

## **BROADBAND NETWORKS AND STATE AID POLICY AND LAW**

**Aleš Ferčič\***

---

### **ABSTRACT**

*In this article, the Author discusses fundamental questions of State aids in the field of broadband network. After the short introduction, which sketches relationships between state aid policy and other policies, including broadband public policy, and after he illustrates the state of play of Slovenian broadband networks, he discusses main challenges in application of State aid rules to public financing of broadband networks. In this regard, special emphasis is dedicated to legal analysis of conditions for the presence of State aids, and to conditions for the compatibility of State aids for broadband network with the Internal market. Furthermore, he emphasizes the importance of coherent public actions and policies in various fields; public policies shall, as far as possible, supplement each other and shall avoid their mutual collisions. Unfortunately, this is not always the case as the author points out regarding the reckless spatial policy, which has negative effects, inter alia, on the Slovenian broadband networks.*

---

### **1. INTRODUCTION**

Broadband networks enabling high-speed communication services are in any way important instrument for the achievement of many values and aims defined by the Treaty on European Union (henceforth: TEU).<sup>1</sup> Consequently, broadband networks issues are directly or at least indirectly covered by various EU policies and state aid policy is definitively one of them.<sup>2</sup>

---

\* Associate professor at University of Maribor, Faculty of law; ales.fercic@um.si.

<sup>1</sup> OJ C 115, 9. 5. 2008, p. 13; see Arts. 2 and 3 TEU.

<sup>2</sup> Already at this point, it shall be emphasized that none public policy shall be considered in isolation, like an 'island'. Namely, one shall always take into consideration the interplay between various public policies.

According to the Europe 2020 Strategy and one of its flagship initiatives, *i.e.* the Digital Agenda for Europe,<sup>3</sup> until 2020:<sup>4</sup>

- all Europeans shall have access to Internet speeds of above 30 Mbps;
- a half or more of European households shall subscribe to Internet connections above 100 Mbps.

This ambitious objective depends on substantial investments,<sup>5</sup> which cannot be provided by the market alone. At the end of the day, co-financing by using genuine Member States' resources seems to be unavoidable and it has to be always carried out in line with EU state aid rules. With other words, both public policies, namely in the fields of broadband and state aid, go with hand in hand.

Hence, this article discusses the application of EU state aid rules to public financing of broadband networks where a special emphasis is dedicated to the analysis of two fundamental issues related to public co-financing, namely to the conditions for presence of State aids and for compatibility of State aids with the internal market. These two core issues are discussed at the abstract level since EU state aid rules apply equally in all Member States; however, due to practical reasons, this article also offers insight into a state of play of the Slovenian broadband networks. That is to say, the present situation in Slovenia and strategy for the development of the next generation broadband networks are briefly sketched to underline, on one hand, the importance of public funds for the normal functioning and development of the Slovenian broadband, and the limits of public financing set by EU state aid rules, on the other. From the methodological point of view, all standard methods are used, including deduction and synthesis, in order to ensure understanding of sectorial application of the relevant State aid rules.

---

<sup>3</sup> COM(2010) 245 final.

<sup>4</sup> In addition, until 2013, all Europeans shall have access to basic broadband.

<sup>5</sup> According to the European Commission, the realization of the afore-mentioned objective demands up to 330 billion of euros. More precisely, an investment of between 38 and 58 billion of euros would need to be made to achieve 30 Mbps coverage by 2020. In addition, between 181 and 268 billion of euros would need to be made to provide sufficient coverage to 50% of households so that they have access to at least 100 Mbps services; see the Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions of 20 September 2010 – European Broadband: investing in digitally driven growth, COM(2010) 472 final.

<sup>6</sup> Of course, a reduction of investment costs due to measures defined by the Directive 2014/61/EU of the European Parliament and the Council of 15 May 2014 on measures to reduce the cost of deploying high-speed electronic communications networks, OJ L 155, 23. 5. 2014, is possible, however, such a reduction can only diminish public burden but it certainly cannot fully exclude the need of public co-financing.

