been replaced by two new directives. This so-called legislative package consists of a directive for public works contracts, public supply contracts and public service contracts (general directive) and a directive for the utility sectors. After publication, the Dutch government will have 21 months to implement the European directives into national legislation. The new transposition legislation is expected in January 2006. Wherever possible, this chapter will take account of the new European regulations.

The following terms form the starting points for all procurement directives: public access, transparency and objectivity. Public access to information means that public procurements are known to the entire European business sector. Transparency is achieved by applying uniform procedures and time-limits for the receipt of European tenders. Objectivity is achieved by formulating non-discriminatory criteria for the selection of tenderers.

Community law on public procurement consists not only of the procurement directives, but also of provisions of primary legislation, embodied in the EC Treaty. These provisions apply to all public procurements. Thus, they also apply to contracts that do not (entirely) fall under the regime of a procurement directive. These could be contracts that fall below the European threshold value and so-called service concessions. The European Committee in particular believes that EC Treaty principles render competitive bidding mandatory, even when below the European threshold amount.

#### WHICH PARTIES NEED TO INVITE EUROPEAN TENDERS?

Besides authorities, broadband projects often involve construction companies, project developers and sometimes housing associations. One question that may arise in the context of broadband projects is which parties are obliged to invite European tenders. It would be beyond the scope of this handbook to discuss the various forms of cooperation between public and private parties (Public-Private Partnerships (PPPs)). This document will be limited to the observation that, in general, the procurement rules virtually always contain the obligation to invite tenders, thus regardless of which party within a PPP is ultimately responsible for the (European) procurement. Depending on the type of partnership, there will be an entity that falls under the definition of a contracting authority. In all other cases, PPP constructions result in an obligation to pass on the tendering requirement on the part of the authority, to the private party.

For example: a municipality is involving itself in the commercial activities of a fibre optic network. As part of its involvement, it wants to permit operation of the passive layer by a private party. The passive layer consists of the fibre optic



cables, the underground pipes (cable protection pipes) and any neighbourhood based equipment rooms (outside plant). Thus, the passive layer consists entirely of material. A statutory two-tier company under Dutch law [structuur-BV] will be formed for operation of the activities; the municipality will hold less than 50% of the shares in this company.

**IS THIS LEGAL ENTITY, WHICH IS GOVERNED BY PRIVATE LAW, SUBJECT TO A EUROPEAN OBLIGATION TO TENDER CONTRACTS?**

Answer: a number of criteria apply when determining whether or not an organisation is a 'public body' in the sense of the European procurement directives. In general, it will not be possible to avoid a European obligation to tender contracts by creating a legal concept that does not meet the above criteria.

**WHICH EUROPEAN PROCUREMENT THRESHOLDS APPLY?**

If the estimated value of a procurement exceeds the procurement threshold for the directive applicable, the European tendering directives will apply. The following procurement thresholds will apply until 31 December 2005 inclusive:

<i>Public works contracts</i>	
All authorities:	€ 5,923,624
Concessions, projects with more than 50% subsidy:	€ 5,000,000
<i>Public supply contracts</i>	
Central government:	€ 154,014
Other authorities:	€ 236,945
<i>Public service contracts</i>	
Central government:	€ 154,014
Other authorities:	€ 236,945
Subsidised contracts, R& D services and Telecommunications services, services falling under Appendix 1 B:	€ 200,000

**WHICH PROCUREMENT PROCEDURES ARE THERE?**

The Works, Supplies and Services Directives consist of four procedures and corresponding time limits. As the contracting authority for a contract to be awarded, an authority can choose between a public and a restricted procedure. Added to this is the option of a negotiated procedure with a call for competition. The last two procedures may only be applied in strictly exceptional situations. If a contracting authority considers using one of the final two procedures, it should certainly also consider obtaining legal advice.

**AM I DEALING WITH A PUBLIC WORKS CONTRACT, A PUBLIC SUPPLY CONTRACT OR A PUBLIC SERVICE CONTRACT?**

In order to determine which category a contract falls under, it must first of all be ascertained whether it falls under the definition of the Works Directive. If it does not, it must be ascertained whether the contract falls under the definition of the Supplies Directive. If it does not, the contract will then fall under the (remaining) category: the Services Directive.

*Works*

The Works Directive defines ‘a work’ as follows: the outcome of building or civil engineering works taken as a whole that is sufficient of itself to fulfil an economic and technical function.

Authorities must exercise caution when placing a contract under the Works Directive. Due to the high value threshold, authorities are sometimes inclined to designate a contract as a public works contract. The definition of a ‘work’ leaves little scope for the flexible use of this term. In any event, the European Court of Justice adopts a very strict approach to this term. In general, it can be stated that maintenance of an existing (building) work must be deemed a work, insofar as it concerns the maintenance of the functions performed by property, by means of repair, replacement and other, similar activities. In short, maintenance work constitutes a service, in principle.

*Supply*

A ‘supply’ is an agreement that relates to the purchase, lease, hire or hire-purchase of products, and is entered into between a contracting authority and a supplier. The Supplies Directive does not provide any further definition of the term ‘products’. It is assumed that this refers to moveable property, in principle.

*Service*

The Services Directive defines public service contracts as follows: contracts for pecuniary interest concluded in writing between a service provider and a contracting authority. In an Appendix to the Directive, services are categorised as primary services and residual services. The full regime of the Directive applies just to the first type of service.

**WHICH DIRECTIVE APPLIES?**

In the event of the concurrence of contracts that are dissimilar in nature (Works, Supply and Service), the value of contracts will determine how they are to be tendered. If the contracts are connected to such an extent that they are complementary, they must be cumulated. Added to this, the choice of procurement method will be determined by the largest contract, referred to as the highest-value criterion.



A practice-based example: a municipality has designated the construction of a passive infrastructure as a 'work'. The value of the component for the digging and construction of the infrastructure (the work) has proved to be higher than the component comprising maintenance services for the network (the service).

When estimating the overall contract, the construction of the network was 'disaggregated' from operation of the network. Thus, two different contracts are concerned here. In close consultation with the European Commission, network operation was ultimately designated a 'service concession'. In principle, the European procurement directives do not apply to this. However, in order to guarantee sufficient transparency, public access and non-discrimination, the negotiated procedure with a call for competition is the most secure procedure. Incidentally, this is not the only way that a municipality can guarantee sufficient competition. Another example is when, during a concession auction, there are a number of candidates for investment in the passive infrastructure.

#### **IS DIVISION INTO PARTS AN OPTION?**

Contracts in the framework of the Works, Services and Supplies Directives can be divided up into parts (for example, one part building works and another installation work). As a result, different companies may be eligible for contracts. However, the value of the contract as a whole is important for the determination of whether or not the directives apply. To be able to determine whether the value thresholds for Works, Services and Supplies are being exceeded, the value of the separate parts must be added up to yield one total.

The Works Directive and Services Directive provide for an exemption for parts that remain under a certain value. Parts that are worth less than € 1,000,000 under the Works Directive and € 80,000 under the Services Directive are exempted from the operation of the Directives. When these small parts together represent less than 20% of the total value, it will not be necessary to put them out to tender. The Supplies Directive does not include this exemption for parts.

The Supplies Directive also uses the term 'supplies of the same type'. This concerns the obligation to add together the value of supplies of the same type when breaking a contract up into parts. The European Commission defines supplies of the same type as supplies that are intended for the same purpose. Examples are different pieces of office furniture and different foodstuffs.

#### **HOW DO I ESTIMATE A CONTRACT WITH A LONGER TERM?**

The Supplies Directive and the Services Directive include specific provisions for the determination of the contract value for contracts to be implemented over a more extended period of time. The following is prescribed for the determination of the contract value of contracts of this nature:

In the case of fixed-term contracts, the contract value is as follows:

- the total value for the entire term, where this is twelve months or less
- Or;
- the total value including the residual value estimated when the term is more than twelve months;
- in the case of contracts for an indefinite period, or in cases where the term cannot be determined, the contract value will be the monthly amount multiplied by 48.

For example: a municipality and a company conclude a contract for an indefinite period, for the monitoring and maintenance of a new broadband infrastructure. The costs per month are € 10,000. To determine whether or not the value of the contract exceeds the value threshold, the amount of € 10,000 must be multiplied by 48. This results in an amount of € 480,000. This amount must be compared with the value threshold then applicable.

#### **HOW DO I ESTIMATE REGULAR CONTRACTS OR CONTRACTS WHICH ARE TO BE RENEWED?**

The Supplies Directive and Services Directive include specific provisions for the determination of the contract value applicable for regular contracts or contracts that are to be renewed within a given time during a certain period.

The following is prescribed for the determination of the contract value of contracts of this nature:

- Determine the actual aggregate value of similar contracts concluded over the previous fiscal year or 12 months, adjusted where possible for anticipated changes in quantity or value over the twelve months following the initial contract.

Or:

- Determine the estimated aggregate value during the 12 months following the first delivery or during the term of the contract, where this is greater than 12 months. This amount is the contract value.

#### **AM I SUBJECT TO A PROHIBITION TO SPLIT UP A CONTRACT?**

In practice, it is not always clear which parts of a contract must be included in the estimation of the value of a public work. When estimating the contract, authorities must make allowance for the prohibition preventing them splitting up contracts. In short, this prohibition entails that estimates must always look at the underlying contract. No method for the estimation of the contract value may be used with the intention of avoiding the application of the European Directives. The prohibition applies to the time and objective underlying a contract. Perhaps unnecessarily, we would also like to mention here the (artificial) splitting up of the organisation. In this last situation, a relevant term often used in this context is the demand aggregation obligation. These three aspects will be elaborated on below.

#### *Time*

Without good reason, a municipality may not 'cut up' a 4-year contract into smaller contracts that will fall below the European value threshold. Quite apart from the fact that the Services Directive also contains rules for recurring contracts, this course of action is a method that is used to split contracts, which is prohibited.

#### *Objective*

A municipality wants to construct broadband infrastructures in four urban districts. These will be launched according to exactly the same specifications

and schedule of requirements. When estimating the project, the districts will have to be added together. The municipality could break the contract down into four parts, so that different contractors are eligible for a (part of a) contract.

#### *Organisation*

Municipalities often have their own components, such as sports centres, libraries and municipal swimming pools. It is not always easy to determine whether these components should be considered so-called 'independent entities'. This is important for the estimation of a contract. The criteria applicable in this respect are: the decentralisation of procurement units, the separation of budgets, self-sufficiency and no interference from the contracting authority in respect of the contracts issued by the independent entity. Although we will not look at these criteria in any more depth in this guide, it is important to state that the voluntary inclusion of these contracts can often result in cost savings. Service providers are inclined to offer better prices, on average, for large contracts.

#### **HOW SHOULD CONTRACT NOTICES BE MADE?**

Contracting authorities must notify the European Union of envisaged contracts, so that they can be published in the Supplement to the Official Journal of the European Union. To do this, the contracting authority must send its contract notice to the Office for Official Publications of the European Communities in Luxembourg. The Office will ensure translation and publication of notices in the supplement to the Official Journal.

#### **WHICH RISKS ARE INVOLVED IN THE FAILURE TO TENDER (CORRECTLY)?**

As the Dutch auditing of municipalities and provinces has become more stringent since the annual accounts for 2004, tendering is increasingly coming to the attention of regional and local administrators. In fact, in the context of compliance audits, accountants will check a number of details, including whether or not the municipality or province has acted in line with the European procurement directives. Procurement procedures that have been carried out



unlawfully may contribute to a situation in which the approval tolerances laid down are exceeded, which may result in an adverse audit report on the annual accounts.

Authorities themselves are responsible for compliance with European legislation and regulations. If compliance is insufficient and, as such, results in infringement of the rules, the European Commission may hold the Netherlands accountable as a member state. The worst-case scenario in this situation is the imposition of a penalty by the European Court of Justice. In cases such as this, the Government will claim compensation for the penalty from the local

authority responsible for the infringement. In the Netherlands, this occurs through recourse procedures at a national level.

The injured party may lodge a complaint with the European Commission, but may also apply to the national court to demand the discontinuation or re-tendering of any European procurement procedure that has not been carried out properly. Failure to observe the procurement rules for public procurement, when observance was compulsory, constitutes an unlawful act on the part of the contracting authority vis-à-vis the tenderers disregarded by it. In principle, these disputes will be settled in a civil court.

## 1.2.2 STATE AID



### WHY IS STATE AID PROHIBITED?

The European Union has set itself the objective of ‘promoting economic and social progress for its population’. A properly functioning internal market and free competition are considered essential for the achievement of this objective. By providing state aid, a member state can favour its own undertakings above undertakings from other member states, which encourages anti-competitive conduct. The state aid rules are part of the EC Treaty (‘primary legislation’) and, as such, apply directly, also for municipalities, provinces and housing associations (etc.).

### HOW TO ASSESS WHETHER OR NOT YOU ARE ELIGIBLE FOR STATE AID (WHICH IS SUBJECT TO THE NOTIFICATION REQUIREMENT)?

The European Commission alone can assess whether a certain form of state aid is permitted. A local authority must determine whether or not the Commission must be notified of a particular aid scheme. However, the criteria for state aid are not always clear, and are quite dynamic, which often results in confusion. Therefore, it is important to be careful and, when in doubt, seek expert advice. The complex process of assessment and, where necessary, notification of an aid scheme can be summarised (in a very simplified form) in three steps.

*Step I: Assessment*

Use the criteria laid down in Article 87(1) of the EC Treaty to determine whether or not aid applies.

*Step II: Exemption?*

Determine whether aid falls under a block exemption regulation. If this is not the case, the state aid is subject to the notification requirement. Proceed to Step III.

*Step III: Notification*

Structure the aid such that the chance of approval is optimised. When doing this, take into account case law and the criteria for the possibilities for exemption available to the Commission. Notify the Commission of the state aid.

**Step I. Assessment****WHICH CRITERIA APPLY FOR STATE AID?**

The EC Treaty (Article 87(1)) determines that where aid schemes granted by the member states distort, or threaten to distort, competition by favouring certain undertakings or products, they are incompatible with the common market. This applies regardless of the type of State resources concerned and insofar as the aid in question affects trade between the member states. Furthermore, the effect of the aid is decisive, not the object of the aid.

Four criteria are decisive (in principle) when seeking to classify state aid as subject to the notification requirement:

1. *The aid must be an advantage that has been financed through state resources*  
State aid concerns advantages that are granted by the member state and/or financed through state resources. This also includes aid granted by local authorities. Aid that is financed through public undertakings or public sector bodies, for example, is considered state aid if the aid is ultimately born by

the State (or a local authority). In short, favouring an undertaking indirectly does not help to avoid state aid. Central government ('member state The Netherlands') will still be the party held accountable by the European Commission. For this reason, municipalities and provinces must also notify the Commission of their state aid via the state aid coordination point [Coördinatiepunt Staatssteun] at the Ministry of the Interior and Kingdom Relations. Housing associations give notice via the Ministry of Housing, Spatial Planning and the Environment.

2. *An advantage applies for an undertaking that the undertaking would not have been able to achieve by normal commercial means*  
'Aid' is the case if the State grants an 'advantage' unilaterally 'for no consideration'. In other words, if the recipient undertaking is not required to provide a proportional consideration in return, an 'advantage' that falls under the state aid rules may be the case. Therefore, the term 'aid' includes not only positive performance such as subsidies, but also aid that reduces the costs that would normally push down an undertaking's budget.

*Avoid gaining an advantage by adopting an approach that is compatible with the common market*

An advantage may have been enjoyed if the consideration provided in return does not counterbalance the State's performance. When considering the above, steps are taken to ascertain whether the advantage granted would also have been enjoyed if the parties had entered into the transaction on a normal commercial basis. This assessment is referred to as the market economy investor principle. In other words: if the government invests as a private investor would do, and subject to similar conditions, state aid is not the case.

*Relationship with public call for tender*

If a public authority observes a procurement procedure when awarding a contract, it can, in principle, be assumed that the market price will be paid for a consideration to be provided in return. Government action will then

be regarded as ‘compatible with the common market’ and, as such, can remain outside the scope of the state aid regime. However, a scheme must be considered aid if (in the future, for example) an undertaking enjoys certain additional advantages that it would not have obtained from a normal commercial transaction. This might be the interim easing of contract conditions, a disproportionate division of risks between the government and the undertaking (in PPP constructions, for example) or the transfer (over time) of proprietary rights to the undertaking that performed the contract. In short, tendering cannot always guarantee that state aid is not involved; checks will always be necessary for each individual contract.

#### *The term ‘undertaking’*

The European term ‘undertaking’ is a broad one. An undertaking is ‘every entity engaged in an economic activity, regardless of the legal status of the entity and the way in which it is financed’. Undertakings may be profit-driven institutions (NVs and BVs) or non-profit driven institutions (foundations and associations).

#### *The term ‘economic activity’*

The term ‘economic activity’ is defined as ‘offering goods and services on a given market’. The provision of aid to organisations that do not perform any economic activity (schools, non-governmental organisations or church organisations, for example) does not involve state aid. However, care must be taken, since these organisations are not permitted to perform any market activities.

#### 3. *A selective advantage must apply: an advantage for one or more certain undertakings or products*

Favouring certain undertakings or products entails that the EC Treaty pertains solely to aid schemes that selectively favour the corporate sector. Aid provided by local authorities will soon meet the selectivity criterion, since a municipal scheme will often be limited to the provision of aid to undertakings in the municipality’s own region.

#### 4. *The advantage must (threaten to) distort competition and affect trade between the member states*

Experience shows that the Commission is quick to conclude that the (threat of) distortion of competition or adverse effects on trade between states applies, even where aid is being provided for a local activity and is of a geographically limited nature.

Even if undertakings concentrate their activities on Dutch territory, it cannot be ruled out that, by favouring them, their position could be strengthened in respect of other undertakings that are involved in intra-community trade. This is because it is the market in which this activity takes place, not the activity itself, that is decisive. If undertakings that receive the subsidy are active in a market that is open for competition from undertakings that are able to operate in a number of member states, it can be assumed that trade between the member states will be adversely affected.

State aid applies where all of the above criteria are met.

### **Step II. Exemption?**

Next, the aid provider should determine whether its aid falls under a block exemption regulation.

An exemption entails that prior notification of the Commission will not be necessary subject to certain conditions. However, retrospective notification by means of a summary of information is always required. For example, there are regulations that offer exemptions for certain forms of state aid to small and medium-sized enterprises, research and development activities or training.

The so-called *de minimis* exemption may apply for broadband initiatives. This involves the provision of state aid to one undertaking, which remains under the ceiling of € 100,000 for a period of three years. If an undertaking meets the *de minimis* conditions, state aid is not, formally, involved.

### Step III. Notification

If a block exemption regulation cannot be applied to an aid scheme, state aid applies and is subject to a notification requirement. Before an aid scheme can be implemented, the authority in question must notify the Commission of this scheme. An aid scheme that is subject to a notification requirement is not automatically prohibited. The Commission is able to grant an exemption on the basis of a number of exceptions. In a number of areas, the exceptions applicable have been laid down in policy rules (framework regulations, guidelines or announcements) from the Commission. The amount of aid that member states are able to grant depends on a number of factors, including the maximum amounts determined in the policy rules. Examples of policy rules are the research and development framework (innovative aspects of projects), the guidelines on regional aid schemes (in Dutch Aid Map municipalities determined by the Commission), announcements on state guarantees and investments in risk capital.

All notifications and summaries of information from municipalities and provinces on the subject of state aid are processed via the state aid coordination point at the Ministry of the Interior and Kingdom Relations. For detailed information on the notification procedure, see the state aid

information guide (in Appendix 2). Housing associations must submit their notifications and summaries of information via the Ministry of Housing, Spatial Planning and the Environment.

#### WHICH RISKS ARISE FROM NON-COMPLIANCE WITH THE STATE AID RULES?

Various risks arise from non-compliance with the state aid rules. The European Commission must already have been notified of possible state aid if an authority intends to grant aid. Otherwise any aid granted will be unlawful. In addition, undertakings that feel disadvantaged by alleged state aid granted to a competitor can submit a complaint to the Commission, which is then obliged to start an investigation. Interested competitors can also appeal to the national courts to demand the discontinuation or repayment of unnotified state aid. Competitors are also able to appeal to the national court for compensation for any losses that they have sustained as a result of unlawful aid.