## 2. STATE OF PLAY OF THE SLOVENIAN BROADBAND NETWORKS

The present situation<sup>6</sup> of the Slovenian broadband networks is illustrated by the set of indicators presented in this chapter and, due to greater transparency, in the appendix of this article.

According to the selected indicators, at the end of the year 2015 only 28.5 % of inhabitants and 73.3 %<sup>7</sup> of households had access to fixed broadband for the Internet, which is in both cases below the EU-average. From the technical and technological point of view at the same time xDSL was predominant (42.5 %),<sup>8</sup> while among other technologies the share of FTTH was 23.9 % and the share of cable modem was 20.0 %. Furthermore, considering the above-mentioned ambitious aims related to the Internet speeds (Mbps), one should also take into consideration the situation at the end of the year 2015, which was as follows: 3.8 % of users had access to the Internet speeds below 2Mbps, 28.6 % of users between 2 and 10 Mbps, 44.9 % of users between 10 and 30 Mbps, and 22.5 % of users above 30 Mbps. At the same time, the households' coverage with standard fixed broadband networks was only 95.4 %, which is below the EU-average (96.6%). This situation is even more problematic when focusing on the Slovenian countryside or rural areas where the coverage is 82.1%.<sup>9</sup> Of course, the delicate situation of the Slovenian broadband networks can be explained, *inter alia*, by the significant stagnation of investments in the e-communications sector, which began in the year 2009. Namely, in the year 2009 less than 200 million of euros were invested in the e-communications sector, which is around 50 % less than in the year 2008 (400 million of euros). The bottom was reached in the year 2011 (130 million of euros). Since the year 2011, the amount of investments is increasing; however, in the following years a yearly amount of investments was lower than the amount invested in the year 2009. The situation is even more problematic since in the recent years a public financing of the open broadband networks reached the highest level ever. This clearly indicates a significant decrease of private financing. This decrease can be partially explained by the global financial and economic crisis, which has more or less affected all Member States. However, in Slovenia there is at least

---

<sup>6</sup> More precisely, the situation is illustrated for the last two years, *i.e.* from the 1<sup>st</sup> quarter of 2014 until the 4<sup>th</sup> quarter of 2015. The data are extracted from the report (Poročilo o razvoju trga elektronskih komunikacij za četrto četrletje 2015, februar 2016) of the Slovenian sectoral regulator (Agencija za komunikacijska omrežja in storitve Republike Slovenije).

<sup>7</sup> According to the RS-SURS research the percentage is even lower, namely 71.8 %.

<sup>8</sup> ADSL 26.3 % and VDSL 16.2 %.

<sup>9</sup> The EU-average is 89.6 %.

one additional specific reason for the discussed decrease that is perhaps not clearly visible at first glance, but already a bit closer look reveals one of the most important (structural) shortcomings, namely, sparsely populated (rural) areas in Slovenia, which cannot be managed overnight and can be in large attributed also to the reckless spatial public policy.<sup>10</sup>

Consequently, in Slovenia, there are a lot of the so called white areas, *i.e.* areas where there is no broadband infrastructure and it is unlikely to be developed in the near future<sup>11</sup> without intensive public intervention. At the end of the day, the future development of the Slovenian broadband sector and its capacity to meet the afore-mentioned ambitious aims largely depends on massive public financing.

### 3. PUBLIC FINANCING OF BROADBAND NETWORKS

Public financing of broadband networks is, *inter alia*, subject to the EU state aid policy and law. In principle, each public financing of broadband network shall be tested against EU state aid rules starting with the Art. 107(1) TFEU which, first, cumulatively defines conditions for the presence of State aid, and second, declares State aid measures as incompatible with the Internal market, save as otherwise provided in the Treaties. There are numerous provisions which regulate conditions for exceptional compatibility of State aids with the Internal market; however, in a daily practice Arts. 106(2) and 107(3) TFEU play the most important role among the Treaty provisions defining exceptions.

However, before we start to discuss the presence of State aid and its compatibility with the Internal market some key procedural aspects shall be underlined since substantive and procedural rules are inseparably linked to each other. In principle, the substantive rules have to be checked and, if appropriate, enforced within special procedures at national and supranational level.<sup>12</sup> EU state aid rules directly regulate the procedures at the supranational level only.<sup>13</sup>

---

<sup>10</sup> Of course, the similar can be said for some other sectors and types of infrastructure for electricity, natural gas and fresh water. Therefore, in addition to various public policies, also the Slovenian spatial public policy shall consider this problem.

<sup>11</sup> The near future is interpreted as a period of three years.

<sup>12</sup> With other words, procedural rules serve as an instrument for the implementation or enforcement of substantive rules.

<sup>13</sup> See in particular the Art. 108 TFEU, and the Council Regulation (EU) 2015/1589 of 13 July 2015 laying down detailed rules for the application of Article 108 of the Treaty on the Functioning of the European Union (OJ EU, L 248, 24.9.2015, p. 9), and the Commission Regulation (EC) No 794/2004 of 21 April 2004 implementing Council Regulation (EU) 2015/1589 laying down detailed rules for the application of Article 108 of the Treaty on the Functioning of the European Union (OJ EU, L 140, 30.4.2004, p. 1–134, and amendments).

However, although the supranational rules do not directly regulate national procedures concerning State aid cases one can still recognize their indirect influence on the national (procedural) law due to the Member States' obligations according to the Art. 108(3) TFEU.<sup>14</sup> Implementation of these obligations depends on credible data regarding State aid grants within the individual Member State and for this reason, Member States usually introduce national notification or reporting systems. Such systems are a general precondition for the realization of the notification and stand-still obligations. Namely, Member States shall inform the European Commission of any plans to grant a new aid or to alter existing one, and in addition, they shall not put their proposed measures into effect until the special European Commission's procedure results in a positive<sup>15</sup> final decision, except if block exemption conditions are met.<sup>16</sup> If the said notification and/or stand-still obligation is breached then a given aid is unlawful<sup>17</sup> and, in principle, it has to be effectively recovered in due time together with the corresponding interests.<sup>18</sup> The same is true when the European Commission, as regards to a given unlawful State aid, decides that such aid is not compatible with the internal market and it takes a negative final decision.<sup>19</sup>

---

<sup>14</sup> Namely, the notification obligation and stand-still obligation. In addition, general principles like primacy and effectiveness of EU law, which limits the principle of procedural autonomy or competence, indirectly influence the national procedural law.

<sup>15</sup> Or at least conditional decision, however, in this case lawfulness of a given State aid depends upon prior fulfilment of prescribed conditions.

<sup>16</sup> Similar can be said in case *de minimis* conditions are met. However, to be precise, *de minimis* aid is not State aid within the meaning of the Art. 107(1) TFEU since such an aid do not sufficiently distort competition or/and affect the trade between Member States.

<sup>17</sup> An unlawful State aid shall be strictly distinguished from an aid which is incompatible with the internal market. To simplify, the former occurs in case of a breach of procedural rules, *i.e.* of rules establishing the notification and stand-still obligations (Art. 108(3) TFEU), and the latter occurs in case of a breach of substantive rules (Art. 107(1) TFEU). The Member State's courts have competence to rule on lawfulness of a given State aid, and within this context they may decide, whether a given measure shall be considered as the State aid within the meaning of Art. 107(1) TFEU, considering also *de minimis* aid, and whether a given State aid can benefit from the block exemption. If a national court finds out that a given State aid is unlawful, it may, *inter alia*, order its recovery together with interests, and in addition, it can also rule on compensation of damage. Moreover, before the national courts negative final decisions of the European Commission, ordering the recovery of a particular State aid, shall be implemented (unless this can be exceptionally done solely by national administrative bodies). The European Commission has, however, the exclusive competence to rule on compatibility of a given State aid with the Internal market.

<sup>18</sup> The interest rates are defined by the European Commission.

<sup>19</sup> If the European Commission declares a given unlawful State aid as compatible with the Internal market, only interest shall be recovered, namely from the date on which the unlawful aid was at the disposal of the beneficiary until the date of a positive or, if given conditions are met, of conditional final decision.