Furthermore, the Commission may start an investigation when it is notified of a suspected infringement, from whichever source (the press or an opposition party, for example).

Since 2004, accountants have also been obliged, in the context of compliance audits, to check whether or not state aid rules are being observed. Thus, the risks arising from non-compliance are often close to home.

# Housing associations

## WHY A SEPARATE FRAME?

Housing associations are increasingly wanting to connect their homes to broadband networks. Like municipalities, housing associations can make a positive contribution to the realisation of broadband facilities in the Netherlands (by promoting the scale of demand required, for example). Amongst housing associations, much is still unclear about the applicability of the state aid rules and procurement rules. This is particularly due to the special legal status enjoyed by housing associations. Housing associations are legal entities under private law, who are responsible for the performance of public tasks. They may only deploy their financial resources in the interest of public housing. Since 1995, housing associations have started to perform a number of 'secondary activities' in addition to their core tasks, such as the construction of more expensive rented housing and owner-occupied housing, land development, involvement in residential-care arrangements, etc. None of this detracts from the fact that housing associations may also be confronted with European legislation and regulations on state aid and procurement. These rules are set out elsewhere in this chapter. This frame presents a brief overview of the most important issues in respect of housing associations and European law.

## IN WHICH SITUATIONS ARE HOUSING ASSOCIATIONS CONFRONTED WITH THE EUROPEAN PROCUREMENT RULES?

Is a housing association a contracting authority? If this question can (or must) be answered in the affirmative, housing associations are also subject to the European procurement rules. The answer to this question is unclear at the present time. The Dutch government believes that it is not necessary for Dutch housing associations to issue calls for tenders. It is in consultation with the European Commission on this subject.

### *Is a housing association a public body?*

Are housing associations public bodies and, as such, contracting authorities? The direct reason for this question is a ruling from the European Court of Justice on French 'sister organisations' of Dutch housing associations, so-called 'HLM companies'. The Court rules that these companies are public bodies. The question of whether a Dutch housing association can be considered a contracting authority in the sense of the European procurement directives must particularly be answered on the basis of the criteria below. Three cumulative criteria must be met:

1. The institution has been set up with the specific objective of providing for needs in the general interest, and not for needs of an industrial or commercial nature;
2. The institution has been incorporated under civil law;
3. The institution's activities are mainly financed by the State, or by territorial or other regulatory organisations. Alternatively, it may be supervised by one of these organisations. Another possibility is that more than half of the members of the Board or the supervisory board have been appointed by these organisations.

Housing associations certainly meet the first two criteria. However, too little information is available for a clear answer to the question of when management is supervised by a contracting authority. The European Commission is also unable to provide much clarity in this respect.

*Supervision by a contracting authority*

An answer could perhaps be sought in the ruling of the European Court of Justice, which determined that ‘supervision’ (as referred to in the third criterion above) applies if an organisation has a certain dependence on the authority, which dependence is equal to the dependence that would apply if one of the two other possibilities set out in the third criterion is met.

The Court took the grounds that the rules for the management of (French) associations were very detailed and that normal supervision of compliance with these rules already implied a major influence from the government. In addition, the French Minister was authorised to dissolve associations and suspend administrative bodies in exceptional situations. Finally, the French government was able to impose a management profile on these associations, and audits could be performed.

Therefore, the Court concluded that the French government was able to influence the associations’ decisions in the field of public procurement, and that, as such, these associations could be deemed public bodies.

The defence put forward by the French association (which was, thus, unsuccessful) consisted of four elements:

- supervision was said to be merely administrative in nature;
- it was asserted that supervision did not include management of the association or its investments;
- it was asserted that supervision was not regular or ongoing, but limited to exceptional circumstances;
- it was asserted that the government did check the accounts, but that its supervision did not extend to influencing the association’s choice of strategy or investments.

*To summarise*

At the current time, it is unclear whether or not housing associations can be considered contracting authorities. The Dutch government believes that housing associations are not contracting authorities. However, given European

case law on this subject, opinions may vary. In any event, housing associations are advised to closely monitor developments.

**IN WHICH SITUATIONS WILL HOUSING ASSOCIATIONS BE CONFRONTED WITH THE EUROPEAN STATE AID RULES?**

The general rules on state aid (see Section 1.2.2 of this chapter) apply primarily to state resources received by a housing association in order to fund certain (broadband) projects.

The question of whether state aid is received by housing associations (for their investments) is a relevant one, since housing associations are supported by State resources in different ways, by:

- the guarantee from the Social Housing Guarantee Fund [Waarborgfonds Sociale Woningbouw], followed by a government backstop;
- the financial reconstruction and project support provided by the Central Fund for Social Housing [Centraal Fonds Volkshuisvesting];
- the exemption from corporation tax;
- the right to borrow money from the Bank Nederlandse Gemeenten.

*Housing associations are undertakings*

From a European point of view, any entity that performs an economic activity (i.e. offering goods and services on the market) is an undertaking; regardless of its legal form, financing, or the question of whether or not it is profit driven. If it performs economic activities, a housing association must be regarded as an undertaking to which the general rules on state aid apply.

*The housing market is a cross-border market*

The cross-border nature of activities on the housing market and property market has been confirmed by the European Commission on a number of occasions. Even if undertakings limit their activities to Dutch territory, it cannot be ruled out that by favouring one undertaking (which might also be a housing association), its position in relation to other undertakings that do operate at a cross-border level could be strengthened.

*Social housing: service of general economic interest*

From the point of view of state aid, it is important to distinguish between social housing and non-social housing. As evident from a recent proposal from the Commission, the provision of social housing can be regarded as a so-called service of general economic interest (see Section 1.3.2 of this chapter). For housing associations, this concerns the activities laid down in the Housing Act [Woningwet] and the Decree on Management of Social Rental Housing [Besluit beheer sociale-huursector (Bbsh)]. In the Altmark judgment (see Section 1.3.2), the European Court of Justice indicated a number of criteria that can be used to determine when aid for the performance of this type of public service does not constitute state aid.

If these four criteria are not met, state aid will apply; the Commission must be notified of this aid in advance. In July 2005, the European Commission adopted a decision allowing for the introduction of an exemption from the notification requirement for social housing that could be considered a service of general economic interest.

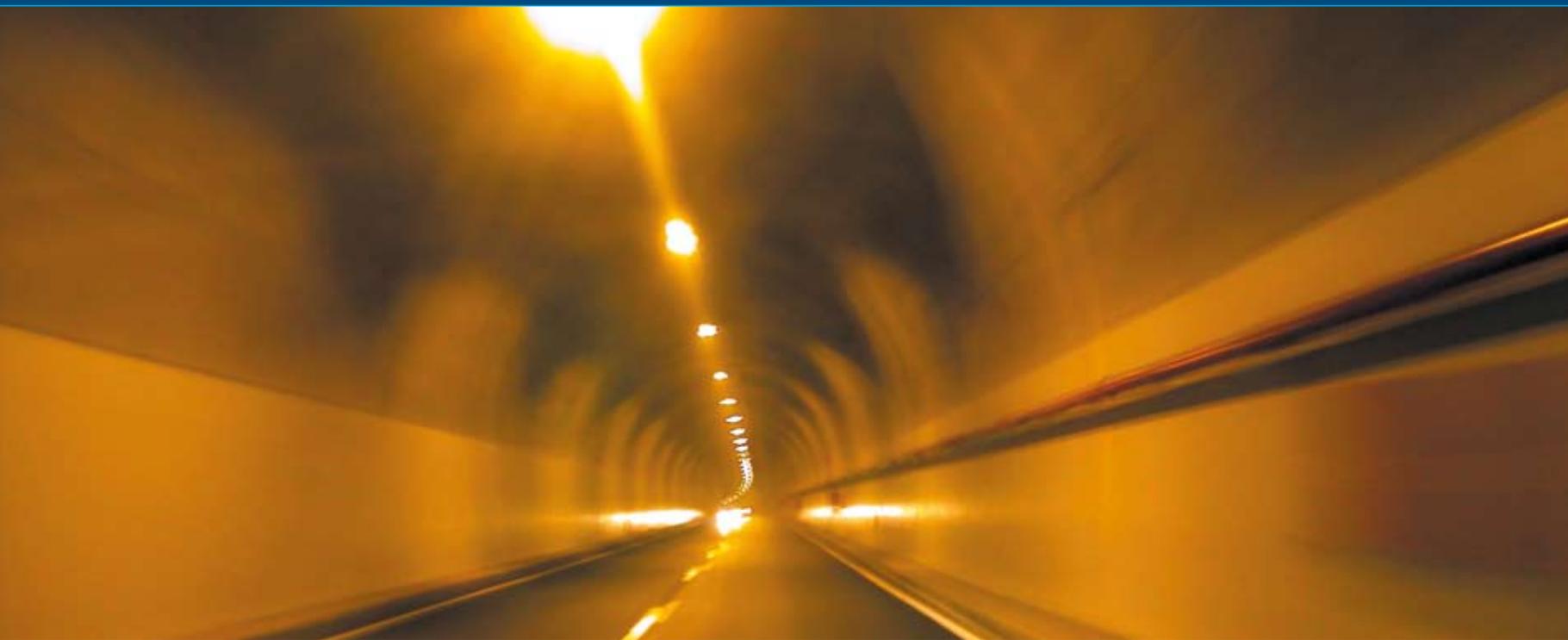
*To summarise*

If a housing association invests in the funding of broadband activities with the help of state aid (given the facilities referred to above), which activities can be regarded as part of the 'service of general economic interest' expected of a housing association, and if the housing association meets the Altmark criteria<sup>7</sup> or the conditions of the exemption decision, incompatible aid will not be deemed to apply. This will then solely concern those broadband activities that can be regarded part of the public task of the housing associations, such as the promotion of broadband with tenants, the provision of its services via broadband, communicating with tenants and promoting care and welfare services by third parties, and investing in broadband in owner-occupied properties. In line with the above, connections to homes – to be installed by third parties – can be funded up to the closest connection point in the area, according to the Decree on Management of Social Rental Housing.

If an association invests in broadband activities that fall outside the scope of the above public tasks, incompatible aid will be involved.

<sup>7</sup> Section 1.3.2 gives an in-depth explanation of what Altmark entails.

## 1.3 Relationship with broadband



This part of the chapter will focus particularly on the subject of state aid, since this is what European Commission investigations concern. However, procurement will not disappear from our attention. On the contrary, procurement is one of the most important conditions for the state aid assessment. Therefore, where relevant, detailed attention will be given to the procurement rules. As soon as an authority invests money in a broadband project, state aid may

apply. Whether or not this actually is the case, and whether or not this aid can be approved, will be decided by the European Commission (and, ultimately, the European Court of Justice). Therefore, it is important to know how the Commission assesses, what it looks out for, and which questions it will raise during an investigation. This is the only way that a municipality or province will be able to conclude with any degree of certainty that aid is not involved, or, where it is, notify Brussels of this aid, for its assessment.

## 1.3.1 EUROPEAN DECISIONS



To be able to indicate how the European Commission decides on broadband cases, it is necessary to study its decisions on this subject. Several have been published in recent years. The Commission warns that these are the first decisions, and that its insights may 'evolve' with advances in economic and technological developments. The results of the various decisions have been incorporated below, in the questions contained in this chapter. For more information about the content of the decisions, see Appendix 2. Besides the Commission, the Dutch court also decides on the potential existence of state aid. This (non-exhaustive) overview will start with a case of this nature.

*Appingedam (district court of Groningen, 3 September 2004)*

Following a complaint from Essent, a cable company, the court ruled that the municipality of Appingedam was to halt the construction of its fibre optic network until the European Commission had assessed the municipality's plans in respect of state aid. The municipality invoked the assertion that state aid could never be granted for the construction of infrastructure, amongst other

things. The court did not agree. It indicated that the question of prohibited state aid could be raised at the stage when the government was involved in the construction of infrastructure. It also indicated that where it is an established fact that two competing infrastructures are already in place (as was the case here), the Commission does not accept that the construction of an additional infrastructure is a government responsibility. Alternatively, the municipality invoked its public task: it considered the construction of a fibre optic network necessary to be able to provide its citizens with a number of socially-important services. This argument was not accepted by the court either, since the services in question could also be supplied via the existing networks. Added to this, residents of the outlying areas of Appingedam would not be served by the new network either, as a result of which construction of the additional infrastructure would not have any added value in this sense. The court took the following grounds: 'However commendable Appingedam's plan may be from a social point of view, it must be ascertained whether the aid granted by it is in fact compatible with the common market. Unfortunately, it is a fact that aid schemes often result in a distortion of (interstate) competition.'

*Project ATLAS (N 213/2003, corrigendum to Decision C (2004) 1809 fin.)*

The provision of aid to Project ATLAS, geared towards the provision of broadband services for the users of a number of business parks, was approved by the Commission after the ambitions for the project were scaled down considerably (following complaints from competitors). Factors that contributed to the approval were the limited geographic scope, the relatively limited extent of aid, and the open and non-discriminatory access to the new network. The Commission assessed the project directly against the EC Treaty, against the exception that facilitates aid to certain regional economies.

*Cumbria Broadband - Project Access (N 282/2003)*

The Commission determined that, in this project, aid was being provided to service providers and end users. This aid scheme was declared compatible with the common market for a number of reasons, including the fact that the scheme met the criteria laid down in the Transparency Directive, as measures had been taken to counteract overcompensation and cross-subsidisation, and because the project for which aid was provided promoted the development of remote and rural areas.

*Broadband Business Fund (N 199/2004)*

State aid was also involved here. However, this was permitted, since it (again) concerned the provision of broadband facilities to remote and rural areas. Aid was considered necessary for the development of broadband in the areas in question, and was granted in a manner that kept the disruption of competition to a minimum.

*Broadband in Scotland (N 307/2004)*

This case seemed very similar to the Broadband Business decision. Again, the aid was declared compatible with the EC Treaty, amongst other reasons because the scheme was in line with the Lisbon Strategy.

*Pyrénées-Atlantiques (N 381/2004)*

This involved the construction and operation of a broadband network in a rural area, in the form of a public service concession put out to tender by the French

government. An investigation revealed that the broadband services offered locally by the market were insufficient to meet the wishes of the population. The Commission approved the government's co-financing of the project since this met the criteria laid down in the so-called Altmark judgment<sup>6</sup>. Therefore, state aid was not the case, merely the compensation of the costs incurred for the provision of an (essential) service of general economic interest, which, according to the European Court of Justice, is permitted (compensation principle). As such, access to broadband services was qualified, for the first time, as a service of general economic interest. This applies only to investments in the network, not to the services themselves.

*Broadband in Limousin - DORSAL (N 382/2004)*

This (approved) project involved the construction of an open broadband infrastructure in the French Limousin. The European Commission again considered general access to broadband services a so-called service of general economic interest and felt that the co-financing of the project by the French government was in line with 'Altmark'. Therefore, the aid was considered 'compatible' with the EC Treaty. This case study corresponds quite closely with the Commission's decision on the Pyrénées-Atlantiques case (see above). Therefore, together, these decisions offer a good insight into how the European Commission uses the Altmark criteria in broadband cases.

*Spanish national broadband strategy (N 583/2004)*

In this case, the European Commission approved the Spanish National Programme for the roll-out of broadband in rural and remote areas. Although state aid was involved, this was considered compatible with the Treaty, since the subsidy granted was considered necessary to ensure that rural and very remote areas gained broadband services. The programme met the starting points laid down in the Lisbon Strategy (for the first time, reference was made to the i2010 initiative, which succeeds the eEurope Action Plan 2005) and was proportional. Selection by means of invitation to tender, technological

<sup>6</sup> See Section 1.3.2.

neutrality and non-discriminatory access for third parties are elements that contributed to a positive assessment.

#### *Broadband in Wales (N 57/2005)*

In this case too, an aid scheme for broadband was approved. Again, this scheme involved an area without any existing broadband capacity. The Commission applauds the fact that the project will provide electronic access to this area. Naturally, this includes a freely accessible network and technologically neutral procurement. The objectives of the programme are in line with the Lisbon Strategy. A new aspect is the approval of the aid granted under the so-called regional aid framework (rules for aid to underdeveloped regions). In addition, the Commission indicates that the schemes are being (correctly) co-financed from the Structural Funds.

#### **ARE THERE ANY OTHER EXAMPLES OF 'FOREIGN' BROADBAND PROJECTS?**

Broadband is (of course) being promoted in many EU member states. See the Appendix entitled 'References and background information' for a number of reports and studies with examples and broadband strategies from various countries, including Ireland, Portugal, Greece, Sweden, France, the United Kingdom and Italy. These examples (which date from before 2004) did not progress as far as a state aid assessment in the form of an official decision on the part of the Commission, but the line taken by the Commission is clear (open infrastructure, compatibility with the common market, issuing invitations to tender, aid for underdeveloped areas).

#### **WHAT DOES THE COMMISSION LOOK FOR?**

The criteria used by the Commission when assessing notifications of possible state aid in the field of broadband can be derived from the decisions and projects described above and a number of European Commission publications and presentations. These will be discussed below. Please note that most

decisions published to date have been in relation to remote, rural and/or underdeveloped areas.

In accordance with the criteria laid down in Article 87(1) of the EC Treaty (see Section 1.2.2), the European Commission determines whether or not prohibited aid could be involved. The criteria are cumulative; if all of the various conditions are met, aid is the case. However, at this stage it is not yet certain that this aid constitutes state aid in the sense of Article 87(1) of the EC Treaty. Under certain conditions, some forms of aid will not qualify as state aid.

#### **HOW USEFUL IS THIS INFORMATION FOR YOU?**

For municipalities and provinces, the criteria used by the Commission and the questions raised by it are important tools for the determination of whether or not aid would be involved for a (proposed) broadband project. They can help to ensure that local broadband policy is 'state aid-proof' and be useful for the assessment of proposed or current projects.

If an authority knows what the Commission looks for when assessing whether or not state aid applies, it (the authority) may be able to organise the financing of the broadband project in question in a manner that rules out any involvement of state aid. Where an authority is successful in this respect, the Commission will not have to be notified of the scheme, and this scheme can simply be implemented.

However, where state aid is indeed (potentially) the case, the Commission will, in all probability, have to be notified of the aid scheme. The scheme cannot be implemented until it has been approved by the Commission. In this case, it is important that the municipality organises the scheme in a manner that optimises the likelihood of approval (preferably following the smooth conclusion of the procedure).

## 1.3.2 STEP-BY-STEP PLAN FOR STATE AID



Using the three steps described in Section 1.2.2, authorities themselves must determine (before the project starts) whether state aid could apply to a broadband project:

- Step 1. Ascertain whether state aid could be involved;
- Step 2. If this is the case: see whether an exemption can be invoked;
- Step 3. If this is not the case: notify the Commission of the aid scheme, after it has been structured in a manner that maximises its likelihood of approval.

### Step 1. Assessment

#### DOES THE AID MEET THE FOUR CRITERIA FROM ARTICLE 87(1) OF THE EC TREATY?

To be able to assess whether aid provided by an authority is state aid in the sense of Article 87(1) of the EC Treaty, an aid scheme must be tested against

said article. In its decisions, the Commission summarises the five criteria in four questions (see Section 1.2.2).

The four questions referred to above form the framework. If an aid provider is able to emphatically answer any one of these questions with 'no', the aid provided does not constitute state aid, and the scheme can be implemented without any further interference from Brussels. However, the aid provider must be quite confident of his situation, which is particularly difficult in broadband cases. Consideration must be given to a large number of 'sub questions'. Where applicable to broadband projects, these questions have been identified below. Although the list is not exhaustive, it does provide a good overview of the priorities made by the Commission when assessing state aid in broadband cases. Please also note that the list is not cumulative. It represents a collection of useful tips that can be drawn on depending on the structure and extent of the aid scheme in question.