The said recovery obligation is also imposed if a legal or authorized state aid is misused. The failure of the said recovery can have a blocking effect, namely, the European Commission cannot decide upon the compatibility with the internal market of a new aid as long as the old unlawful aid has not been repaid,<sup>20</sup> and it can also have a financial effect, namely, a lump-sum or penalty payment. In addition, any competitor or impaired person may claim for restitution of damages according to the national law of obligations.<sup>21</sup>

Since it is obvious that a breach of the state aid rules can lead to several significant legal consequences, there is certainly reasonable to act in line with the said rules. Of course, understanding of these rules is a precondition to perform public financing of broadband networks within a safe harbour. For this reason, this article discusses fundamental questions related to the presence of State aid (3.1.) and its compatibility with the Internal market (3.2.).

### 3.1. PRESENCE OF STATE AID

Presence of State aid shall be tested case-by-case by careful examination of all criteria as defined in the Art. 107(1) TFEU. Namely, the Art. 107(1) TFEU sketches contours of the State aid concept by determining it as any aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods in so far as it affects trade between Member States. An analysis of the said article reveals various conditions that must be met for the existence of State aid, namely there must be an aid:

- granted by a Member State or through State resources,
- received by at least one undertaking, offering it an economic benefit or advantage,
- having selective effect by favouring only certain undertakings,
- having potential to distort competition, and
- having potential to affect trade between Member States.

These conditions are defined cumulatively<sup>22</sup> and therefore each of them can be considered as a condition *sine qua non*. For practical reasons, this article briefly

---

<sup>20</sup> This is the so called Deggendorf rule.

<sup>21</sup> For more on national court proceedings see the Commission notice on the enforcement of State aid law by national courts (OJ EU, C 85, 9.4.2009, p. 1–22) and the Notice from the Commission — Towards an effective implementation of Commission decisions ordering Member States to recover unlawful and incompatible State aid (OJ EU, C 272, 15.11.2007, p. 4–17).

<sup>22</sup> See for example cases: C-206/06, Essent Netwerk Noord BV, 2008, ECR I-5497; case T-309, 317, 329 in 336/04, TV2, 2008, ECR II-2935; and the XXVI<sup>th</sup> Report on Competition Policy (1996), paragraph 166.

discusses all the stated conditions in order to mark out the outer contours of the said autonomous concept of EU law,<sup>23</sup> however, the emphasis is made on those aspects which are of utmost importance for public financing of broadband network.

As already mentioned, the first condition of the five step test is related to State resources, or more precisely to any kind of aid granted by a Member State or through State resources (*e.g.* direct grant, tax rebate, soft loan or other type of preferential financing conditions). An individual aid can be granted directly by a central, regional or local authority, or indirectly, for example through a public undertaking. However, an observed public measure or action must burden<sup>24</sup> State or public resources,<sup>25</sup> and it must be attributable or imputable to a national public authority, otherwise there is no State aid.<sup>26</sup> An aid burdens public resources if a particular public measure or action is financed by a public authority resulting in higher public outgoings or lower revenues.<sup>27</sup> Furthermore, an aid is imputable to a public authority if a decision to grant an individual aid is taken by a public authority or, when an aid is granted indirectly, if a public authority actually<sup>28</sup> exercises dominant influence over a public undertaking or another entity.<sup>29</sup>

---

<sup>23</sup> As in all other cases when dealing with autonomous concepts of EU law, such a concept must be interpreted widely and with due respect of the Court's and Commission's practice. That is to say, independently of any similar national concepts, if there are any.

<sup>24</sup> At least potentially, like for example in case of public guarantees.

<sup>25</sup> For the explanation of State or public resources see for example cases: C-83/98 P, *Ladbroke Racing*, 2000, ECR I-3271; T-358/94, *Air France*, 1996, ECR II-2109.

<sup>26</sup> See for example cases: C-379/98, *PreussenElektra*, 2001, ECR I-2099; C-222/07, *UTECA*, 2009, ECR I-1407; C-482/99, *Stardust Marine*, 2002, ECR I-4397.

<sup>27</sup> Since in a daily practice also European structural and investments funds can be used for public financing of broadband networks it is worthy to point out that even European funds, such as the European Agricultural Fund for Rural Development and the European Regional Development Fund, can constitute State resources when these funds are allocated at a Member State's discretion. That is to say, if a Member State can autonomously fulfill the wide framework as defined by EU law and, as a consequence, it can use or allocate sources received from European funds, such funds become State's funds (existence of outer limits set by EU law is not decisive in this regard).

<sup>28</sup> Even if a public authority is in a position to control a public undertaking and to exercise a dominant influence over its operations, actual exercise of that control in a particular case cannot be automatically presumed. A public undertaking may act with more or less independence, according to the degree of autonomy left to it by a public authority. Therefore, the mere fact that a public undertaking is under public authority's control is not sufficient for measures taken by that undertaking to be imputed to a public authority. It is also necessary to examine whether the public authorities must be regarded as having been involved, in one way or another, in the adoption of those measures. See case C-482/99, *Stardust Marine*, 2002, ECR I-4397.

<sup>29</sup> The Court has ruled that the said 'imputability' may be inferred from a set of indicators arising from the circumstances of the case and the context in which that measure was taken, and at the same time it has offered several relevant indicators. See case C-482/99, *Stardust Marine*, 2002, ECR I-4397.

The second condition of the five step test is related to an economic benefit or advantage received directly or indirectly<sup>30</sup> by at least one undertaking<sup>31</sup> which it would not have received from its own commercial endeavour within a given market in the normal course of business, including also situations where a gratuitous advantage results from the mitigation of charges which are normally included in an undertaking's budget. An advantage will be gained where, as a result of the aid, the beneficiary's net financial position is improved, or, even where there is no actual improvement in the beneficiary's position, where, without the aid, that position would have deteriorated. When analysing a beneficiary's financial position, or better to say a change of that position, a point of departure must necessarily be a competitive position existing within a relevant market before the adoption of the measure in issue. However, if its financial position is improved because of a public measure or conduct, this is not automatically a proof of the said advantage, since a profit is an ultimate aim of any business activity and its desired companion. Yet, in this regard a gained profit must be of reasonable extent. For that reason, it is necessary to distinguish between an ordinary and extraordinary advantage. Only the latter, i.e. the qualified advantage is relevant for the purpose of the Art. 107(1) TFEU. Its assessment is far from trivial task, and in this regard special tests are needed as developed by the European Commission and the Court of Justice of the EU. In principle, the private undertaking test<sup>32</sup> is used for the assessment of ordinary commercial activities, and the SGEI or Altmark test<sup>33</sup> is used for the

---

<sup>30</sup> For example, when third-party operators receive wholesale access to the subsidized infrastructure.

<sup>31</sup> Undertaking is an entity performing at least one economic activity, *i.e.* offering goods or/and services within a given market, regardless of its legal status or form, ownership and a way of financing. The construction of a broadband network infrastructure with a view of its future commercial exploitation by the State or third-party operators, also constitutes an economic activity, while the roll-out of a broadband network for non-commercial purposes might not constitute State aid, because the network construction does not favour any undertaking. However, if such a network is subsequently opened for the use of broadband investors or operators, State aid is likely to be involved. See the Communication from the Commission – EU Guidelines for the application of State aid rules in relation to the rapid deployment of broadband networks, OJ EU, C 25, 26. 1. 2013, p. 3.

<sup>32</sup> This test has several modalities, *e.g.* private investor test (market economy investor test), private creditor test, private purchaser test, private vendor test, private guarantor test, etc. In all these cases, the benchmark is a rational private undertaking aiming at reasonable profit in mid- or long-term period, accepting reasonable risk.