**I. IS THERE AN ADVANTAGE, WHICH IS BEING FINANCED BY STATE RESOURCES?****WHICH FORM DOES THE AID TAKE?**

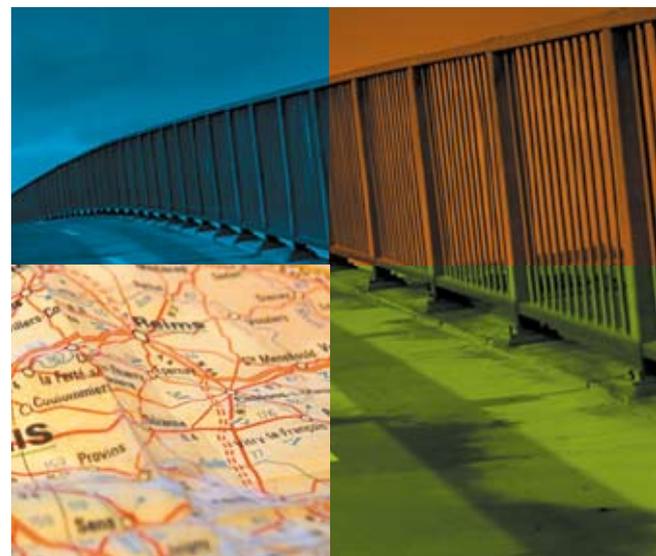
State aid is aid provided by an authority. If an authority contributes to the financing of a project that involves private parties, the 'aid scheme financed by state resources' criterion is very likely to be met. The same also applies if an authority sets up a separate company or uses a public body (such as a development corporation, which does occur in relation to broadband projects). In general, the European Commission (supported by the European Court of Justice) gives short shrift to numerous creative legal and financial constructions. If a market party profits from state funds, state aid may apply, regardless of how the private party obtains said funds. In this context, the Commission itself refers to the 'transfer of public resources'. The following applies for broadband projects too: as soon as financing involves state funds in any way, the first condition of the state aid definition will have been met.

**II. HAS AN UNDERTAKING GAINED AN ECONOMIC ADVANTAGE THAT IT WOULD NOT HAVE ACHIEVED COMMERCIALY?**

For state aid to apply, the aid scheme in question must offer an 'aided' undertaking an advantage that this undertaking would not have achieved under normal, commercial conditions. The terms 'advantage' and 'undertaking' are important here, both of which are interpreted very broadly. As a result, it is very difficult for aid schemes to avoid this assessment, regardless of the shape given to it and the undertaking that aid is provided to (for more information on the interpretation of the term 'undertaking' and the forms possible for aid, see Part II). To be able to objectively assess the wide range of aid schemes, the Commission is strict in its application of the rules. The following questions are raised in relation to broadband projects:

**ARE THE ACTIONS OF THE AUTHORITY COMPATIBLE WITH THE COMMON MARKET?**

An important criterion that is used at this stage to determine whether or not aid applies is the market economy investor principle (MEIP). If the authority enters into an investment scheme with a private party, the Commission will seek to ascertain whether the scheme is compatible with the common market. If this is the case, there may not be any advantage in comparison with the situation that a company would be confronted with in the commercial market. To date, this situation has been rare in relation to broadband in the Commission's decision-making practice, as the authority usually intervenes if the 'market' is in fact unable or unwilling to provide the services required. However, this does not mean that there are no advantage situations: particularly in the case of PPP constructions, which are also popular in the Netherlands, it is important to carefully monitor 'compatibility with the common market'.



Since compatibility with the common market must be demonstrated, well-substantiated administrative and financial documentation of broadband projects is essential. Consideration must be given to factors such as income, return and depreciation periods. Here too, the rules are applied strictly.

A scheme will only offer the possibility of the absence of state aid if strict conditions have been stipulated in relation to compatible interest and repayment (time limit!). State aid may not apply if a project is able to support itself and earn back the aid granted within a reasonable period and against a return that is proportional to the investment risk applicable. In this context, it is important, for example, that one of the requirements imposed on the operator is the optimal commercial operation of the broadband facility.

When assessing whether parties have acted in line with the market economy investor principle, an important factor is whether aid is intended solely for the development of infrastructure, or whether the aided project also includes the provision of services via this infrastructure. In the first case, it usually takes longer before the aid can be earned back, and the return is lower. The Commission recognises this, but in this case too, the invocation of compatibility with the common market must also be substantiated by means of a sound business plan. The network must be operated on a fully commercial basis. As soon as limitations are imposed on the prices that the operator is able to charge, compatibility with the common market will be jeopardised. What is more, an authority would be wise to try to involve private parties in the financing of any project (which may reduce the aid required).

The Commission has published a number of communications on compatibility with the common market in state aid cases. This may also be useful when assessing broadband projects.

The most important way to ensure compatibility with the common market is to make a public call for tender. However, a call for tender does not guarantee that state aid will not apply; see the question below.

#### **WILL A PUBLIC CALL FOR TENDER BE MADE FOR THE PROJECT?**

According to the European Commission, a public call for tender (also see Section 1.2.1) is the best way to ensure that the conditions for an aid scheme correspond with the market price, so that aid is compatible with the common market. However, the (sometimes very emphatically stated) idea that a call for tender rules out state aid is not correct. According to the Commission, the party that wins a contract to design, construct and/or operate new broadband facilities may have a so-called 'first mover advantage': the position that it achieves by means of the aid granted enables it to establish itself as the first player in the new market. What is more, the aid provided enables it to offer its services at lower prices and, by doing this, attract more customers. Even if the winner of the procurement process becomes the co-owner of the infrastructure, the Commission believes that this creates an advantage. Uncertainty about a tender can be provoked by means of the procedure chosen (a negotiated procedure offers more uncertainty than a public procedure does).

In general, the Commission will not honour a 'no-state aid invocation' of a public procedure, while it is certain that state aid cannot be ruled out (not even in the future, after termination of the aid scheme!).

Particularly where broadband projects are concerned, a call for tender is certainly not the 'escape route' that it is assumed to be. Despite this it is important to call for tender wherever possible, whether or not through European tenders. The reason for this is that tendering also plays a role in any approval of aid that is subject to the notification obligation. If no calls for tender are made, the Commission and the court will immediately find fault. The likelihood that an aid scheme will be approved will then diminish considerably.

#### **IS A TYPICAL GOVERNMENT TASK INVOLVED?**

When granting aid for broadband infrastructure, authorities often invoke the fact that this aid forms part of a 'typical government task'. It is assumed that the construction and maintenance of generally accessible and necessary

infrastructure do not fall within the scope of the state aid prohibition. In other words: aid granted for infrastructure of this nature is not considered state aid and, as such, it is not necessary for the Commission to be notified. However, the Commission has indicated that this is only possible under a number of conditions, which must be met in full. In any event, the project in question must be in the general interest, would not (or could not) have been achieved commercially, and steps must have been taken to prevent certain parties from gaining an advantage. If the project is intended for a certain number of businesses (as in the case of a business park or industrial estate) or duplicates existing, commercial initiatives and services, no exception to the state aid regime will apply.

Thus: the ‘infrastructure argument’ only holds where aid is intended for basic infrastructure and passive elements of said infrastructure, such as ducts and dark fibre. To date, the invocation of a ‘typical government task’ has not been successful. If the Commission doubts whether a task of this nature applies, it will be strongly inclined to assume that state aid could indeed be the case.

#### **IS THE AID BEING GRANTED IN COMPENSATION OF A SERVICE OF GENERAL ECONOMIC INTEREST?**

An ‘advantage’ as referred to in the second criterion in Article 87(1) of the EC Treaty may not apply if an aid scheme can be regarded as compensation for the cost of activities that a recipient undertaking carries out in order to perform services of general economic interest. If the aid scheme meets the criteria of the Altmark judgment (see below), it will not be necessary to notify the Commission of the scheme.

#### **SERVICES OF GENERAL ECONOMIC INTEREST**

In Community practice, it is generally assumed that the term ‘service of general economic interest’ (SGEI) refers to services of an economic nature, for which the member states or the Union declare public service obligations applicable in accordance with a criterion of general interest. This term pertains to all economic activities to which public service obligations apply. In addition to

large network industries (transport, post, energy, etc.), other well-known examples are local and regional radio and television, the management and processing of domestic waste, but also social housing. In very general terms, this concerns services that any undertaking operating on a purely commercial basis would not provide, or would provide inadequately, and which serve the general economic interest (not the interests of a particular group). Translated into broadband situations: if broadband is installed at schools, libraries or hospitals, this would be a SGEI. However, if the same occurs for a certain undertaking or group of undertakings, this is not generally the case.

There are no European regulations to determine which services of general economic interest there are and how these are to be organised. Thus, a (local) authority has considerable freedom when ‘designating’ a service as a service of general economic interest, but this freedom is far less great than is supposed; the aid granted for an SGEI must comply with various conditions. For example, the SGEI must have been designated before a compensation applies, and the undertaking performing the service must be doing this on the basis of legislation or a contract. The conditions have been laid down by the European Court of Justice on the basis of case law spanning a number of years, which, in 2003, culminated in the Altmark judgment.

How the Commission applies the four criteria from the Altmark judgment in its assessment of a public service concession for the construction and management of a broadband network can be inferred from the Pyrénées-Atlantiques decision (and the similar Limousin decision).

Before the actual ‘Altmark test’ can commence, it must be determined whether a ‘real’ service of general economic interest applies at all. The Commission stipulates three conditions in this respect:

- a. There are no Community rules on the service in question;
- b. The economic interest in question goes beyond generic economic activities;
- c. The service has characteristics that justify government intervention.

*Condition a: no existing Community rules*

As indicated above, each individual member state determines when a public service obligation or service of general economic interest applies. However, there is a limit to this freedom: no pertinent Community rules may exist (which would, after all, take precedence).

A Communication rule that could be relevant for broadband is the Universal Service Directive (2002/22/EC), which applies to the provision of general basic services (including an internet connection of up to 56kb per second). The Commission believes that broadband does not (yet) fall under these basic services and that, as such, there are no Community rules that stand in the way of the designation of a service of general interest. However, it is important that this concerns areas in which broadband facilities are not present, or only to a very limited extent.

*Condition b: an economic interest that goes beyond generic economic activities*

When assessing whether a broadband facility serves a distinct economic interest, consideration will be given to whether or not the service fulfils a 'general and fundamental need'. This need must be a need on the part of the public in general, not businesses alone. Because access to broadband can promote new activities, such as e-health, teleworking, e-government and e-education ('access to knowledge'), the facilitation of this access is considered economically distinct from the normal market mechanism. For the sake of completeness: general economic development (of a certain area, for example) emphatically does not constitute an argument for the designation of a service as SGEI.

*Condition c: the service has characteristics that justify government intervention*

In order to justify the authority's allocation of a public task to a market party, 'certain characteristics' must also distinguish the service from normal commercial services. In the case of broadband services, it is important that they are not offered (fully) by the market in the area in question, because it is not commercially feasible to do so. The development costs are extremely high, it is difficult to gain financing and, if a private network already exists, there is a

risk that the operator will not grant other parties access to it. In circumstances such as this, the market 'fails' and intervention by the government may be justified. Promotion of the development of a freely accessible network by the government can contribute to the achievement of a level playing field and, as such, counteract the distortion of competition. Once completed, the network must be managed by an independent party and be open for all interested service providers, at a fixed price. Ultimately, the result must be for the network to provide the population with access to broadband services. Once this is the case, the service has, according to the Commission, distinguished itself from normal commercial services and allocation of a task by the government is justified. In the Pyrénées-Atlantiques case, the Commission believed that certain economic peculiarities existed in the cable and network industry in particular to justify intervention by government in certain geographic areas. Later, the Commission emphasised that it may not draw the same conclusion for projects that (contrary to the Pyrénées-Atlantiques case) concern areas where providers are already present, the so-called 'black areas'.

All in all, these 'preliminary questions' form a significant obstacle for broadband projects in the prosperous and densely-cabled Netherlands. The three conditions are undoubtedly easier to fulfil in a remote, thinly built-up, thinly populated and poorly accessible area. If the government believes that it can still overcome this hurdle, it must ascertain whether it can meet the actual Altmark conditions.

**Altmark I:** *the recipient undertaking must actually have been responsible for the performance of public service obligations, and these obligations must have been clearly defined.*

When defining the obligations applicable, a detailed specification is required of the services envisaged. In this situation, a public call for tender for the service concession may be useful; normally, the selection criteria and the summary of additional information and changes as part of a call for tender will contain a description that is sufficiently clear to achieve compliance with Altmark.

**Altmark II:** *the parameters on the basis of which the compensation is calculated must have been determined beforehand, in a manner that is objective and transparent.*

The SGEI exception can only be applied if the payment received by an undertaking for the performance of a service of general economic interest consists solely of compensation for extra costs (compensation principle) necessary for the performance of this service. Therefore, the conditions and calculation method (the parameters) on the basis of which the compensation is calculated must have been calculated and fixed beforehand, in a manner that is objective and transparent.

In general, as soon as parameters allow for any ‘margin of discretion’ when determining the compensation applicable (for example, because they offer the possibility to grant ex-post additional funding, or, in time, make it possible for the operator to earn more from the exploitation of the network than justified by the compensation principle), the Commission will decide that it cannot be ruled out that overcompensation may occur afterwards. In cases such as this, it will not consider Altmark II to have been fulfilled. Even a public call for tender (which is, after all, generally applauded as the best way to achieve the most favourable conditions from the market) does not guarantee that Altmark II will be fulfilled. If a call for tender occurs by means of a negotiated procedure (instead of an open procedure or restricted procedure), this is sufficient reason for the Commission to conclude that compliance with Altmark II is not the case, as the parameters have not been determined in advance (since these are determined in part during negotiations with the tenderers). Incidentally, the legal correctness of the latter interpretation is disputed.

Whatever the case may be, the second Altmark criterion is interpreted very strictly. There will only be a chance of clearing the Altmark II hurdle if compensation is laid down in the contract in advance, both in terms of time and extent, and said compensation is limited. In the French case approved, the parameters laid down in the contract consisted of the determination of the total costs for the project, the exact percentage that the government would contribute, a maximum for this amount and a delineation in time.

**Altmark III:** *the compensation must not exceed what is necessary to cover all or part of the costs incurred in discharging the public service obligations, taking into account the relevant receipts and a reasonable profit for discharging those obligations.*

Altmark III focuses on the subject of overcompensation. Overcompensation is the case if the contribution made by the government to a project exceeds the additional costs that are necessary to perform the public service in question. If discharging the public service obligation generates income (and profit), this may form part of the compensation, provided it is in reasonable proportion to the costs accompanying the SGEI.

In some situations, the fact that a contract has been awarded on the basis of the lowest price may not guarantee that overcompensation is avoided. This will apply if the contractor has exclusive access to an infrastructure (in broadband cases, read: network), or if competition in the sector is very limited (which will certainly occur in rural and remote areas).

This can be resolved by including a requirement in the concession contract to the effect that a separate entity will be created to discharge the public service obligation. In this way, the contractor’s commercial and public activities, both financial and legal, are kept strictly separate. Added to this, the contract must provide for a technical and financial verification and audit system. Finally, a reverse payment mechanism must be provided for, as this will be needed if the profit that the contractor achieves for discharging the public service obligation exceeds a certain (absolute) amount (and/or an amount based on a certain percentage).

**Altmark IV:** *when, in a specific case, the undertaking to be responsible for discharging public service obligations is not chosen in the context of a public procedure, the compensation applicable must be determined on the basis of the costs that a typical, well run undertaking, which is equipped to be able to meet the requirements applicable for the public service, would have incurred in order*



*to discharge these obligations, taking into account the relevant receipts and a reasonable profit for discharging the obligations.*

There are two solutions that make it possible to comply with Altmark IV: the contract must be awarded by means of an open tender procedure (as part of which a competitive market ensures that the candidate with the lowest costs wins), or a comparison must be made with the costs that a typical, well-run market party would incur in the discharge of the public service obligation.

In the French cases (following an extensive investigation and a complex procedure), the authorities started by analysing ten scenarios, in which they used variables such as geographical coverage, the maximum subsidy, the level of investments, etc. This made it possible to calculate various solutions for the performance and financing of the public service, in a way that was objective and transparent, and it was also possible to determine how the services determined could be performed for the lowest possible cost.

Next, the authorities launched a public call for tender, in order to select a concessionary. The latter was obliged to set up a legally independent company, the bank accounts for which were audited on a regular basis. What is more, by

concluding a 'reverse payment arrangement', allowance was made for income that might exceed a reasonable level of profit.

It was striking that the winner was selected not only on the basis of quantitative, but also qualitative criteria (geographical coverage, 'quality' of the business plan). As such, 'Altmark IV' was interpreted on a functional rather than a literal basis. The Commission looked at the object of the criterion (lowest costs and the most efficient operator) and determined that the method used by the French authorities was the best one.

Thus, the Commission agreed because, in this case, the use of qualitative criteria and a procedure that was just partly public were considered necessary for the achievement of the result required. Another factor taken into consideration was the situation that, given the complexity and development of technology, it was impossible to specify the contract in detail in advance.

To summarise: in the case of aid for the development of new broadband infrastructure (not in the case of aid for services!), the invocation of the service of general economic interest exception may offer some hope of success. The financing of infrastructure may be a way of providing for a service of general

(economic) interest, which – if the infrastructure is accessible for everyone – will not seriously distort competition (in remote and/or rural areas, for example). If a public procedure is well-substantiated, the Commission will assess it on a functional rather than a formal basis. Incidentally, the likelihood of the successful invocation of a service of general economic interest is limited where direct commercial competition exists.

For the sake of good order: the above is merely a summary of the extensive and complex procedure followed by the French authorities. If a Dutch municipality is to have any chance of success with a similar procedure, this will certainly require careful studying of the decision and expert legal assistance.

If all of the conditions referred to above are met, it will not be necessary to notify the Commission of the aid scheme.

#### **IS THE INFRASTRUCTURE A ‘PUBLIC INFRASTRUCTURE’?**

If a public broadband infrastructure is to be constructed, and is (and will continue to be) 100% state owned, state aid may not apply. After all, a ‘public infrastructure’ of this nature does not confer any advantage on a particular undertaking, but is a public service (similar to a road, bridge or port). In this situation, it is important that tendering occurs according to the rules and that the infrastructure is made available to everyone in a manner that is non-discriminatory and compatible with the common market. As soon as the infrastructure is operated by a third party (or a municipal service that can be designated an undertaking), the other state aid rules will come back into play.

#### **WILL THE OPERATOR PROFIT FROM THE AID SCHEME?**

In broadband projects, the management and/or exploitation of the infrastructure is/are often outsourced to commercial third parties. These are economic activities, and if the party that performs them (the operator) enjoys a financial advantage conferred upon it by the State, competition will be distorted and state aid may apply. The following cases are clear indications of the above:

- throughout the term of the aid scheme, the operator is the exclusive provider for local (government) institutions;
- following termination of the aid scheme, the new infrastructure remains the property of the operator, which is able to commercially exploit the network.

In order to avoid any advantage (and, thus, state aid too) the conditions to be met must include the following:

- the exploitation concession or financial aid granted will depend on the consent of the government, including the condition that the nature of the infrastructural service continues to be a facility that is available for different users and activities;
- proof must be given of the private operator’s payment of an appropriate compensation that is compatible with the common market, or, where a contribution has been made to the financing, which was at least the minimum amount required to ensure the project’s continuation;
- the concession or financing was granted by means of an open, transparent and non-discriminatory procedure (preferably, by means of a call for tender).

#### **WILL END USERS PROFIT FROM THE AID SCHEME?**

The European Commission understands ‘end users’ to mean the private individuals and businesses that (will) use the broadband facilities realised with the state aid provided. Private individuals are not subject to the state aid rules, but businesses are. According to the Commission, as soon as businesses start to enjoy a financial advantage from the aid scheme, an advantage applies that they would not normally have enjoyed under normal market conditions, and, as such, state aid may apply. This is the case, for example, if businesses profit from prices for broadband services that can be kept below the market price as a result of the aid granted.

Particularly when aid is granted to end users, it may be possible to invoke the de minimis rule (for more information see below, under ‘Does the aid fall under the de minimis exemption?’).

**DO 'THIRD-PARTY' PROVIDERS PROFIT FROM THE AID SCHEME?**

State aid may apply even in situations involving an open network, which is being managed correctly by the municipality or a commercial party. If the aid provided causes the prices calculated for use of the network to be lower than the market price under similar circumstances, this may mean an advantage for parties that provide services via this network. Thus, an aid provider must ensure that this does not happen, for example by laying down that network use must occur on the basis of reasonable prices.