<sup>33</sup> The Altmark test was first introduced in the case C-280/00, ECR 2003, I-7747, as a tool used to distinguish between State aids and aid-free measures; an individual compensation escapes qualification as State aid if all four conditions are met:

– first, the recipient undertaking must actually have public service obligations to discharge, and the obligations must be clearly defined [...];



assessment of public financing of public services. Of course, in the field of broadband network one can imagine cases in which one<sup>34</sup> or the other<sup>35</sup> of both tests applies. At this point it is also worthy to clarify the function and limits

---

second, the parameters on the basis of which the compensation is calculated must be established in advance in an objective and transparent manner, to avoid it conferring an economic advantage which may favour the recipient undertaking over competing undertakings [...];

third, the compensation cannot exceed what is necessary to cover all or part of the costs incurred in the discharge of public service obligations, taking into account the relevant receipts and a reasonable profit [...];

fourth, where the undertaking which is to discharge public service obligations, in a specific case, is not chosen pursuant to a public procurement procedure which would allow for the selection of the tenderer capable of providing those services at the least cost to the community, the level of compensation needed must be determined on the basis of an analysis of the costs which a typical undertaking, well run and adequately provided with means of transport so as to be able to meet the necessary public service requirements, would have incurred in discharging those obligations, taking into account the relevant receipts and a reasonable profit for discharging the obligations. [...].

Regarding the above mentioned conditions it is also worthy to point out the Communication from the Commission – EU Guidelines for the application of State aid rules in relation to the rapid deployment of broadband networks, OJ EU, C 25, 26. 1. 2013, which offers further clarification as to some of these conditions, *i.e.* to the definition of services of general economic interest (paragraphs 19 – 25) and to the calculation of compensation and clawback (paragraphs 26 and 27).

<sup>34</sup> *I.e.* private undertaking test in cases of recapitalization, guarantee, soft loan *etc.*

<sup>35</sup> *I.e.* Altmark test in cases where Member States or their public authorities consider that the provision of a broadband network should be regarded as a service of a general economic interest within the meaning of the Art. 106(2) TFEU and the Altmark case and provide public funding on this basis. In this regard it shall be emphasized that although Member States enjoy a relatively wide discretion regarding the definition of services of general economic interest they have to consider the outer limits of the autonomous concept of EU law. Since the ‘exemption’ as defined by the Art. 106(2) TFEU could jeopardize the effectiveness of EU law, if applied wrongly or abusively; the European Commission and Court of Justice of the EU put their attention on manifest errors. In principle, the European Commission has already clarified, that Member States cannot attach specific public service obligations to services that are already provided or can be provided satisfactorily and under conditions, such as price, objective quality characteristics, continuity and access to the service, consistent with the public interest, as defined by the State, by undertakings operating under normal market conditions. Of course, this logic applies also for deployment of broadband network and, as a consequence, in areas where private investors have already invested in a broadband network and are largely providing competitive broadband services with an adequate broadband coverage, setting up a parallel competitive and publicly funded broadband infrastructure cannot be considered as a service of general economic interest, except in cases where it can be demonstrated that private investors are not in position to provide in the near future, *i.e.* in the period of three years, an adequate broadband coverage to all users (consumers and undertakings) in a given area, thus leaving a significant part of the users outside the circle. In principle, only the so called white spots or areas are ‘eligible’ (yet, there is a little space for exceptions, mostly due to the ‘near future’ argument).

of competitive selection process, since the latter is often used for the selection of the best bidder. Such a process, when applied in the field of broadband network, does not guarantee that there is no economic advantage or benefit within the meaning of the Art. 107(1) TFEU but only that such benefit is limited to the minimum amount necessary for the particular project.

The third condition of the five step test is related to a selective favouring of certain undertakings, where certain advantage is not granted to all relevant undertakings within the observed Member State.<sup>36</sup> Therefore, the said condition is met in cases of unfounded legal or factual differentiation between undertakings which are in a comparable position. In principle, there are two kind of selectivity, namely the material and regional selectivity. The material selectivity encompasses the sectorial selectivity, i.e. measures limited to certain sectors only, but also the *de facto* selectivity, i.e. measures limited to certain categories of undertakings, e.g. to small and medium-sized undertakings or to newly created companies. On the other hand, the regional selectivity encompasses measures that favour only undertakings located in particular area. However, it is important to point out that selective measures meet their antipode in general measures.<sup>37</sup> The latter do not constitute State aids within the meaning of the Art. 107(1) TFEU. Considering what was just said, state measures supporting the deployment of broadband networks are selective in nature in that they target broadband investors and third-party operators which are active only in certain segments of the overall electronic communications services market.<sup>38</sup>

The fourth condition of the five step test is related to a (potential) distortion of competition. The said condition is met if a public measure or conduct is capable to influence existing competition relationships within at least one relevant market, or if it is capable to prevent or hinder the formation of new competition relationships within such market. The said distortion of competition occurs

---

<sup>36</sup> A regional or local unit of particular Member State can be only exceptionally considered as the reference system. See for example cases: C-88/03, Azores, 2006, ECR I-7115; C-428-434/06, Rioja, 2008, ECR I-6747.