**III. IS THE ADVANTAGE SELECTIVE? ARE 'CERTAIN UNDERTAKINGS OR PRODUCTIONS' BEING FAVOURED?**

In broadband projects, the selectivity criterion will be soon be fulfilled, since a scheme that focuses on one sector is by definition selective. Therefore, the Commission considers an aid scheme to be selective if it focuses on undertakings in the telecommunications sector that provide broadband services. What is more, the fact that broadband projects are often limited to part of a member state's territory means that selectivity applies. If a scheme is to avoid selectivity, it must 'be available to all enterprises, in all sectors of the economy and without any territorial limitation and without discretion'. According to the Commission, where it cannot be ruled out that the undertakings involved are or will be involved in trade activities between member states, it will immediately answer the 'selectivity question' in the affirmative.

**IV. DOES COMPETITION DISTORTION OR DISRUPTION OF TRADE BETWEEN THE MEMBER STATES APPLY?**

A negative effect on trade is assumed if the aid scheme affects businesses from other member states that also operate in the broadband market (operators, service providers, etc.). Since the European broadband market is becoming increasingly liberalised, and its players generally operate at an international level, in broadband cases the Commission quickly accepts that an aid scheme will affect trade. Consideration is also given to any secondary effects:

undertakings that use the 'aided' broadband services may enjoy an advantage in comparison with their competitors in other member states.

**Step 2. Exemption?****IS IT STILL POSSIBLE TO AVOID NOTIFICATION?**

If the criteria laid down in Article 87(1) have been met and it is not possible to invoke services of general economic interest, state aid applies, and the European Commission must be notified, in principle. At this stage, it will only be possible to avoid this if one of the exemptions provided for by the Commission can be invoked.

**DOES THE AID FALL UNDER THE DE MINIMIS EXEMPTION?**

The European Commission assumes that limited aid amounts will not affect trade and (thus) will not distort Community trade. The de minimis rule was created in view of this assumption. Incidentally, the de minimis is not a 'real' exception regulation; if the conditions are met, state aid does not apply (and, as such, an exemption from the rules is not required either).

In general, broadband projects are large and expensive. Therefore, when financing infrastructure and service provision, the threshold for the de minimis exemption (€ 100,000 per undertaking over a period of three years) is soon exceeded. Despite this, the de minimis is sometimes invoked in relation to broadband projects, particularly for so-called aid to end users. Usually, one of the objects of broadband aid is the provision of broadband facilities to businesses and private individuals. Private individuals are not subject to the state aid rules, although smaller businesses are, and aid for a broadband project (with the lower prices that accompany this) could favour them in respect of businesses situated outside the project area. If a limited amount is involved per company, the de minimis rule could apply for these companies. However, it is then important for the rule to contain guarantees, particularly a guarantee to the effect that the requirements stipulated by the de minimis regulation in relation to accumulation and maintaining detailed



records are met. Otherwise, the Commission will assume (it already has in one case) that ‘it cannot be ruled out’ that the de minimis threshold will be exceeded and that state aid could apply.

#### **IS IT POSSIBLE TO INVOKE A DIFFERENT EXEMPTION?**

There are a number of exception regulations, but only one of these regulations applies, i.e. the exception for small and medium-sized enterprises (the SME exemption). This exemption is intended to facilitate the development of SMEs. The cost of technology transfer and costs for advisory services are generally eligible for exemption. If an aid scheme can be considered eligible for this

exemption, it will not be necessary to notify the Commission in advance. However, summary information must subsequently be provided, and ceilings and report obligations will apply. To date, this exemption has not been invoked in broadband practice.

In July 2005, the European Commission adopted a new exemption decision adopted for relatively small compensations for services of general economic interest. This exemption applies to annual compensations that do not exceed an amount of 30 million euro, provided the annual turnover of the recipient undertaking remains under 100 million euro. The exemption also applies for

social housing, regardless of the level of the compensation. Experience will show whether and the extent to which broadband projects will be able to 'profit' from this. The Commission must be notified of all compensation for services of general economic interest that do not meet the Altmark criteria and which do not fall under this exemption decision. The Commission will apply new regulations for approvals, which regulations were also approved in July 2005.

#### **NO NOTIFICATION REQUIREMENT, BUT STILL NOTIFY THE COMMISSION?**

In some situations, on the basis of the criteria above, the aid-granting authority may conclude that state aid is not involved and that, as such, it is not necessary to notify the Commission. However, this conclusion will never offer complete certainty. If it is later found that the conclusion was incorrect for whatever reason, the scheme may as yet be found to be prohibited or incompatible. After all, ultimately, the Commission alone is able to decide on whether or not the aid granted is compatible with the common market.

It is, therefore, possible to notify the Commission of a scheme that does not constitute an aid scheme for the purpose of legal certainty. The administrative requirements applicable in this respect are virtually identical to those for a 'standard' notification; so, the procedure involves the same amount of work and time. The advantage is that, at the end of the procedure, the parties involved know for certain whether or not state aid applies. If it does not, it would seem obvious to repeat the procedure for future schemes. By doing this, parties can be satisfied that their decision not to notify the Commission is the right decision.

However, please note that this procedure is particularly useful for real cases of doubt. Parties should not inundate the Commission with files for the sake of legal certainty. Prior consultation is recommended with the State Aid Coordination Point at the Ministry of the Interior and Kingdom Relations (municipalities and provinces) or the Ministry of Housing, Spatial Planning and the Environment (housing associations).

A less 'official' route is the informal sounding out of the Commission as to whether it considers that a particular scheme is subject to the notification requirement. Although the result of a consultation of this nature is an indication rather than legal certainty, in practice this is often enough to be able to decide whether or not to notify the Commission.

### **Step 3. Notification**

#### **WHAT'S THE BEST WAY TO MAKE SURE AN AID SCHEME IS APPROVED?**

If an aid scheme meets the criteria laid down and no exemption applies, it must be submitted to the European Commission for its assessment. Parties often dread the notification procedure. Despite this, by far the majority of aid schemes (more than 90%) are 'approved' (in formal terms: declared compatible), albeit it sometimes after prolonged deliberation. The likelihood of a speedy approval can be influenced. If, when developing the aid scheme, consideration is given to case law and the guidelines, announcements and previous decisions by the Commission, and if the scheme seeks to harmonise itself with specific European policy objectives, the likelihood of a favourable decision increases considerably.

Below, the legal basis of the assessment practice is considered, and is followed by a summary of the questions (that could be) asked by the Commission in broadband cases; some questions will not apply for all projects. By familiarising yourself with them (and ensuring that you are able to satisfactorily answer questions relevant for you), you will know what to take into consideration when seeking to ensure that an aid scheme is declared compatible.

#### **WHAT DOES THE COMMISSION BASE ITS APPROVAL ON?**

The EC Treaty offers the European Commission two opportunities to declare state aid 'compatible with the common market', despite said aid being prohibited in principle. In this type of case, the Commission assesses cases 'directly in relation to the Treaty'. For broadband aid, Article 87(3)(c) alone is relevant. It reads as follows:

*‘The following may be considered to be compatible with the common market: (...) aid to facilitate the development of certain economic activities or of certain economic areas, where such aid does not adversely affect trading conditions to an extent contrary to the common interest.’*

To date, most aid schemes subject to the notification requirement and relating to broadband projects have been examined in relation to this article, partly because specific broadband rules are (still) absent (so: examination directly in relation to the EC Treaty). They have all been approved. Therefore, in order to increase the likelihood of approval, it is important, when establishing the aid scheme, to take into consideration the criteria that the Commission applies in its examination. The Commission’s examination consists of two parts: the necessity test and the proportionality test.

Please be aware that criteria for both of the tests outlined below do not form a cumulative examination (as is the case for the criteria laid down in Article 87(1)). The summary below sets out the factors that are taken into consideration when approving an aid scheme. The Commission ascribes more weight to some elements than to others. The summary is as complete as possible, but is not exhaustive: other questions may be asked in individual cases.

#### **WHAT DOES THE COMMISSION LOOK FOR IN ITS NECESSITY TEST?**

In its necessity test, the Commission seeks to ascertain whether the aid scheme is necessary for the achievement of the objective in question. At this stage, particular consideration is given to the question of whether the scheme is in line with the political and economic objectives of the European common market. The starting point is that the development of broadband must be promoted in areas where broadband development is not of interest to commercial parties. At the same time, the Commission also takes its role as protector of the free market very seriously. A positive outcome of the necessity test requires a detailed motivation and documentation on the aid scheme in question. The Commission’s decision-making practice shows that the following questions amongst others should be taken into account:

#### **DOES THE AID SCHEME REFLECT THE OBJECTIVES OF THE LISBON AGENDA?’**

At the Lisbon European Council in 2000, it was decided that the economy of the European Union must be the ‘the world’s most competitive and dynamic knowledge-based economy’ in 2010. In order to achieve this objective, the eEurope Action Plan 2005 was developed, amongst other things, followed, at the end of 2005, by the European information Society 2010 action plan, referred to as i2010. The Europe-wide distribution of affordable broadband, including the promotion of broadband services and the development of infrastructure, is a ‘fundamental’ part of one of the European Union’s most important policy objectives. Therefore, when developing plans for aid for broadband projects, it would be wise for authorities, when explaining their reason for the aid in question, to follow on from the objectives of the Lisbon Agenda and the formulations of eEurope 2005 and i2010. The inclusion of objectives such as improved, faster and more affordable access to internet, the investment in relevant training and the promotion of e-commerce and e-government, will certainly contribute to a positive outcome of the necessity test. In decisions in which the Commission has declared aid compatible with the EC Treaty, reference is invariably made to ‘Lisbon’, eEurope 2005 and, since May 2005, to i2010.

#### **IS MARKET FAILURE THE CASE?**

Market failure is one of the arguments used most by municipalities wanting to provide aid for broadband projects. The demonstration of market failure also occurs in the ‘Altmark test’. So, if unsuccessful in the Altmark test, the necessity test offers a second opportunity to invoke market failure.

In principle, the Commission recognises that the development of broadband (by the government) must be promoted in areas in which the market is ‘failing’: without government intervention, commercial parties would not offer broadband facilities and services at a reasonable price. However, this concerns less well developed, poorly-accessible areas, with a small population and a relatively low level of income. Below a certain population, it is not interesting for market parties to develop broadband in these areas. The infrastructure investments in particular do not stack up against potential receipts. The need,

then, for government to promote broadband arises from the Lisbon Strategy, which, after all, is geared towards the achievement of an ‘information society’ for all European citizens and businesses.

The invocation of market failure (and, as such, the need to provide financial support for intervention) must be substantiated with all due care, starting with the identification of existing infrastructure and services. What is more, care must be taken to ensure that a competitive market is guaranteed in the future, by stipulating free access to the new network. Finally, steps must be taken to ensure that any existing infrastructure is not duplicated (even though the Commission acknowledges that this is not always possible).

#### **IS THERE REGIONAL AID OR AID FROM STRUCTURAL FUNDS?**

Aid granted to economically less well developed regions may fall under the Commission’s regional objectives. Subject to strict conditions (laid down in a so-called aid framework), aid may be permitted. However, the rules apply solely to the areas covered by the so-called aid map (in the Netherlands, this concerns a limited number of areas in North Holland, Twente, South and Central Limburg, Lelystad and Urk). In view of the strict conditions and the fact that the Dutch aid map may disappear altogether at the end of 2006 (if the aid programmes are revised), this question is probably less relevant for Dutch broadband projects.

Money from the European structural funds (more specifically, money via the European Fund for Regional Development) must also be issued in accordance with the state aid rules. In 2003, the Commission issued an Announcement on the exact procedure applicable in the electronic communication sector in this respect (see ‘Practical issues’ below). The Announcement focuses primarily on aid for broadband, particularly in sparsely populated rural areas, which are geographically isolated.

#### **WHAT DOES THE COMMISSION LOOK AT IN ITS PROPORTIONALITY TEST?**

In the proportionality test, the Commission assesses whether aid is in proportion to the objective of the aid scheme in terms of duration, intensity

(the percentage of aid in relation to the total cost of the project) and scope. Aid must not distort competition in a manner that is detrimental to the general interest. The Commission assesses the advantages of regional economic development and a contribution from the Lisbon Strategy against the disadvantages possible: the distortion of free competition and the discouragement of private investment. In concrete terms, this translates into the following questions:

#### **IS THE AID RECIPIENT SELECTED BY MEANS OF A PUBLIC TENDER?**

If the recipient of aid is selected by means of a public tender, the Commission regards this as positive (although this does not guarantee approval). The procurement process is believed to keep government interference and the government’s contribution to a minimum. The ‘private’ provision of aid to a known party or to a party set up specifically for this purpose is incompatible with the (Treaty) starting points, i.e. transparency, public access and non-discrimination, and considerably reduces the likelihood of approval.

#### **WHICH TASKS FALL UPON THE RECIPIENT OF THE AID?**

If the operator of a new broadband network receives aid for its activities, it must be ensured that it is not in direct competition with telecom providers and service providers that are not receiving aid. To ensure that it actually does this, the contract must state that an operator’s tasks are limited to maintenance, management and leasing of the passive infrastructure. In short: the facilitation of tasks that are essential for the provision of services by other (commercial) parties.

#### **IS THE PROJECT TECHNOLOGICALLY NEUTRAL?**

In order to prevent market disruption, a project may not, in principle, opt for one particular technology. The best method is to describe the service envisaged in as much detail as possible, and to leave the choice of technology to the service provider. If, despite this, it is decided not to make the selection criteria applicable ‘technologically neutral’ (and, thus, an explicit choice is made for ADSL, cable, optic fibre, satellite, wireless, etc.), these choices must be

substantiated in various ways, including a cost-benefit analysis, which outlines a number of alternatives for the service provision envisaged. Thus, do remember that choosing optic fibre (often the favourite choice of Dutch municipalities) will not be considered technologically neutral!

#### **DOES A FREELY ACCESSIBLE NETWORK (OPEN ACCESS) CONSTITUTE A CONDITION FOR AID?**

Aid for a new broadband network is more likely to be declared compatible if the network is freely accessible. The obligation for an operator to lease network capacity to third parties (commercial parties) in exchange for aid is a ('pro-competitive) solution that the Commission prefers to attempts to force dominant market parties to use the network.

Conditions must be transparent and non-discriminatory. For example, the prices calculated must be published and any technical facilities required must be made available. If, following the termination of the contract, the operator remains the owner of the network, it is recommended that it be stipulated that the new infrastructure continue to be freely accessible for third parties after the contract period, subject to non-discriminatory conditions. If open access is guaranteed in this manner, this will contribute significantly to a positive assessment.

#### **IS AN EXISTING INFRASTRUCTURE BEING USED?**

A broadband project will require a network, but the construction of a new infrastructure is by far the most expensive solution. If a suitable infrastructure is present, it is more efficient to buy and/or lease it from third parties. Therefore, the Commission prefers the latter; particularly because parties that already have infrastructure in the area in question can bring this into the project, which reduces the consequences resulting from the disruption of the market by the new 'aided' network.

Of course, construction is sometimes unavoidable, and in many cases a combination of construction, buying and leasing will prove the most efficient solution. Therefore, it is recommended that the service provider be allowed to choose how to procure the infrastructure required. To reiterate: the use

of existing infrastructure and collaboration with existing operators wherever possible is the preferred choice. Overlap (the construction of a new network next to an existing network) must be avoided wherever possible. A pure replica of an existing network will not withstand the proportionality test.

#### **IS THE AID BEING GRANTED SOLELY FOR INFRASTRUCTURE OR ALSO FOR BUSINESS SERVICES?**

Aid for broadband projects is usually granted for the development and management of the infrastructure. However, sometimes, aid is also provided for business services: the obligation to provide service to (end) users via the network services forms part of the contract tendered for (end-to-end service). In general, the provision of aid for services increases the likelihood of market disruption, but can also have advantages. The Commission has summed up a number of positive and negative factors that it takes into consideration in the proportionality test.

##### *Positive*

The requirements imposed on services to be provided are usually described in less detail than the requirements imposed on infrastructure and technical resources. According to the Commission, this has a number of advantages, including the fact that it will be possible to use existing infrastructure at an earlier stage than new infrastructure.

If the construction and management of new infrastructure is less important than the rapid provision of broadband services, the provision of aid for business services may have advantages. If business services are included in the conditions for the project, the authorities will have more influence on the content of the services and on the time at which they are provided (otherwise, there is a risk that market parties will not deem the project economically viable, resulting in an infrastructure without any services).

A project that also includes services offers more commercial opportunities for the party that wins the contract. This may mean that private parties are more

inclined to invest in the project, which means, in turn, that less public money and lower aid intensity are needed.

#### *Negative*

Projects that also include services are more likely to distort competition than ‘pure’ infrastructure projects are. After all, the number of markets that may be influenced by them is greater, and they normally have less of a need for state aid (services via broadband). Usually, aid for the non-discriminatory provision of capacity in an open infrastructure is already sufficient for the creation of a market in which services are supplied by a number of providers.

If an operator has to offer services, it has an advantage in that it also manages the infrastructure. This is considered a disadvantage in comparison to the

situation applicable in most infrastructure projects, in which the authority remains the owner of the network and leaves its management (in the form of a fixed-term concession) to an independent ‘neutral’ party, which is not permitted to act as a service provider.

Finally, aid for services can also create an advantage for the party selected, which will have the first opportunity to provide services via the new network. This may result in the exclusion of other potential providers.

All in all, the Commission concludes that aid for services is more likely to disrupt the market than aid for infrastructure (despite the fact that the latter is often accompanied by higher costs).

#### **IS THE AMOUNT AND INTENSITY OF THE AID PROPORTIONAL?**

To achieve a positive answer to this question, it is important to stipulate that (some of) the aid granted will be repaid, as demand for the services aided increases (reverse payment mechanism). According to the Commission, this ensures that only the minimum amount of aid required is provided. In addition, it is important that aid is placed with operators, service providers and end users as little as possible (these parties could otherwise gain an advantage that is incompatible with the common market).

In short: the less aid is granted and the lower the intensity (the percentage of aid as a proportion of the total cost of the project), the more aid will be considered proportional.

#### **CAN THE AID CAUSE THE PRICES FOR BROADBAND SERVICES TO DISTORT COMPETITION?**

Aid providers must ensure that the aid provided does not cause the price of services provided to businesses via a broadband project to be too far below the market price. Failure to do this might result in the distortion of competition and curb investment by market parties. Added to this, disproportionately low prices may cause more aid to be granted than is strictly necessary for the provision of



broadband services in areas that are digitally disadvantaged. Therefore, prices must be in reasonable proportion to the prices charged by service providers in areas that do not benefit from aid. When determining this proportion, the prices of existing service providers can be used as a benchmark.

In general, it can be concluded that aid providers must ensure that no discrimination occurs between commercial customers of 'aided' broadband services and their colleagues in areas where market prices are charged.

#### **IS THE AID SCHEME SUFFICIENTLY TRANSPARENT (FROM A FINANCIAL POINT OF VIEW)?**

Aid schemes are often complex and there is always a risk that State funds will be used in a manner for which they are not intended. Overcompensation (in situations where more aid is granted than necessary for the compensation of extra costs) and cross-subsidisation (where aid is used for a purpose other than that for which it is intended) must be avoided. Therefore, the financial aspect of the aid scheme must be transparent and possible to monitor. This can best be achieved by ensuring that the costs eligible for aid are clearly specified and by demanding that separate accounts are kept. What is more, (independent) audits must be carried out on a regular basis.

A good (i.e. approved) way to avoid overcompensation in broadband cases is to link aid directly to demand for broadband services. As demand increases, a percentage of the income for the service provider is offset against the aid provided. In this way, the service provider only receives compensation (plus a reasonable remuneration) for the extra costs incurred by it in order to provide the services required.

Where aid is provided for a broadband project, separate accounts (in accordance with the regulations laid down in the Transparency Directive) can be included as a requirement in the contract with the service provider. Commercial and non-commercial activities must be entered separately in these accounts. In this way, the correct amount of compensatory aid can be

calculated and accounted for, and overcompensation and cross-subsidisation can be reduced.

#### **IS THE AID LIMITED IN TERMS OF TIME?**

A clearly-defined period for the provision of aid will contribute to the proportionality of the scheme. The period must also be reasonable; a limit of 3 to 5 years is usually maintained for broadband projects. In general, the shorter the period for which aid is provided, the better.

#### **DOES DEMAND AGGREGATION APPLY?**

Demand aggregation is the coordination and bundling of local or regional demand from government authorities, institutions and businesses, making it possible for a broadband network to be constructed in the manner most efficient. The Commission believes that demand aggregation may constitute state aid, because aggregation can create an advantage for the winner of the 'aggregated' contract. After all, the winner will be assured of a certain number of commissions during the term of the contract, which commissions are not available for possible competitors. In this case too, the Commission does not believe that tendering will guarantee the absence of state aid.

In order to avoid demand aggregation becoming a stumbling block in the proportionality test, it is recommended that the following points be taken into account:

- The extent and duration of the contract must be proportional (more specifically: aid should not be too substantial, nor be provided for too extensive a period);
- Allowance must be made for the fact that demand for the services included in the contract will probably grow during the period in which aid is granted. After all, this demand will not manifest itself on the free market, but will automatically reach the winner of the contract, which may create an advantage for this party. In the contract, allowance should be made for compensation for this advantage.

The specific application of the above points for attention (so: when demand aggregation is proportional) must be determined on a case-by-case basis. After all, this will depend on the wishes and characteristics of the market in which a project is being implemented. In general, demand aggregation for which the above has been taken into account will not result in prohibited state aid.

**DOES THE AID CONFER AN ADVANTAGE ON COMMERCIAL END USERS?**

‘Commercial end users’ are businesses that use broadband facilities that have been made available by means of state aid. If, as a result of aid, the prices for

broadband services can be kept disproportionately lower than the market price, this confers an advantage on these businesses over their colleagues in areas without State-aided services. In order to prevent this, it must be stipulated that services will be provided at a competitive price, the benchmark for which could be the average prices charged by a major national provider.

## 1.4 Summary



This chapter provides a number of guidelines for the assessment of broadband projects under European law. The general European rules described can be used to make sure that broadband projects are ‘Europe-proof’. However, it is not possible to provide a ready-made solution in this respect, due to the great variety of broadband projects.

When a municipality or province wants to spend money, in whatever form, it must be ascertained whether tendering is desirable or essential. When procuring works, services and/or supplies, the ‘ordinary’ procurement rules apply. Tendering or, in any event, the awarding of contracts according to a transparent and public procedure, is very important to the assessment of

whether or not state aid applies. Without correct tendering, the outcome of a state aid assessment is virtually certain to be negative. We recommend that you opt for the procurement process whenever you are in any doubt!

Another important element is free access to the broadband network envisaged. If a network is open for all service suppliers, free competition will be possible. The European Commission attaches great importance to free competition.

The European Commission particularly wants to promote broadband in remote, sparsely populated and rural areas. These are areas in which broadband infrastructure is entirely or partially absent and where competition is limited.

The Commission must certainly be notified of broadband projects – for both networks and services – that focus on businesses in areas where broadband competition already exists. Notification will always be necessary if it is not possible to invoke: 1) a service of general economic interest; 2) the ‘Altmark-criteria’; 3) the criteria of the exemption decision for small-scale services of general economic interest.

We advise you to bear in mind that the European Commission wants to promote broadband, but that this ambition is limited by the principles of free competition. Therefore, the provision of aid for broadband projects must at least be compatible with the common market and be financially transparent.

Good substantiation is essential. The likelihood of approval is maximised if an authority demonstrates that it is doing its utmost to disrupt the free

market as little as possible and to observe European rules. Europa Decentraal [the knowledge centre on European law for local authorities], the umbrella organisations and the ministries can offer you support in this respect. We advise that you submit any questions or uncertainties that you have to the European Commission before starting a project.

This chapter sets out all current developments in terms of state aid and tendering. We anticipate that new developments will occur, which will also affect the European law aspects of broadband. Interest in this subject is clear from the new decisions and judgments issued by the Commission, for instance. Therefore, we strongly advise that you follow developments. To do this, you may want to consult the authors of this guide, amongst other individuals and/or organisations. See the appendix to this document, entitled ‘References and background information’ for the relevant names, addresses and websites.



## Broadband issues: descriptions from the field

## 2.1 Introduction

In various broadband initiatives, the art is to strike the right balance between a promoting role on the one hand and legislation, regulations and a healthy competitive market on the other hand. Therefore, in its government position on the ICM report<sup>9</sup>, the Cabinet indicated how broadband could be promoted. The presence of a healthy competitive market must also be nurtured, as this is important for the development of the telecoms market and economic growth. Added to this, a healthy competitive market ensures equal opportunities for all parties and an optimal price-quality ratio for consumers. The Cabinet's recommendations may help municipalities to develop their broadband ambitions and broadband policy objectives. In this chapter, these recommendations will be discussed through a number of questions, practice-based examples and a step-by-step plan.

### WHICH QUESTIONS WILL BE RAISED?

No two broadband projects are the same. Political ambitions and policy objectives may vary, as well as regional context and local supply and demand. However, several central questions are essential to the well-considered and effective promotion of broadband. These questions are raised in this chapter and have been derived from a report providing recommendations on broadband activities, which report was published by the Inter-departmental Competition Committee in 2004, and the government position on this report.

The following questions will be discussed in this chapter:

1. Which role do municipalities play in the value chain?
2. How do municipalities respond to state aid rules?
3. Is a cost-benefit analysis necessary?
4. How do municipalities respond to European procurement rules?
5. Which choices and conditions apply when designing or constructing a network?
6. How can municipalities ensure the clear separation of interests?
7. How do municipalities respond to competition rules?
8. How can municipalities avoid a truck system?

### HOW SHOULD THE PRACTICE-BASED EXAMPLES BE INTERPRETED?

The practice-based examples provided in this chapter will be described in line with the various questions applicable. They may form a source of inspiration and show how the rules can be applied in practice. Many municipalities had already made a start before the Cabinet published its position further to the ICM report. The various practice-based examples, which have been described as objectively as possible, illustrate how municipalities have responded to one or more of the eight questions raised. In each case, these examples are illustrative of the question at hand, but not necessarily of the other questions raised. Added to the above, the examples given are subject to change due to the dynamics of the broadband market. Municipalities are becoming increasingly more inventive in their development of new models that reflect new market developments and legislation and regulations. These dynamics will result in other, new issues, while yet others become less important. It must be emphasised here that although this guide provides a number of practice-based examples, this does not mean that all of the relevant rules have been complied with in full in these examples.

### WHICH MODELS DO MUNICIPALITIES USE?

There are a wide range of broadband projects, in which the extent and form of municipality involvement varies considerably. Therefore, each project is

<sup>9</sup> Government position on the ICM report providing a number of recommendations on broadband activities by public organisations [Aanbevelingen breedbandactiviteiten publieke organisaties] (26 643, no. 57). This report looks in more depth at possible market disruptions accompanying municipal initiatives.



unique to a certain extent. The projects vary in terms of the role played by the municipalities involved and in terms of project management, organisation and implementation. The way in which projects are embedded within the local environment and context varies too. Although, ultimately, each municipality opts for its own specific structure and organisation, four main models can generally be distinguished:

1. the demand aggregation carrier-owned model<sup>10</sup>;
2. the demand aggregation customer-owned model<sup>11</sup>;
3. the partnership model or public-private partnership model (PPP);
4. the public, managed dark fibre model<sup>12</sup>.

#### THE ROLE PLAYED BY HOUSING ASSOCIATIONS

Housing associations play an important role within these models, as they hold considerable housing stock. Various associations have expressed intentions, and other associations are already involved in broadband initiatives. Numerous associations are currently considering the nature and extent of their role. For example, they could act as demand aggregators or become involved in demand aggregation initiatives run by other parties. This will make it possible for them

to connect their properties up to a (fibre optic) network. Of course, when doing this, they will be bound by current statutory frameworks, such as the Subsidised Rented Sector (Management) Decree. In specific terms, this means limiting themselves to the funding of connections to be constructed and managed (by third parties), up to the closest connection point in the area<sup>13</sup>. Network ownership – whether or not via a holding in the network company in question – is prohibited for housing associations within the present frameworks.

The table below briefly sets out the different models and the role played by housing associations, together with the practice-based examples provided. This chapter will conclude with a detailed overview in which the models are set off against the eight questions discussed. The role played by housing associations is also included in the overview.

<sup>10</sup> Network ownership remains with the network company.

<sup>11</sup> The network is owned by the organisation (municipality, foundation, private limited company (BV)) that launched a public tender for the network.

<sup>12</sup> 'Managed fibre' is a term that is used if a party only offers fibre-optic capacity. The actual transmission of information over these lines ('lighting') lies with the customer. The supplier only manages physical maintenance (digging work, etc.), which is why the term 'managed' is used.

<sup>13</sup> This is a broadening of the term originally used: 'plot boundary approach' [erfgrensbenadering].

TABLE: AN EXPLANATION OF THE FOUR GENERIC MODELS AND THE ROLE PLAYED BY HOUSING ASSOCIATIONS

MODEL	EXPLANATION	PRACTICE-BASED MODEL
Demand aggregation carrier-owned model	<p>The aggregation of demand for a broadband connection is performed by a municipality, (semi-)public or private institution. This usually involves a municipality initiative or an initiative by (semi-)public organisations.</p> <p>1. Open market place: By means of an independent market place for service providers, market parties open up their carrier-owned fibre optic networks to businesses and institutions. The municipality aggregates demand, but does not invest in the infrastructure.</p> <p>2. (Semi-)closed user group: A user group attains user rights within the carrier-owned model, often geared towards public institutions. This user group usually initiates demand aggregation (idem).</p>	<p>Deventer, Zwolle, Amersfoort</p> <p>Breda</p>
Demand aggregation customer-owned model	<p>1. Together, various public (and private) parties have a managed dark fibre network constructed for their own use. The participants themselves are responsible for the development of the active infrastructure layer and the service layer<sup>14</sup>.</p> <p>2. Cooperative ownership, as part of which the members construct a(n operational) network.</p>	<p>Eindhoven, The Hague</p> <p>Nuenen</p>
Partnership model or public-private partnership model (PPP)	An authority is a co-investor, launches an open tender for the construction and management of the active layers and regulates (open) access to the services layer.	Amsterdam, Almere
Public managed dark fibre model	A government institution instructs the construction of a dark fibre network and leases access to customers and operators in the active layer. In practice, there are many variations on this model.	Rotterdam
Role played by housing associations	Housing associations initiate the connection of their housing stock to a broadband network.	

<sup>14</sup>In the section below, the layers will be explained in the layers model.

## 2.2 How do municipalities respond to the various questions?

### 2.2.1 WHICH ROLE DO MUNICIPALITIES PLAY IN THE VALUE CHAIN?

In theory, there are various roles that municipalities can take upon themselves, such as a driving role, or the role of initiator, demand aggregator, director, investor, operator, etc. The specific role chosen will directly influence the organisation of the value chain for broadband networks. The competitive environment in the value chain may vary considerably at different levels: from full competition to monopoly. Thus, the specific role chosen by a municipality within the value chain influences market relations. For example, when a municipality invests in the passive network, it actually becomes a player in the market for infrastructure providers.

To be able to determine the role played by a municipality and the corresponding broadband model, it is useful to distinguish between the various functional layers. Three functional layers can be distinguished, which together form the value chain for the network<sup>15</sup>:

- the 'passive infrastructure' layer. This is the first and lowest layer, and comprises the underground cables<sup>16</sup> (pipes), dark fibre optic cables and neighbourhood-based equipment rooms;
- the 'active infrastructure and switching' layer. This second layer uses transmission capacity from the first layer and supplies transmission services to the third layer. The second layer contains the active equipment<sup>17</sup> set up in the local exchanges, such as optical ports<sup>18</sup>, switches ('exchanges') and routers<sup>19</sup>;
- the 'access services and applications' layer. This third layer comprises (access) services, such as the activities of internet Service Providers (ISPs). Service Providers provide access services to the suppliers of applications, such as internet access, television, Video-on-Demand or telephony. So-called content providers supply the actual content and end-user services.

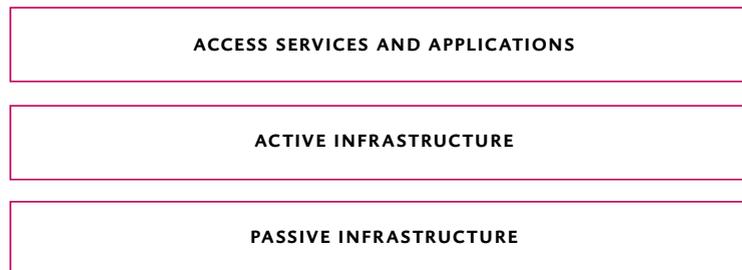


FIGURE 1: THREE FUNCTIONAL LAYERS IN THE BROADBAND VALUE CHAIN

The Cabinet advises that as much competition as possible be achieved in and between the various layers of the value chain, and indicates that primary responsibility for investments lies with the market. In practice, this results in the recommendation that different independent parties be active in the various layers and in competition with each other. This does not mean that one party cannot be active at more than one layer. This competition facilitates an optimum price-quality ratio for consumers. The situation in which one party is active in a number of adjacent layers of the value chain is also referred to as 'vertical integration'.

<sup>15</sup> Clearly, this is a simplified picture of reality. The exact dividing line between active infrastructure and the access services and applications layer is currently the subject of a discussion within various broadband initiatives.

<sup>16</sup> The hollow conduits are often referred to as 'ducts'.

<sup>17</sup> The active equipment ensures that data are transported through the optic fibre. Thus, without the active equipment, the fibre-optic network literally remains 'dark'.

<sup>18</sup> An optical port on a computer that facilitates communication with other computers or equipment via infrared light.

<sup>19</sup> A router is a device that connects up sub-networks. A router decides which path the sub-networks follow.

## STEP-BY-STEP PLAN

1. Limit state funding to a minimum and work (initially) on the basis of full competition;
2. If this is not feasible for a certain role in a functional layer, consider the provision of a private-law concession to a market party;
3. If this is not feasible either, consider a public-private partnership (PPP) or a solely public role;
4. Avoid any unnecessary coupling of layers and roles ('keep the split as low as possible') and limit the merger of activities to the passive layer.
5. Avoid discrimination between parties;
6. With a view to the future, bear in mind the importance of flexibility.

In practice, it will be found that competition is not always achievable at every layer of a broadband project. Where this situation arises, a municipality can opt to grant a concession to just one party in certain layers. When granting a concession such as this, municipalities are advised to build in sufficient guarantees in respect of the price level (cost-oriented) and access conditions (open standards), for example. If a municipality opts for a construction in which competition in the passive or active layer is restricted temporarily, this period must be limited (seven years, for example). After some time, a concession of this nature<sup>20</sup> may no longer be necessary. The Cabinet advises municipalities not to restrict competition in the services layer since it is here in particular that different provisioning can compete with each other on the basis of a level playing field.

Technology and the market will continue to undergo rapid development in the years ahead<sup>21</sup>. For this reason, municipalities are advised to structure the business model adopted by them flexibly. As this market continues to develop, the role played by government may change.

The practice-based examples below illustrate the intelligent approach different municipalities have taken to this point for attention

## PRACTICE-BASED EXAMPLES

*Deventer*<sup>22</sup>

The municipality of Deventer played an organisational and facilitatory role in the Deventerbreed project. The municipality wanted to improve utilisation of capacity from existing networks for its institutions and businesses. Deventer entered into an open partnership with existing network operators KPN and Essent. Other network operators are welcome too. Both market parties are now offering favourably-priced broadband access services in Deventer. In return, the municipality has aggregated demand from 200 institutions and businesses and promoted the initiative. The KPN and Essent networks have been linked to a market place where independent service providers can join and offer their services to all customers, regardless of whether they are

from KPN or Essent. The network operators also offer services, on their own networks and on the networks of other network providers, as part of an 'open partnership'. Other parties besides KPN and Essent are free to enter this partnership.

The municipality of Deventer is not investing in the network infrastructure itself, but has clearly opted for the role of demand aggregator. In this role, the municipality is utilising the existing networks available from the infrastructure providers. In Deventer, the first two functional layers in the model have been integrated vertically<sup>23</sup>. However, (at least) two parties are active in this combination of layers. Added to this, service providers, such as ISPs and providers of various other services, have full open access.

#### *Zwolle*

In Zwolle, the municipality has also opted for the organisational and facilitatory role of demand aggregator. It does not have any financial involvement in the construction and operation of the infrastructure. Just as in Deventer, the network operators offer services on their own networks and on networks belonging to other carriers in an open partnership. Any carrier is able to enter this open partnership. In this model, the municipality strives to observe the principle of full competition wherever possible.

#### *Breda*

In Breda, 12 institutions from the education, housing and healthcare sectors started a broadband project at the end of 2003. A European tender was issued. Just before a contract was awarded, the housing associations were forced to drop out due to regulations put in place by the Ministry of Housing, Spatial Planning and the Environment. At this point, the initiators of the project decided to switch from a customer-owned network to a carrier-owned network. A private limited company was established, Breedband Breda BV, and is the economic owner of the network. NV Casema, a public limited company, is the legal owner. An Indefeasible Right of Use agreement (IRU) was entered into between the public limited company and the private limited company. The

IRU provided Breedband Breda BV with exclusive use of the Casema managed dark fibre<sup>24</sup> network for 15 years. During the 15th year, the two companies will discuss the continuation of their partnership and use of the network. The private limited company has four shareholders, which also lease the dark fibre network. The network is accessible for companies and institutions in the region. An open marketplace was created immediately, where networks can be linked and service providers provide their services.

#### *The Hague*

School boards in The Hague have initiated the construction of a closed fibre optic network. The foundation Stichting GlasLokaal has been formed specifically for this purpose. The municipality is not involved in the financing of the network, but is playing a supporting role for the primary schools involved. It has made a subsidy of € 100 available for each primary school wishing to use the GlasLokaal network or the network belonging to a similar legal entity. An institution, organisation or company becomes a participant in the foundation by entering into a user agreement. Stichting GlasLokaal owns the passive infrastructure. The operation and management of the passive layer are separate and are both implemented by different parties, selected on the basis of a tendering procedure.

#### *Nuenen*

In Nuenen, a cooperative model has been developed for the roll-out of a fibre optic network to the majority of homes and businesses there. The municipality played a facilitatory role and left the broadband initiative to other parties. Nuenen is an example of a 'customer-owned' demand aggregation model.

<sup>20</sup> A concession of this nature cannot be applied by housing associations.

<sup>21</sup> See: The Future of Electronic Communications, the Ministry of Economic Affairs, 2005

<sup>22</sup> A similar approach has been adopted by the municipality of Amersfoort and Zwolle.

<sup>23</sup> In this case, this means that ownership of the dark fibre-optic cables and the lighting of these cables is in the hands of the same party.

<sup>24</sup> Actually, the leasing of managed dark fibre is an example of a role that remains limited to Layer 1.

In Nuenen, Netwerk Exploitiemaatschappij BV (NEM) was established for the construction and operation of the fibre optic network envisaged. NEM's capital has been drawn from private financiers, a connection charge levied by the housing association for its properties and connection charges from customers (residents). The aggregation of demand was performed by Ons Net, a local telecoms cooperative. A resident joins the Ons Net cooperative, and pays a certain amount of membership money (in Nuenen, this is € 800). As an association, Ons Net uses the monies contributed to buy shares in NEM. As a result, Ons Net members are indirectly co-owners of the network, i.e. via the cooperative association. When a subscriber cancels his broadband connection, he also ceases to be a member of Ons Net. The development in Nuenen was supported by the subsidy that residents received for a broadband connection, as part of the Kenniswijk project.

#### *Eindhoven*

Breedband Regio Eindhoven (BRE) is a partnership between a number of participating businesses, government institutions and care institutions in the Eindhoven region. A legal construction has been chosen in which participants join forces to set up a private limited company (BV). The municipality of Eindhoven participates in this BV, which it does subject to the same conditions applicable to the other participating market parties. This initiative is based on the joint procurement by BRE BV of dark fibre between its own locations. Participants in the BV bear the cost of investments together and become the joint owners of the shared ring infrastructure (customer-owned). Breedband Regio Eindhoven BV concludes contracts with the contractor, acquires the network and makes this available to the participants on the basis of a user contract. The participants buy shares in the BV in proportion to their investment in the realisation of the network.