<sup>37</sup> See more in Bartosch, 2010: 729-752; Bousin and Piernas, 2008: 634-653; Kurcz and Valindas, 2008: 159-182.

<sup>38</sup> The situation is less straightforward when it comes to business end-users of the subsidized network since for them the measure might not be selective as long as the access to the subsidized infrastructure is open to all sectors of the economy. With other words, selectivity will exist if broadband deployment is specifically addressed to dedicated business users, for instance if the State support is geared toward the deployment of a broadband network in favour of predetermined companies which are not chosen according to general criteria applicable in the entire area for which the granting authority is responsible. See the Communication from the Commission – EU Guidelines for the application of State aid rules in relation to the rapid deployment of broadband networks, OJ EU, C 25, 26. 1. 2013, p. 4.

because of a public intervention which, within a given relevant market, is capable to improve or at least to preserve a competition position of one or more aid-beneficiaries in comparison to their competitors who have not received such aid, or which is capable to prevent or hinder an entry of new competitors. According to the Court's practice already a small amount of aid is capable to distort a competition, in particular within relevant markets where degree of competition is high. However, at this point it is worthy to mention the so called *de minimis* aid, as defined by special regulations.<sup>39</sup> Namely, aid measures shall be deemed not to meet all the conditions of Art. 107(1) TFEU, *i.e.* the conditions of potential distortion of competition or of potential effect on trade between Member States, and shall therefore be exempt from the notification requirement of the Art. 108(3) TFEU, if they fulfil the conditions laid down in particular *de minimis* regulation. Since broadband sector in the EU is, in principle, highly competitive it is relatively safe to say that usually the fourth condition is easy to 'tick off'.

The fifth condition of the five step test is related to a (potential) effect on trade between Member States. An aid is capable to affect the trade between two or more Member States if it actually causes, or at least threatens to cause a change of pattern in the cross-border trade, where the concept of trade shall be interpreted widely, *i.e.* as an economic activity related to goods, services or capital. The said situation can occur if an aid results in an improved market position of beneficiary in comparison to its competitors in another Member State, what is only possible if a relevant market is extended over two or more Member States. In this case, the cross-border trade can be affected also in case if a beneficiary exercises its economic activity solely in one Member State. Similar, as already said within the previous condition, the Court's practice shows that already a small amount of aid can affect the trade between Member States, except in cases of the *de minimis* aid as defined by special regulations.<sup>40</sup> What is more, similar as with the fourth condition also here is relatively safe to say that in most cases this condition is easy to 'tick off'.

In short, the public financing of broadband network is qualified as State aid within the meaning of the Art. 107(1) TFEU if all above discussed conditions

---

<sup>39</sup> See for example the Commission Regulation (EU) No 1407/2013 of 18 December 2013 on the application of Articles 87 and 88 of the Treaty to *de minimis* aid (OJ, L 352, 24. 12. 2013, p. 1); and the Commission Regulation (EU) No 360/2012 of 25 April 2012 on the application of Articles 107 and 108 of the Treaty on the Functioning of the European Union to *de minimis* aid granted to undertakings providing services of general economic interest (OJ, L 114, 26. 4. 2012, p. 8).