#### *Amsterdam*

The municipality of Amsterdam appointed a committee (the Andriessen Committee) that has inventoried the need for the construction of a fibre optic network in Amsterdam. On the basis of its findings, the committee

advised the municipality on the best set-up for this project. The committee's recommendations have largely been adopted by the municipality. The municipality has opted for the role of minority owner of the passive layer. The majority of this layer will be owned by private parties. The municipality has opted for the market economy investor principle. Construction of the passive layer and investment in and management of the active layer have been put out to public tender. In the services layer, access is offered against non-discriminatory conditions. For a limited number of years, the active layer will be in the hands of a market party, without any form of financial aid (or guarantees) from the municipality. The plan is currently being assessed by the European Commission.

In practice, the more recent broadband initiatives, such as Deventer, Zwolle and Breda, are showing a shift from so-called customer-owned models to carrier-owned models. It appears that providers in the market are in a better position today to offer the service and infrastructure demanded by municipalities subject to affordable conditions than they were several years ago. Use of the existing infrastructure means that there is less need for state funding.

#### **STEP-BY-STEP PLAN**

1. Limit state funding to a minimum and work (initially) on the basis of full competition;
2. If this is not feasible for a certain role in a functional layer, consider the provision of a private-law concession to a market party;
3. If this is not feasible either, consider a public-private partnership (PPP) or a solely public role;
4. Avoid any unnecessary coupling of layers and roles ('keep the split as low as possible'<sup>25</sup>) and limit the merger of activities to the passive layer.
5. Avoid discrimination between parties;
6. With a view to the future, bear in mind the importance of flexibility.

<sup>25</sup> The 'higher' the layer, the greater the chance that competition is possible. For this reason, the Cabinet advises that the separation of the layer model takes place as low as possible, thus facilitating competition in the layers above.

## 2.2.2 HOW DO MUNICIPALITIES RESPOND TO STATE AID RULES?



### STEP-BY-STEP PLAN

1. Determine the extent and form of the financial aid, as well as the recipient undertakings involved at the level of investors, parties carrying out works, operators and/or users;
2. Determine whether state aid applies in the sense of Article 87(1) of the EC Treaty. If yes:
3. Consider alternative forms of support, which are also open to other parties (target subsidies, incentives or communicative instruments, for example);
4. When state aid applies, where there are any doubts in this respect, or when there is a need for legal certainty, it is recommended that the European Commission be notified of the project via the Ministry in question.

The European Union is striving to achieve 'economic and social progress for its population'. A properly functioning internal market and free competition are vital to this. By providing state aid, a municipality can favour certain undertakings, both from the Netherlands and from other member states, above other undertakings. This can lead to the distortion of competition. This risk also exists for the broadband initiatives being developed by housing associations. After all, as indicated in the last chapter, the European Commission regards the advantages enjoyed by housing associations as state aid. The compatibility of the association system with the European regulations is also one of the starting points for the imminent reconsideration of this system. On the basis of this reconsideration, the Minister of Housing, Spatial Planning and the Environment wants to issue a policy vision for the future of housing associations<sup>26</sup>. In this framework, she will also decide on the question of whether and under which conditions a housing association will be permitted to perform activities other than social-housing related activities,

such as the construction and management of broadband infrastructure. To avoid any complaints about unfair competition in relation to this involvement, housing associations must at any rate strive to achieve full transparency with regard to their involvement in broadband projects. This also promotes financial supervision by the Central Fund for Social Housing. Added to this, it is important that residents who choose not to use the new network are not required to pay for it.

The European Commission alone can assess whether a certain form of state aid is permitted. A local authority must determine whether or not the Commission must be notified of a particular aid scheme. However, state aid cases are complex, and, as such, interpretation of the criteria applicable is not

<sup>26</sup> Letter from Minister Dekker from the Ministry of Housing, Spatial Planning and the Environment to the Lower House, dated 22 June 2005, (TK2004-2005, 29846, no. 7)

always simple in practice. Therefore, it is important to be careful and, when in doubt, seek expert advice. When a municipality participates financially in or contributes to a broadband project that has been set up not only for its own use, but also to provide services for customers, it is advisable, and in many cases compulsory, to notify the European Commission.

The previous chapter described the steps to be taken by municipalities when providing state aid. The text below gives examples of the different ways that various municipalities respond to statutory rules on state aid.

#### PRACTICE-BASED EXAMPLES

##### *Deventer*

The municipality of Deventer does not invest in infrastructure; it leaves this entirely to the market. However, the municipality has made financial resources available for the project organisation responsible for the demand aggregation process. Any party that wishes to do so is able to take part in the project subject to the same conditions, and these parties have been invited to do so. This is an example of a non-selective approach. The first 100 businesses and institutions that wished to use the Deventer Glasvezel Netwerk received a one-off amount of up to € 1500 from the municipality in order to promote demand. The municipality funded these one-off amounts from the GSB II resources<sup>27</sup>. Since this concerns individual contracts between end users and infrastructure providers, the municipality of Deventer is able to meet the conditions stipulated by the de minimis block exemption regulation. This regulation entails that if the total Dutch state aid granted to a certain undertaking remains under the € 100,000 limit over a period of three years, it is not necessary to notify the European Commission<sup>28</sup>.

<sup>27</sup> This forms part of urban policy [Grote Steden Beleid].

<sup>28</sup> For more information on this block exemption regulation, see [www.europadecentraal.nl](http://www.europadecentraal.nl), state aid file.

<sup>29</sup> State aid only applies where an undertaking or party is favoured in a manner that is not compatible with the common market.

##### *Amersfoort and Zwolle*

The model adopted by Amersfoort and Zwolle is very similar to that chosen by the municipality of Deventer. They too invited all network providers to take part in the project. Added to this, an advertisement was placed in *Het Financieel Dagblad*, which increased transparency.

##### *Eindhoven*

In Eindhoven, a partnership has been entered into between the municipality, public institutions and businesses. The municipality has opted to bear a proportional level of risk and to participate subject to the same (financial) conditions as the other participating parties (the so-called market economy investor principle was applied). In this way, the municipality is striving to achieve involvement that is compatible with the common market and that does not include state aid<sup>29</sup>. The contractor responsible for installation of fibre optic cabling was selected via a European procurement procedure. This procedure included maintenance of the optic fibre networks, which the contractor in question is committing itself to for a period of five years.



*The Hague*

The municipality is not investing in GlasLokaal, but is supporting primary schools with an amount of € 100 per month for 15 years, for the procurement of connections via GlasLokaal or a similar legal entity. The network is being funded subject to market terms. For GlasLokaal, this means a reduction of 25% in the lease costs applicable. In principle, the provision of support to a public institution that does not perform economic activities (a primary school, for example) will not be considered state aid. Added to this, there have been European procurement procedures for a managed dark fibre service and a managed network service. Various parties in the market have been called upon to submit proposals for the procurement of central internet access.

*Amsterdam*

The municipality of Amsterdam is intending to become a minority shareholder in the owner of the passive layer (Glasvezel Amsterdam BV). In this context, the municipality is acting in line with the market economy investor principle mentioned above. As described above for the municipality of Eindhoven, this means that the municipality will participate subject to exactly the same (financial) conditions as the other (private) owners, including a profit requirement that is compatible with the common market. For the sake of legal

certainty, and given its financial participation, the municipality of Amsterdam has notified the European Commission of this project. The Commission will determine whether the market economy investor principle has actually been applied. A statement from the Commission on this subject is expected in 2006.

The lessons from the above examples can be translated into the following steps in relation to state aid.

**STEP-BY-STEP PLAN**

1. Determine the extent and form of the financial aid, as well as the recipient undertakings involved at the level of investors, parties carrying out works, operators and/or users;
2. Determine whether state aid applies in the sense of Article 87(1) of the EC Treaty<sup>30</sup>. If yes:
3. Consider alternative forms of support, which are also open to other parties (target subsidies, incentives or communicative instruments, for example)<sup>31</sup>;
4. When state aid applies, where there are any doubts in this respect, or when there is a need for legal certainty, it is recommended that the European Commission be notified of the project via the Ministry in question.

<sup>30</sup> See: <http://www.eel.nl/documents/ectreaty/ectreaty.html> for the text of the EC Treaty.

<sup>31</sup> These alternative forms of aid will not be discussed in this chapter, but can be found in Chapter 7 of the ICM final report, pp. 73-77.

## 2.2.3 IS A COST-BENEFIT ANALYSIS NECESSARY?



### STEP-BY-STEP PLAN

1. Carefully formulate a substantiation of authority intervention: exactly what does the municipality want to achieve from its involvement?
2. Prepare a cost-benefit analysis (CBA);
3. Where possible, perform a zero measurement and follow-up measurements corroborating the cost-benefit analysis.

If a municipality decides to participate financially in a local broadband network, the substantiation of this authority's intervention is vital. Firstly, a municipality must be able to indicate exactly what it wants to achieve through its participation in a particular broadband project. Its reasons must indicate the added value that the municipality envisages for its citizens over and above the value of existing possibilities. The Cabinet also recommends that costs and benefits be set off against each other before a municipality commits itself to a project. To what extent do the economic and social benefits expected from the network weigh up against the cost of its construction and management?

A cost-benefit analysis (CBA) is one method that can be used to clarify costs and benefits. Although ex-ante quantification of the costs involved is certainly a possibility, it is considerably more difficult to do the same for the benefits applicable. After all, no actual results are visible at this stage and they are often difficult to predict. The best that can be achieved is the estimation of future benefits, as accurately as possible. The CBA outcomes can be used to substantiate an authority's investment decision (for approval by a municipal council, for example). From the point of view of policy evaluation, it is recommended that a zero measurement be performed prior to the

commencement of the project. This makes it possible for a municipality to identify the economic and social impact applicable following the realisation of the broadband trial.

Housing associations that decide to connect their properties up to a network must also estimate investment risks as realistically as possible. Ultimately, the connection costs applicable will be reflected in housing operations. The housing association can propose the use of these facilities to new and existing tenants, resulting in a rental charge or a rent increase. Steps must be taken to ensure that any tenants not wishing to use the new connection do not contribute towards the costs involved in this respect.

#### PRACTICE-BASED EXAMPLES

##### *Deventer*

Since the municipality itself is not investing in the network, it is not necessary for it to carry out a cost-benefit analysis. The issue here is the micro-economic assessments made by market parties internally. Therefore, the municipality of Deventer did not perform an ex-ante cost-benefit analysis. However, internal ex-post analyses led to the conclusion that the project generates approximately 3 million euro in savings on an annual basis for the participating institutions and local businesses. These savings are achieved in the form of lower prices for broadband connections<sup>33</sup>.

##### *Almere*

In 2003 and part of 2004, the municipality of Almere developed and implemented the Almere Fiber Pilot. The municipality invested in the project too<sup>34</sup> and instructed the performance of a zero measurement prior to the broadband pilot. After the pilot, this enabled the municipality to determine the economic benefits applicable. Amongst other things, it was found that the pilot had made a positive contribution to the growth and retention of jobs, the establishment of new multimedia businesses and the attraction of major investors<sup>35</sup>.

The experience gained in various cities can be translated into the step-by-step plan below:

#### STEP-BY-STEP PLAN

1. Carefully formulate a substantiation of authority intervention: exactly what does the municipality want to achieve from its involvement?
2. Prepare a cost-benefit analysis (CBA);
3. Where possible, perform a zero measurement and follow-up measurements corroborating the cost-benefit analysis.

<sup>33</sup> Broadband generates 3 million euro per year for Deventer. Press release Deventerbreed, Week 11, 18 March 2005.

<sup>34</sup> Investments in the passive network were made by the municipality of Almere. The Province of Flevoland also made a financial contribution to this network.

<sup>35</sup> Proposal to the municipal council - Broadband in Almere II, Almere Fiber City, 23 June 2005.

## 2.2.4 HOW DO MUNICIPALITIES RESPOND TO EUROPEAN PROCUREMENT RULES?

Putting aside all of the statutory rules applicable in relation to procurement, there are various reasons why it may be advisable for a municipality to call for tender – even when it is not strictly statutorily obliged to do so. This might apply when the amount to be tendered for part of the network falls below the procurement threshold. Firstly, a procurement procedure forces a municipality to formulate a well-considered and future-oriented vision of competition in the various layers of the network. Secondly, the authority is guaranteed the best price, as various parties bid in competition with each other. Thirdly, where there is transparency and procurement for various activities in the value chain occurs by means of an open tender procedure, a municipality is more likely to achieve a positive state aid assessment by the European Commission. This may apply for a contract for the construction or provision of infrastructure, network maintenance or the provision of a concession for a certain activity. When doubting whether or not to call for tender, it is wise to obtain advice from a specialised legal bureau. In this connection, the European Commission has now taken the position that the principles of transparency and non-discrimination must also be observed when awarding public contracts that fall outside the scope of application of the European procurement directives. The Commission concludes from this that, in principle, an appropriate form of prior publication must occur for each case.

### PRACTICE-BASED EXAMPLES<sup>36</sup>

#### *Deventer*

The municipality is not investing in infrastructure, nor is it procuring any infrastructure services. As such, a call for tender is not relevant for the Deventer model. However, the municipality of Deventer has entered into a contract with existing providers, in which these providers agree to open up

their networks for each other and other service providers. These contracts are not exclusive and are open to all existing and future broadband infrastructure providers. In return, Deventer has organised the demand aggregation process and ensured media attention for this project. Infrastructure providers have been invited to enter the open partnership.

#### *Amersfoort, Zwolle*

Just as in Deventer, a call for tender across Europe is not necessary in these municipalities. The municipality has no financial involvement whatsoever in the construction of the network, nor will it procure any services.

#### *Breda*

The parties taking part in Breedband Breda have issued a joint European tender for a managed dark fibre service over an existing and partially new network to be created. Casema won the contract and is offering managed dark fibre to the partners over its own network. Casema is the legal owner and Breedband Breda the economic owner. Casema and Breedband Breda have entered into an IRU agreement together, which lays down their mutual rights and obligations for a period of 15 years. The parties have also entered into an agreement for maintenance and management. The private limited company BV Breedband Breda will determine the policy to be pursued, while the management team appointed will ensure the proper execution of its operations.

#### *The Hague*

In The Hague too, the Stichting GlasLokaal has initiated a European procurement procedure for the construction of the network. Via the Publications Office of the European Union, both construction and management of the managed dark fibre network and service provision have been put out to tender separately. For the procurement of central internet access, a negotiated procedure amongst interested parties in the market has been chosen instead

<sup>36</sup> For these examples, it is uncertain whether the rules applicable (in this case the European procurement rules) have been complied with in full.



## STEP-BY-STEP PLAN

1. Observe transparent procurement procedures, even where this is not strictly obligatory from a legal point of view;
2. Put in place independent selection procedures for different roles.

of a call for tender across Europe. This decision was made because value thresholds for European calls for service and supply tenders within the public sector are well in excess of the price to be expected for this component.

### *Eindhoven*

In Eindhoven too, the organisers of the BRE broadband project have decided to call for tender across Europe for aggregated broadband demand. They have done this despite the fact that the amount applicable was under the value threshold in question and, as such, tendering was not formally obligatory.

### *Amsterdam*

In the Amsterdam fibre project, a call for tender across Europe was opted for at various stages. Construction of the passive layer and selection of the active layer of the investing and operating market party were put out to tender across Europe, including advertisements in international media. Wherever

possible, communication was routed via the project site, in order to promote transparency. Added to this, in 2004, Amsterdam voluntarily published an international request for information. Its main objective was to call upon market parties to indicate the conditions under which they could construct and operate the active infrastructure layer.

The practice-based examples show that the following steps have been followed by various municipalities. For in-depth information on when and how authorities will be required to issue calls for tender, see Chapter 1.

## STEP-BY-STEP PLAN

1. Observe transparent procurement procedures, even where this is not strictly obligatory from a legal point of view;
2. Put in place independent selection procedures for different roles.

## 2.2.5 WHICH CHOICES AND CONDITIONS APPLY TO NETWORK DESIGN AND CONSTRUCTION?



### STEP-BY-STEP PLAN

1. Determine whether or not network technical choices result in (indirect) discrimination against certain market parties;
2. Determine whether the conditions imposed on market parties (open access, rates, etc.) are strictly necessary for the achievement of the objective in question;
3. Develop a well-considered compensation structure for access to parts of the network that are (partly) in public hands;
4. Determine the extent to which the design can be made (more) technology-neutral.

Firstly, it is important that municipalities ascertain whether the imposition of certain conditions on market parties is actually necessary. A number of choices arise from broadband-infrastructure direction and design, and may affect competition in the market. Firstly, these choices will pertain to network technology, such as network design and the size of sub-networks (tranches). Secondly, this concerns conditions stipulated in respect of the services provided. The provision of a certain service package, such as triple play (TV, radio and internet) is an example of a condition of this nature. Another practical example: is a municipal broadband initiative intended to achieve the construction of a broadband network or a fibre optic network?

<sup>37</sup> For example, just one rate may be applied for one and the same passive infrastructure, which rate will be independent of the services offered on this infrastructure (thus, no service-dependent rate for the passive infrastructure).

The latter is perhaps unnecessarily technology-specific and may actually result in discrimination against certain types of market party, or to the prior exclusion of market parties from participation in a broadband project ('indirect discrimination'). Although it will be impossible to design a network in a way that ensures that everyone has exactly the same opportunities, choices that systematically disadvantage certain parties must be avoided. Therefore, it is recommended that:

- network technology choices are only made when this is actually necessary for the achievement of the objective in question;
- a simple compensation structure is used in the value chain. This must be linked to the service or performance provided, not to the value that other parties subsequently add to it<sup>37</sup>;
- vertical integration is not prohibited, but that the abuse of this integration is monitored. In this respect, it is essential that vertical integration does not impede other parties from entry or actual operation on their part.

Given the above, the Cabinet advises that, wherever possible, parties opt for a technology-neutral approach. For example, it is recommended that functional requirements alone are formulated and that, wherever possible, technical choices are left to the parties concerned. In concrete terms, this means, for example, that a municipality will demand that providers will be able to guarantee a certain service package over the network. Subsequently, the providers themselves choose which technology they want to deploy for this purpose. It is possible for a provider to use its freedom of choice to organise its network in a way that makes it technically and economically unfeasible for other parties to offer competitive services in the other layers. In this way, freedom of choice can be used unintentionally to reduce competition. In this situation, the municipality could consider the stipulation of specific technical requirements. When making choices of this nature, it is wise to fall back on independent studies performed by third parties.

#### PRACTICE-BASED EXAMPLES

##### *Deventer*

The municipality of Deventer has left all network technology choices entirely to the market. However, in order to safeguard open access to the network, it has stipulated two requirements. Firstly, the network must be able to supply a minimum of 100 Mbps Ethernet<sup>38</sup>. Secondly, the network must be open, making it easy for all service providers to hook up to the network. Although the requirements concerned here initially appear rather technology specific in nature, this is not really the case in practice. For example, the ethernet technology referred to can be realised without all too many problems using any of the relevant network technologies, and is even already common practice in most cases. This means that providers considering alternative technologies will not be hindered unnecessarily in terms of their potential participation.

##### *Almere*

The operator (First Mile Ventures) and service provider (Unet) were required to ensure that end users were offered at least radio/TV, telephony and internet

(triple play). In principle, triple play services can be realised over coax cables, copper cables and fibre optic cables. This requirement does not automatically exclude existing parties and, as such, can be considered sufficiently technology-neutral.

##### *Amsterdam*

In Amsterdam, Glasvezel Amsterdam BV will own the passive layer (trenches, ducts, dark fibre and neighbourhood-bases equipment rooms). Ownership of the neighbourhood-based equipment rooms (here: outside plant) is important since accessibility to the network starts at the points where equipment is installed. Previous experience gained in the ADSL market shows that inadequate access can result in substantial barriers for new parties. This is a good example of a situation in which a municipality gives explicit attention to a certain aspect, where conditions or agreements could have a discriminatory impact.

The above shows that municipalities must exercise caution where (technical) choices and conditions are concerned. If formulated correctly, this also provides municipalities with a tool to guarantee open access to local broadband networks for other service providers, for example. To summarise, the most important lessons have been set out in the step-by-step plan below.

#### STEP-BY-STEP PLAN

1. Determine whether or not network technical choices result in (indirect) discrimination against certain market parties;
2. Determine whether the conditions imposed on market parties (open access, rates, etc.) are strictly necessary for the achievement of the objective in question;
3. Develop a well-considered compensation structure for access to parts of the network that are (partly) in public hands;
4. Determine the extent to which the design can be made (more) technology-neutral.

<sup>38</sup> Ethernet is the underlying network used to enable computers to communicate with each other if their hardware is connected in a Local Area Network (LAN), using network cards and network cables.

## 2.2.6 HOW CAN MUNICIPALITIES ENSURE A CLEAR DIVISION OF INTERESTS?

Sometimes, when public parties participate in broadband projects, they may perform different roles simultaneously. This may result in a conflict of interests, which can manifest itself in different ways (in a situation where a municipality and other providers (co-)own a network company that is competing in the telecoms market, for example). This may cause friction when the municipality is also the body required to issue competing providers with permits to dig, or if it is responsible for the coordination of digging work.

A conflict of interests arises particularly when a municipality combines the role of shareholder or participant in a broadband project with one or more of the following public roles:

- Regulator and protector of general interests;
- Digging coordinator;
- Collector of charges and municipal tax on encroachments on or above public land<sup>39</sup>;
- Recipient of fees<sup>40</sup> and other contracts in connection with road works;
- Manager of public spaces, developer of land-use plans (collocation facilities, for example)<sup>41</sup>.

<sup>39</sup> Municipal tax on encroachments on or above public land [precariobelasting] is a form of tax levied on the use of public municipal land, such as outdoor shop displays and various other objects to be found in the public streets. A lesser known fact is that this tax also applies for objects underground, such as pipes, cables, ducts and foundations.

<sup>40</sup> Fees [retributievergoedingen] apply when an authority imposes tax on tax subjects by way of consideration for services performed by the authority (toll money, port and harbour dues, road tax, school and university fees, for example).

<sup>41</sup> A colocation facility is a facility where physical access is provided to any connection point in the connecting network (a central office, concentrator or other unit, for example), where the new provider can instal its own network equipment and facilities in order to provide services to its customers.

These conflicts of interest can be avoided by effectively separating the tasks performed by the departments in question. Where public financial involvement applies, a transparent and verifiable system and independent supervision can contribute to confidence amongst market parties and increase willingness to invest.

### PRACTICE-BASED EXAMPLES

#### *Rotterdam*

The municipality of Rotterdam is financing the greater part of the construction of the networks in the Lloydkwartier and Nesselande pilot areas. There is a danger that the municipality's role as an issuer of permits and collector of charges and municipal tax on encroachments on or above public land will become entangled with its role as the owner of a broadband network. For this reason the municipality in its role as owner of a network must be considered a market party and be treated as such. In order to clarify its equal treatment, the municipality will permit the inspection of the invoices received by it. The transparent organisation of the process in this manner will prevent a conflict of interests.

#### *Eindhoven*

In Eindhoven, the municipality has chosen to bear proportional risks and to participate in the partnership (Breedband Regio Eindhoven BV (BRE BV)) under the same (financial) conditions as the other participating parties. This decision was based on the market economy investor principle, which implies equality and transparency. The BRE BV enters into a contract with a contractor, buys the network and makes it available to participants on the basis of a user agreement. The participants acquire shares in the BV in proportion to their investment in the realisation of the network.



## STEP-BY-STEP PLAN

1. Critically identify where conflicts of interest could arise;
2. Separate the tasks in which a conflict of interest could arise and provide for a transparent and verifiable system;
3. Ideally, put independent supervision in place.



As such, by placing the municipality's activities in a separate BV, they have been separated clearly, making it possible for its public tasks to be performed and assessed independently.

The separation of authority roles and authority interests is particularly imperative where a broadband infrastructure is in (partial) public ownership. Even when municipalities do not have any direct financial involvement in broadband projects, it is wise to set up a good, independent verification system. The following steps may be of some use in the above.

## STEP-BY-STEP PLAN

1. Critically identify where conflicts of interest could arise;
2. Separate the tasks in which a conflict of interest could arise and provide for a transparent and verifiable system;
3. Ideally, put independent supervision in place.

## 2.2.7 HOW DO MUNICIPALITIES RESPOND TO COMPETITION RULES?



### STEP-BY-STEP PLAN

1. Limit collaboration to layers in which this is absolutely necessary;
2. Base rules pertaining to access to the infrastructure on non-discriminatory and transparent rules and ensure that third parties are also able to access the infrastructure;
3. Avoid coordination of conduct by existing parties in the market for services and infrastructure.



European and national competition rules are intended to create an economic climate in which all parties have a fair chance of competing with each other. These rules have been put in place in order to prevent parties from abusing any dominant position they may have in the market. In most broadband initiatives in which public organisations are involved, competition is not at issue. The restriction of competition comes into play when the most important existing or potential competitors ‘merge’ in an initiative. When this results in the concentration of power, specific obligations from the Telecommunications Act [Telecommunicatiewet] may apply. This might be the provision of special access and the provision of interconnection against non-discriminatory conditions<sup>42</sup>. This will only apply when a broadband (service) provider enjoys

significant market power in the relevant economic and geographic market. Thus, when developing a new business model for broadband, it is important to take the competition rules into account. This applies particularly in the event of collaboration between market parties and when making mutual agreements.

### PRACTICE-BASED EXAMPLES

#### *Deventer*

In the Deventerbreed project, two major network suppliers (KPN and Essent) are working together closely within one initiative. As such, the restriction of competition is a very real danger. Both parties could divide up the market

in Deventer between themselves, which is prohibited under the Dutch Competition Act [Mededingingswet]. Given this risk, the municipality obtained external legal advice. Added to this, discussions were held with the Netherlands Competition Authority [Nederlandse Mededingingsautoriteit (NMa)]. On this basis, it was determined that customers will choose which provider will realise the Deventerbreed connection. Thus, KPN and Essent are continually competing for customers. Besides this, the contract that the municipality of Deventer has entered into with infrastructure providers is not exclusive. As such, all infrastructure providers wanting to participate in the Deventerbreed project have the opportunity to do so. Through these two measures, the municipality of Deventer has left the existing level of competition intact as far as possible and has not unnecessarily impeded competition.

#### *Amsterdam*

The municipality of Amsterdam is following various open procedures to select the parties to construct and manage the passive or active layers. By making

sure that construction and management are separated and by following separate procurement procedures for the functional layers, the likelihood of proposals that really are competitive is the greatest. As a result, the risk of coordinated conduct on the part of market parties is reduced.

The step-by-step plan below summarises the most important issues once again. This step-by-step plan is only relevant when existing competitors in the market collaborate in a local broadband project.

#### **STEP-BY-STEP PLAN**

1. Limit collaboration to layers in which this is absolutely necessary;
2. Base rules pertaining to access to the infrastructure on non-discriminatory and transparent rules and ensure that third parties are also able to access the infrastructure;
3. Avoid coordination of conduct by existing parties in the market for services and infrastructure.

<sup>42</sup> Examples of other specific obligations are: application of accounting separation, compulsory transparency and reference offers.

## 2.2.8 HOW DO MUNICIPALITIES AVOID A TRUCK SYSTEM?



### STEP-BY-STEP PLAN

1. Avoid unnecessary limitation of services to specific infrastructures;
2. Ensure that the end user has the freedom to choose whether or not to utilise services;
3. Ensure that costs are only charged to actual users;
4. Avoid the unnecessary phasing out of present service provision.

The risk of compulsory buying, or a truck system, may arise when customers are forced to buy new products or services from their present supplier. The risk of a truck system is usually greater where a dependency exists (between a tenant and a housing association, for example). The relationship between municipalities and citizens is less of a risk than the relationship between a housing association and its tenants, or the relationship between the present telecommunications provider (KPN or the local cable company) and its customers. Since the reasons for a prohibition against a truck system are obvious, no specific examples of this have been included in this document. For a housing association with a direct relationship with its tenants, the prohibition against a truck system need not form an obstacle. However, in the case of broadband initiatives, it is important that the association comply with a number of conditions in order to rule out a truck system. This concerns the following specific cases:

- End users must always be given the choice between using or not using broadband facilities;
- The cost of broadband infrastructure may only be charged to those end users who have chosen to use it (this concerns both direct and indirect costs, in both the short and long term);

- If the provider of new broadband services also provides existing services, users of existing services may not be confronted with the unnecessary phasing out of the existing range of telecommunications services;
- The accessibility of services may not be restricted unnecessarily to certain network infrastructures or categories of these infrastructures. A service that lends itself to preparations for a normal ADSL connection, for example, may not be designed in a manner that limits it to a (fibre optic) connection faster than 10 Mbps, for example.

The step-by-step plan below summarises the most important conclusions on the theme of truck systems. This step-by-step plan is only relevant when the initiator or parties involved already have a relationship with the customer.

### STEP-BY-STEP PLAN

1. Avoid unnecessary limitation of services to specific infrastructures;
2. Ensure that the end user has the freedom to choose whether or not to utilise services;
3. Ensure that costs are only charged to actual users;
4. Avoid the unnecessary phasing out of present service provision.

## 2.3 Overview

OVERVIEW TABLE: Relevant issues with a number of practice-based examples<sup>43</sup> within the various business models used

ISSUES MODEL	WHICH ROLE DO MUNICIPALITIES PLAY IN THE VALUE CHAIN?	HOW DO MUNICIPALITIES RESPOND TO STATE AID RULES?	IS A COST-BENEFIT ANALYSIS NECESSARY?	HOW DO MUNICIPALITIES RESPOND TO EUROPEAN PROCUREMENT RULES?
<p><b>Demand aggregation carrier-owned model</b></p> <p>a. <b>Open market place (Zwolle, Amersfoort, Deventer)</b></p> <p>b. <b>Closed user group (Breda)</b></p>	<p>The aggregation of demand for a broadband connection by a municipality, (semi-)public or private institution.</p> <p>a. Market parties open up their carrier-owned fibre optic networks to businesses and institutions through an independent market place for service providers. The municipality does not invest in infrastructure.</p> <p>b. A (semi-)closed user group that acquires user rights within the carrier-owned model</p> <p><i>Deventer, Amersfoort, Zwolle</i> The municipality is not involved in the construction and operation of the infrastructure. As part of an open partnership, network operators offer services on their own networks and on the networks of other carriers. The networks are freely accessible for other service providers. The municipality facilitates the open market place and project organisation.</p> <p><i>Breda</i> The municipality is not involved in the project in Breda. 12 institutions have issued a joint call for tender, which was won by Casema. Casema will remain the owner of its network, but has a 15-year exclusive user agreement with Breedband Breda BV for managed dark fibre. The parties light the active layer of the network themselves.</p>	<p>In the open market place model, the applicability of state aid is not obvious.</p> <p>When a municipality participates financially in or contributes to a broadband project that has not only been set up solely for its own use, but also to provide services to customers, it is advisable or even compulsory to notify the European Commission of the project.</p> <p><i>Deventer</i> The municipality of Deventer is not investing in passive or active infrastructure and places all initiative in this respect with the market. Compensation paid to businesses or institutions that connect to the Deventer Glasvezel Network complies with the conditions of the de minimis block exemption regulation, and, as such, state aid does not apply.</p>	<p>Since the municipality is not an investor, a cost-benefit analysis is not necessary.</p> <p>Nor is a CBA necessary in the closed demand aggregation carrier-owned model, since the authority will participate primarily for its own use. A CBA may be desirable for the further substantiation of decision-making.</p> <p><i>Deventer</i> The municipality did not carry out an ex-ante cost-benefit analysis. Internal retrospective analyses have led to the conclusion that the project has generated an amount of approximately 3 million euro for the city.</p>	<p>Where an authority does not participate financially and the open market place model applies, a call for tender is not necessary. However, in the closed demand aggregation carrier-owned model, the procurement rules are compulsory if a municipality is involved.</p> <p><i>Deventer, Amersfoort, Zwolle</i> In these municipalities, a call for European tenders is not necessary, since the municipality has no financial involvement in the construction of the network, nor is it procuring any infrastructure services.</p> <p><i>Breda</i> The demand-aggregating partners have together procured a managed dark fibre service for 15 years via a European call for tender.</p>

<sup>43</sup> Please note that there is no guarantee that the rules applicable have been complied with in full in these examples.

ISSUES MODEL	WHICH CHOICES APPLY WHEN DESIGNING OR CONSTRUCTING THE INFRASTRUCTURE?	HOW CAN MUNICIPALITIES ENSURE THE CLEAR SEPARATION OF INTERESTS?	HOW DO MUNICIPALITIES RESPOND TO COMPETITION RULES?	HOW CAN MUNICIPALITIES AVOID A TRUCK SYSTEM?
<p><b>Demand aggregation carrier-owned model</b></p> <p>a. <b>Open market place (Zwolle, Amersfoort, Deventer)</b></p> <p>b. <b>Closed user group (Breda)</b></p>	<p>Firstly, it is important for a municipality to determine whether certain conditions are really necessary. If these conditions are imposed anyway, these must be substantiated properly.</p> <p>In the demand aggregation carrier-owned model, demand must be formulated such, from a technological point of view, that it does not adversely affect any parties (non-discriminatory). In the open market place model, the municipality sets several technical conditions. These are of a functional nature, making it possible for the market parties themselves to choose the technology to be used.</p> <p><i>Deventer</i> Network technological choices lie with the market. However, two functional requirements are imposed on the network:</p> <ol style="list-style-type: none"> <li>1. minimum speed (100 Mbps symmetrical Ethernet)</li> <li>2. open access for service providers.</li> </ol>	<p>In these models, the municipality does not compete with market parties. As a result, the likelihood of a conflict of interests is minimal.</p>	<p>Given the fact that the most important existing or potential competitors in the open market place model 'merge' in an initiative, the competition rules must be taken into account here.</p> <p><i>Deventer</i> The customer himself chooses the provider to realise the Deventerbreed connection. KPN and Essent continually compete for customers. Added to this, other infrastructure providers can participate in the project too.</p>	<p>A truck system will only play a role in models involving housing associations, or where a (lock-in) relationship exists between a telecom provider and an existing customer. This does not apply for this model.</p>

OVERVIEW TABLE: Relevant issues with a number of practice-based examples within the various business models used

MODEL	ISSUES WHICH ROLE DO MUNICIPALITIES PLAY IN THE VALUE CHAIN?	HOW DO MUNICIPALITIES RESPOND TO STATE AID RULES?	IS A COST-BENEFIT ANALYSIS NECESSARY?	HOW DO MUNICIPALITIES RESPOND TO EUROPEAN PROCUREMENT RULES?
<p><b>Demand aggregation customer-owned model (Eindhoven, The Hague)</b></p>	<p>Various public (and private) parties have a managed dark fibre network constructed for their own, combined use. Organisation of the higher layers is determined by the participants themselves.</p> <p><i>The Hague</i> Stichting GlasLokaal owns the passive infrastructure. Operation and management of the passive layer are separate and both are performed by different parties on the basis of tendering.</p> <p><i>Eindhoven</i> Together, the participants set up a BV and buy dark fibre between their own locations (customer-owned). The BV enters into a contract with the contractor, buys the network and makes it available to the participants on the basis of a user agreement.</p>	<p>In this model, state aid is not ruled out if an authority participates under different conditions to the other (private) parties (bearing a disproportionately large part of the risks, for example).</p> <p><i>Eindhoven</i> The municipality of Eindhoven carries proportional risks and takes part subject to the same (financial) conditions as the other participating parties (market economy investor principle). In this case, state aid does not apply. The contractor was selected to construct the fibre optic network via a European call for tender.</p> <p><i>The Hague</i> The municipality is not investing in GlasLokaal, but gives a subsidy of € 100 per month to primary schools in The Hague, which they can use to buy connections via GlasLokaal or a similar legal entity. The provision of support to a public institution that does not perform economic activities does not constitute state aid. A call for tender avoids any advantage to the operator/supplier of the network.</p>	<p>In this model, the municipality is not only striving to achieve general social and economic benefits, but also wants to buy cheaper connections for its own use. Therefore, it will calculate its return on investment.</p>	<p>A European call for tender must be issued for the construction of a dark fibre network. Even if the value of the contract remains under the procurement threshold, it is useful to issue a European call for tender.</p> <p><i>The Hague</i> Separate European calls for tender have been issued for the construction and management of the managed dark fibre network and the provision of services. A negotiated procedure was used for the procurement of central internet access.</p> <p><i>Eindhoven</i> A European call for tender was issued for the construction of the passive network, although, given the estimated value of the network, this was not necessary according to the European procurement rules.</p>

ISSUES MODEL	WHICH CHOICES APPLY WHEN DESIGNING OR CONSTRUCTING THE INFRASTRUCTURE?	HOW CAN MUNICIPALITIES ENSURE THE CLEAR SEPARATION OF INTERESTS?	HOW DO MUNICIPALITIES RESPOND TO COMPETITION RULES?	HOW CAN MUNICIPALITIES AVOID A TRUCK SYSTEM?
<p><b>Demand aggregation customer-owned model (Eindhoven, The Hague)</b></p>	<p>Firstly, it is important for a municipality to determine whether certain conditions are really necessary. If these conditions are imposed anyway, these must be substantiated properly.</p> <p>The customer-owned networks in this model are constructed for internal use. Therefore, technological neutrality is less relevant.</p>	<p>In this model, a conflict of interests is unlikely provided the customer-owned network continues to be for internal use. However, the importance of independent supervision and transparency is relevant here too.</p> <p><i>Eindhoven</i> The municipality's activities have been placed in a separate BV, making it possible for its tasks to be performed and assessed independently. The market economy investor principle was used, which implies equality and transparency.</p>	<p>Competition rules only play a role in cases in which the most important existing or potential competitors 'merge' in an initiative. This is not the case in this model.</p>	<p>In the practice-based examples described, the compulsory procurement of new services from the present supplier has not been identified.</p>

OVERVIEW TABLE: Relevant issues with a number of practice-based examples within the various business models used

ISSUES MODEL	WHICH ROLE DO MUNICIPALITIES PLAY IN THE VALUE CHAIN?	HOW DO MUNICIPALITIES RESPOND TO STATE AID RULES?	IS A COST-BENEFIT ANALYSIS NECESSARY?	HOW DO MUNICIPALITIES RESPOND TO EUROPEAN PROCUREMENT RULES?
<p><b>Partnership model or PPP model (Amsterdam, Almere)</b></p>	<p>An authority is a co-investor, launches an open call for tender for the construction and management of the active layer and regulates (open) access to the services layer.</p> <p><i>Amsterdam</i> The municipality is the initiator of and (minority) financier in the passive layer by means of a BV. In the services layer, the municipality works on the basis of free competition. The active layer is operated by a market party selected as part of a transparent approach.</p>	<p>Through municipal participation and partnerships with private parties, state aid may easily apply in this model. The European Commission must be notified of this aid.</p> <p>State aid can be avoided if an authority invests subject to specific conditions, such as those applicable under the market economy investor principle.</p> <p><i>Amsterdam</i> The municipality of Amsterdam is intending to become a minority shareholder in Glasvezel Amsterdam BV. It is acting in line with the market economy investor principle and, in order to gain legal certainty, has submitted the project to the European Commission for its assessment. A decision is expected from the Commission at the end of 2005.</p>	<p>In this model, the authority invests in the passive infrastructure. In this case, the Cabinet recommends an in-depth cost-benefit analysis in order to estimate the social and economic impact of the investments.</p> <p><i>Almere</i> Prior to the submission of its application for the project, Almere performed a zero measurement. Experiences gained during the pilot were evaluated in depth, on the basis of the measurement performed.</p>	<p>If the amount concerned exceeds the European procurement threshold, a European call for tender must be issued for the construction of a dark fibre network. When a party is given the exclusive right to operation in the higher layers of the value chain, this party must also be selected via open and transparent procedures.</p> <p><i>Amsterdam</i> A European call for tender was issued for the construction of the passive layer and the selection of the investing and subsequently operating market party, including advertisements in international media.</p> <p><i>Almere</i> Almere launched a public call for tender for the design and construction of the passive network.</p>

ISSUES MODEL	WHICH CHOICES APPLY WHEN DESIGNING OR CONSTRUCTING THE INFRASTRUCTURE?	HOW CAN MUNICIPALITIES ENSURE THE CLEAR SEPARATION OF INTERESTS?	HOW DO MUNICIPALITIES RESPOND TO COMPETITION RULES?	HOW CAN MUNICIPALITIES AVOID A TRUCK SYSTEM?
<p><b>Partnership model or PPP model (Amsterdam, Almere)</b></p>	<p>Firstly, it is important for a municipality to determine whether certain conditions are really necessary. If these conditions are imposed anyway, these must be substantiated properly.</p> <p>In this model, technological neutrality can be achieved by imposing requirements on services or speeds, independent of a certain technology or network.</p> <p><i>Almere</i> The operator/service providers were required to offer end users triple play (radio/TV, telephony and internet) at least. The approach taken to this is open.</p> <p><i>Amsterdam</i> The municipality consciously became the owner of installation points in order to guarantee the requirement of open access to the network for new entrants.</p>	<p>A conflict of interests is possible in this model. A transparent and verifiable system and independent supervision (when public financial involvement is the case) are recommended.</p>	<p>Competition rules only play a role in cases in which the most important existing or potential competitors 'merge' in an initiative. This is not the case in this model. This is possible in this model, but problems are avoided by observing open and transparent procedures when selecting parties.</p> <p><i>Amsterdam</i> The municipality of Amsterdam observes various open procedures in order to select parties for the construction and management of the passive and active layers.</p>	<p>In the practice-based examples described, the compulsory procurement of new services from the present supplier has not identified.</p>

OVERVIEW TABLE: Relevant issues with a number of practice-based examples within the various business models used

MODEL	ISSUES WHICH ROLE DO MUNICIPALITIES PLAY IN THE VALUE CHAIN?	HOW DO MUNICIPALITIES RESPOND TO STATE AID RULES?	IS A COST-BENEFIT ANALYSIS NECESSARY?	HOW DO MUNICIPALITIES RESPOND TO EUROPEAN PROCUREMENT RULES?
<p><b>Public managed dark fibre model (Rotterdam)</b></p>	<p>A public authority commissions the construction of a dark fibre network and leases access to customers and operators in the active layer. In practice, there are many variations on this model.</p>	<p>Given the authority's large-scale financial participation, it is often necessary to notify the European Commission of state aid.</p>	<p>When a public organisation invests community funds in a (broadband) project, it is very advisable that an in-depth CBA be performed.</p>	<p>For this model, the same applies as for the PPP model.</p>
<p><b>Role played by housing associations</b></p>	<p>Housing associations initiate the connection of their properties to a broadband network. Their investments in infrastructure may not exceed the costs applicable for the connection of their properties to the closest connection point in the area (connection model). (Participation in the) operation of networks is not permitted.</p>	<p>As the EC regards the advantages that associations benefit from as state aid, the risk of market disruption applies to broadband initiatives undertaken by associations. For this reason, but also given the national statutory framework (BBSH), associations must restrict themselves to the connection model in the construction of infrastructure. The possibility of a wider role in the future (via a commercial subsidiary) is still the subject of further decision-making. Complete transparency on their involvement may prevent any complaints about unfair competition.</p>	<p>A realistic estimate of the costs and risks applicable is advisable. Overly optimistic estimates may not be permitted to result in the on-charging of costs to non-users.</p>	<p>N/a.</p>

VRAAGSTUKKEN MODEL	WHICH CHOICES APPLY WHEN DESIGNING OR CONSTRUCTING THE INFRASTRUCTURE?	HOW CAN MUNICIPALITIES ENSURE THE CLEAR SEPARATION OF INTERESTS?	HOW DO MUNICIPALITIES RESPOND TO COMPETITION RULES?	HOW CAN MUNICIPALITIES AVOID A TRUCK SYSTEM?
<p><b>Public managed dark fibre model (Rotterdam)</b></p>	<p>Firstly, it is important for a municipality to determine whether certain conditions are really necessary. If these conditions are imposed anyway, these must be substantiated properly.</p> <p>The necessity of technological conditions will depend on the use envisaged and on specifications for the active layer. Many services are also possible on existing networks or on upgraded networks. By defining the objectives as carefully as possible and by leaving technological specifications to the market parties wherever possible, all parties have a fair chance.</p>	<p>A conflict of interests is possible in this model. This can be avoided by separating the tasks performed by different departments, by introducing a transparent and verifiable system, and setting up independent supervision.</p> <p><i>Rotterdam</i> As the issuer of permits and the collector of charges and municipal tax on encroachments on or above public land, the municipality will become entangled with its role as the owner of a broadband network. The municipality can be considered a market party and must be treated as such. In order to clarify its equal treatment, the municipality will permit the inspection of the invoices received by it.</p>	<p>Competition rules only play a role in cases in which the most important existing or potential competitors 'merge' in an initiative. This is not the case in this model.</p>	<p>In the practice-based examples described, the compulsory procurement of new services from the present supplier has not identified.</p>
<p><b>Role played by housing associations</b></p>	<p>Firstly, it is important for a municipality to determine whether certain conditions are really necessary. If these conditions are imposed anyway, these must be substantiated properly.</p> <p>Housing associations may impose functional requirements, on the basis of which the supplying market parties are able to choose the technology to be used. Added to this, the use of authorised capital means that cost considerations play a role here.</p>	<p>Firstly, it is important for a municipality to determine whether certain conditions are really necessary. If these conditions are imposed anyway, these must be substantiated properly.</p> <p>Housing associations may impose functional requirements, on the basis of which the supplying market parties are able to choose the technology to be used. Added to this, the use of authorised capital means that cost considerations play a role here.</p>	<p>Competition rules only play a role in cases in which the most important existing or potential competitors 'merge' in an initiative. This is not the case in this model.</p>	<p>Competition rules only play a role in cases in which the most important existing or potential competitors 'merge' in an initiative. This is not the case in this model.</p>

# State aid check flow chart

## Step 1.

### Determine whether state aid applies (pag. 29)

If broadband projects are confronted with European rules, the system underlying the 'state aid assessment' is found particularly problematic. This flow chart may help. Please note: to be able to apply these rules properly, authorities must be familiar with both this chart and with the texts to which the chart refers.



**I. DOES AN ADVANTAGE APPLY THAT IS FINANCED THROUGH STATE RESOURCES? (PAG. 30)**

**Yes** > proceed to question II.

**No** > no state aid, no notification requirement.



**II. DOES AN ECONOMIC ADVANTAGE APPLY FOR AN UNDERTAKING THAT IT WOULD NOT HAVE ACHIEVED BY COMMERCIAL MEANS? (PAG. 30)**

*This is where the important market economy investor principle (MEIP) is raised (page 30). The importance of public calls for tender (pages 31 and 12) and the 'typical government task' (page 31) are discussed.*

An 'advantage' may not apply if an aid measure can be regarded as compensation for the cost of activities that a recipient undertaking carries out in order to perform services of general economic interest (SGEI, page 32). If an aid measure complies with the criteria of the Altmark judgment (page 33), it will not be necessary to notify the Commission of this scheme.

If the broadband infrastructure constructed is a 'public infrastructure', state aid may not apply.

**Yes** > proceed to question III.

**No** > no state aid, no notification requirement.



**III. IS THE ADVANTAGE SELECTIVE? ARE 'CERTAIN UNDERTAKINGS OR PRODUCTS' BEING FAVOURED? (PAG. 37)**

**Yes** > proceed to question IV.

**No** > no state aid, no notification requirement.



**IV. DOES COMPETITION DISTORTION OR DISRUPTION OF TRADE BETWEEN THE MEMBER STATES APPLY? (PAG. 37)**

**Yes** > proceed to Step 2.

**No** > no state aid, no notification requirement.



## Step 2.

### Determine whether an exemption can be invoked. (pag. 37)

Regulations relevant for broadband are the block exemption regulation for SME aid (page 38) and, in particular, the *de minimis* regulation (pag. 37).



**Yes >** proceed to Step 3.

**No >** no state aid, no notification requirement. Possible to notify the European Commission for reasons of legal certainty (pag. 39).



## Step 3.

### Notify the European Commission of the measure once the likelihood of ‘approval’ is optimal. (pag. 39)

The European Commission must be convinced that state aid is vital and proportional. Therefore, when notifying the European Commission of state aid, ensure that the aid measure is substantiated properly. In the necessity test, consider the Lisbon Agenda, for example (page 40), and possible market failure (page 40). In the proportionality test, a number of factors are important, such as a public procurement (pages 41 and 12), technological neutrality (page 42), open access (page 42) and transparency (page 44).

## References and background information

### *Publications*

#### **ADVIES VAN DE IMPULSCOMMISSIE BREEDBAND**

Broadband Impulse Committee: 'Towards a national strategy for broadband', including best-practice projects and a reference model

<http://www.vng.nl/Documenten/Extranet/Fei/WenE/rapport%20impulscommissie.pdf> and <http://www.breedband.ez.nl>

#### **BROADBAND PAPER**

Broadband paper: the importance of swift implementation and better use, Ministry of Economic Affairs, april 2004

<http://www.breedband.ez.nl>

#### **BROADBAND STIMULATION IN FRANCE, IRELAND AND SWEDEN**

<http://www.cullen-international.com/documents/cullen/cipublic/studies/broadbd.pdf>

#### **CONNECTING EUROPE AT HIGH SPEED: NATIONAL BROADBAND STRATEGIES**

Statement (COM(2004) 369 final) made by the European Commission regarding broadband strategies in Europe, including examples

[http://europa.eu.int/information\\_society/eeurope/2005/doc/all\\_about/broadband/com\\_broadband\\_en.doc](http://europa.eu.int/information_society/eeurope/2005/doc/all_about/broadband/com_broadband_en.doc)

#### **eEUROPE 2005**

Action plan for implementing the Lisbon Strategy, with the main focus being broadband

[http://europa.eu.int/information\\_society/eeurope/2002/news\\_library/documents/eeurope2005/eeurope2005\\_nl.pdf](http://europa.eu.int/information_society/eeurope/2002/news_library/documents/eeurope2005/eeurope2005_nl.pdf)

#### **GUIDELINES ON CRITERIA AND MODALITIES OF IMPLEMENTATION OF STRUCTURAL FUNDS IN SUPPORT OF ELECTRONIC COMMUNICATIONS**

Guidelines for using structural funds in projects in the electronic communications sector, including, among others, calls for tender, transparency and technological neutrality

[http://europa.eu.int/comm/regional\\_policy/sources/docoffic/working/doc/telecom\\_en.pdf](http://europa.eu.int/comm/regional_policy/sources/docoffic/working/doc/telecom_en.pdf)

#### **ICM-RAPPORT**

The report entitled 'Aanbeveling breedbandactiviteiten publieke organisaties' by the Inter-departmental Commission for Market Regulation (September 2004) contains recommendations made by the Dutch central government to promote broadband without interfering with the market

<http://www.breedband.ez.nl>

**INFORMATIEWIJZER STAATSSTEUN**

Public guide to state aid

<http://www.europadecentraal.nl/file.asp?filetype=doc/01/003/002/informatiewijzer.pdf>

**ONDERZOEK BREEDBANDINVESTERINGEN BINNEN DE EU**

The study (on behalf of the Citynet project group of the municipality of Amsterdam) contains examples of broadband projects in France, Sweden, Italy and Finland

[http://www.europadecentraal.nl/file.asp?filetype=doc/01/001/009/onderzoek\\_citynet.pdf](http://www.europadecentraal.nl/file.asp?filetype=doc/01/001/009/onderzoek_citynet.pdf)

**STATE AID RULES AND PUBLIC FUNDING OF BROADBAND**

A practical summary of the European Commission's state aid policy in the field of broadband, by employees of the Commission

[http://www.europa.eu.int/comm/competition/publications/cpn/cpn2005\\_1.pdf](http://www.europa.eu.int/comm/competition/publications/cpn/cpn2005_1.pdf)

**SWEDISH COMMITMENT TO BROADBAND BOTH IN THE CITIES AND IN THE COUNTRYSIDE**

Report on the national broadband strategy in Sweden

<http://www.oecd.org/dataoecd/25/27/2736714.pdf>

*Sites*

**BREEDBANDBELEID EZ**

Broadband pages of the Ministry of Economic Affairs

<http://www.breedband.ez.nl>

**eEUROPE 2005**

[http://europa.eu.int/information\\_society/eeurope/2005/all\\_about/broadband/index\\_en.htm#pastnavigation](http://europa.eu.int/information_society/eeurope/2005/all_about/broadband/index_en.htm#pastnavigation)

**i2010**

[http://europa.eu.int/information\\_society/eeurope/i2010/index\\_en.htm](http://europa.eu.int/information_society/eeurope/i2010/index_en.htm)

**The Lisbon Strategy**

[http://europa.eu.int/growthandjobs/index\\_en.htm](http://europa.eu.int/growthandjobs/index_en.htm)

**NEDERLAND BREEDBANDLAND**

A site containing a large amount of (technical) information on broadband, including a list of the most accepted terms

<http://www.nederlandbreedbandland.nl>

*Broadband decisions made by the European Commission*

**PROJECT ATLAS** (n 213/2003, correctie op beschikking c(2004) 1809 fin.)

[http://europa.eu.int/comm/competition/state\\_aid/decisions/n213\\_2003/en.pdf](http://europa.eu.int/comm/competition/state_aid/decisions/n213_2003/en.pdf)

**CUMBRIA BROADBAND - PROJECT ACCESS** (N 282/2003)

[http://europa.eu.int/comm/secretariat\\_general/sgb/state\\_aids/comp-2003/n282-03.pdf](http://europa.eu.int/comm/secretariat_general/sgb/state_aids/comp-2003/n282-03.pdf)

**BROADBAND BUSINESS FUND** (N 199/2004)

[http://europa.eu.int/comm/competition/state\\_aid/decisions/n199\\_2004/en.pdf](http://europa.eu.int/comm/competition/state_aid/decisions/n199_2004/en.pdf)

**BROADBAND IN SCOTLAND** (N 307/2004)

[http://europa.eu.int/comm/competition/state\\_aid/decisions/n307\\_2004/en.pdf](http://europa.eu.int/comm/competition/state_aid/decisions/n307_2004/en.pdf)

**PYRÉNÉES-ATLANTIQUES** (N 381/2004)

[http://europa.eu.int/comm/competition/state\\_aid/decisions/n381\\_04/fr.pdf](http://europa.eu.int/comm/competition/state_aid/decisions/n381_04/fr.pdf)

**LIMOUSIN - DORSAL** (N 382 /2004)

[http://europa.eu.int/comm/secretariat\\_general/sgb/state\\_aids/comp-2004/n382-04.pdf](http://europa.eu.int/comm/secretariat_general/sgb/state_aids/comp-2004/n382-04.pdf)

**SPAANSE NATIONALE BREEDBANDSTRATEGIE** (N 583/2004)

[http://europa.eu.int/comm/competition/state\\_aid/decisions/n583\\_2004/es.pdf](http://europa.eu.int/comm/competition/state_aid/decisions/n583_2004/es.pdf)

**BROADBAND IN WALES** (N 57/2005)

[http://europa.eu.int/comm/competition/state\\_aid/decisions/n57\\_2005/en.pdf](http://europa.eu.int/comm/competition/state_aid/decisions/n57_2005/en.pdf)

*Examples used in practice:*

**DEMAND AGGREGATION CARRIER-OWNED MODELS**

**a. Open marketplace**

Zwolle: [www.breedbandzwolle.nl](http://www.breedbandzwolle.nl)

Amersfoort: [www.breednet.nl](http://www.breednet.nl)

Deventer: [www.deventerbreed.nl](http://www.deventerbreed.nl)

**b. Closed (foundation)**

Breda: [www.breedbandbreda.nl](http://www.breedbandbreda.nl)

**DEMAND AGGREGATION CUSTOMER-OWNED MODELS**

The Hague: [www.GlasLokaal.nl](http://www.GlasLokaal.nl)

Eindhoven: [www.breedbandeindhoven.nl](http://www.breedbandeindhoven.nl)

Nuenen: [www.onsnetnuenen.nl](http://www.onsnetnuenen.nl)

**PARTNERSHIP OR PPP MODEL**

Amsterdam: [www.citynet.nl](http://www.citynet.nl)

Almere: [www.almerekennisstad.nl/afp](http://www.almerekennisstad.nl/afp) en [www.almerecitynet.nl](http://www.almerecitynet.nl)

**PUBLIC MANAGED DARK FIBRE MODEL**

Leeuwarden: <http://www.ictcenter.nl>

Rotterdam: Pilot Nesselande: [www.nesseweb.nl](http://www.nesseweb.nl)

Fibre optic cables in the Lloydkwartier and Nesselande pilot areas

[www.rotterdam.nl/smartsite1144.dws?Tekstmode=0&Menu=265528&MainMenu=0&goto=2014344&channel=182](http://www.rotterdam.nl/smartsite1144.dws?Tekstmode=0&Menu=265528&MainMenu=0&goto=2014344&channel=182)

BBned to develop fibre optic infrastructure in Rotterdam

<http://www.rotterdam.nl/smartsite1144.dws?Tekstmode=0&Menu=265528&MainMenu=0&goto=2036878&channel=182>

Website of Rotterdam Development Corporation: <http://www.obr.rotterdam.nl>

*Other examples of urban broadband initiatives in the Netherlands:*

Groningen: [www.communitynetwork.nl](http://www.communitynetwork.nl)

Heerlen: [www.isidoor.net](http://www.isidoor.net)

Dordrecht: [www.breedbanddordrecht.nl](http://www.breedbanddordrecht.nl)

Emmen/ Coevorden: [www.coevorden.nl/web/show/id=116601](http://www.coevorden.nl/web/show/id=116601)

Hilversum: [www.ev.nl/breedbandhilversum](http://www.ev.nl/breedbandhilversum)

Delft: [www.ev.nl/breedbanddelft](http://www.ev.nl/breedbanddelft)

Leiden: [www.wirelessleiden.nl](http://www.wirelessleiden.nl)

Tilburg: [www.breedbandtilburg.nl](http://www.breedbandtilburg.nl)

Enschede: [www.casenet.nl](http://www.casenet.nl)

*Public links to organisations:*

Stedenlink: [www.stedenlink.nl](http://www.stedenlink.nl) (Almere, Amsterdam, Arnhem, The Hague, Deventer, Eindhoven, Enschede, Helmond, Leeuwarden, Tilburg, Zoetermeer)

Nederland Breedbandland: [www.nederlandbreedbandland.nl](http://www.nederlandbreedbandland.nl)

Kennisland: [www.kennisland.nl](http://www.kennisland.nl)

Samen snel op glas: [www.samensnelopglas.nl](http://www.samensnelopglas.nl)

*Other sources used:*

Government Information (Public) Access Act (WOB) documents of the Ministry of the Interior and Kingdom Relations:

[www.minbzk.nl/grondwet\\_en/openbaarheid/wob\\_verzoeken](http://www.minbzk.nl/grondwet_en/openbaarheid/wob_verzoeken)

Smidts, M, Marieke Fijnvandraat, Rens Vandeberg, fibre optic Quicksan G30, *Results of a brief stock-taking by the thirty GSB municipalities (G30) of the activities directed at connecting (semi-) public institutions using fibre optics.*

Utrecht: Dialogic, February 2004.

Dialogic: Broadband at its highest increase.

Utrecht: in process of being published

Interdepartmental Commission for Market Regulation, *Recommendations for broadband activities in public organisations.* The Hague: September 2004.

Municipality of Eindhoven, Council proposal of 27 July 2004 with regard to the participation of the municipality of Eindhoven in the Regional Broadband Consortium.

Municipality of Almere, Proposal to the municipal council of 23 June 2005, Broadband in Almere II, Almere Fibre city.

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### *Printing:*

#### **MINISTRY OF ECONOMIC AFFAIRS**

February 2006

*This guide is a translation from the Dutch version  
'Goed op weg met breedband: handreiking voor gemeenten,  
provincies en woningcorporaties', october 2005.  
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