<sup>40</sup> See *supra*, footnote No. 39.

are met. Thus, for greater clarity let us repeat that the act of public authority<sup>41</sup> is not the State aid in case of:

- recapitalization, loan, guarantee or any other classical commercial conduct which can be considered as a normal market conduct on the basis of the private undertaking test,
- compensation granted for the provision of services of general economic interest which corresponds to the Altmark test,
- *de minimis* aid,
- aid for broadband network for non-commercial use,<sup>42</sup>
- regulatory and administrative measures, according to the Directive 2014/61/EU.<sup>43</sup>

Public measures which are not qualified as State aid within the meaning of Art. 107(1) TFEU do not fall under the Art. 108(3) TFEU; there is no obligation to notify such measures to the European Commission and to wait with their realization until the final European Commission's decision. Quiet opposite, public measures which are qualified as (new) State aid within the meaning of Art. 107(1) TFEU are subject to the notification and stand-still obligation according to the Art. 108(3) TFEU, except in cases when all conditions, as defined by EU regulation<sup>44</sup> or other act,<sup>45</sup> for the so called block exemption are met.<sup>46</sup> The notification and stand-still obligations are defined in order to ensure the assessment of compatibility of a given new State aid with the Internal market. European Commission has the exclusive power for such an assessment.

---

<sup>41</sup> And even of public undertaking in case its act can be imputed to the public authority.

<sup>42</sup> However, if this network is subsequently opened for the use of broadband investors or operators, State aid is possible.

<sup>43</sup> See *supra*, footnote No. 5.

<sup>44</sup> See for example the Commission Regulation (EU) No 651/2014 of 17 June 2014 declaring certain categories of aid compatible with the internal market in application of Articles 107 and 108 of the Treaty, OJ EU, L 187, 26. 6. 2014, p. 1.

<sup>45</sup> See for example Commission Decision (2012/21/EU) of 20 December 2011 on the application of Article 106(2) of the Treaty on the Functioning of the European Union to State aid in the form of public service compensation granted to certain undertakings entrusted with the operation of services of general economic interest, OJ EU, L 7, 11. 1. 2012, p. 3.

<sup>46</sup> In such a case a given State aid is deemed to be compatible with the Internal market and no notification to European Commission (and stand-still) is needed.

### 3.2. COMPATIBILITY OF STATE AID WITH THE INTERNAL MARKET

Compatibility of State aid with the Internal market is further fundamental question in the field of State aid, which has to be answered on case-by-case basis if the answer to the former fundamental question, *i.e.* regarding the presence of State aid, is affirmative.<sup>47</sup> In essence, the question of compatibility addresses the treatment of State aids in the European model of social market economy. Or to put it simply, are State aid treated as a poison or remedy? The answer is to be found in the Art. 107(1) TFEU, which declares State aids as incompatible with the Internal market, save as otherwise provided in the Treaties. Thus, there is no straightforward answer to this question and once more a case-by-case approach is needed.

TFEU defines numerous cases in which a State aids can be declared as compatible with the Internal market and, as a consequence, in a daily practice State aids play important role in the field of various public policies where they are used as an instrument for the realization of public aims.<sup>48</sup> Of course, not all provisions of the TFEU, defining conditions for exceptional compatibility of State aids with the Internal market, are applicable for public financing of broadband networks. There is, however, no doubt that in the field of broadband networks the Arts. 106(2) and 107(3) TFEU are of utmost importance for the assessment of compatibility of State aids with the Internal market.

#### 3.2.1. Art. 106(2) TFEU

Art. 106(2) TFEU states that undertakings entrusted with the operation of services of general economic interest or having the character of a revenue-producing monopoly shall be subject to the rules contained in the Treaties, in particular to the rules on competition, in so far as the application of such rules does not obstruct the performance, in law or in fact, of the particular tasks assigned to them, and that the development of trade must not be affected to such an extent as would be contrary to the interests of the EU.

As already said, in some cases a Member State may consider that the provision of a broadband network should be regarded as a service of a general economic interest and it may provide public funding on this basis; however, such a funding shall be performed according to the Art. 106(2) TFEU. Since the latter defines an exception (namely, a non-application the Treaty provisions, like for

---

<sup>47</sup> Which means we are dealing with certain State aid in a real life situation.

<sup>48</sup> In this regard, I think the way of how the EU has tackled with the global financial and economic crisis speaks for itself.

example of non-application of (certain) State aid rules), it shall be interpreted narrowly. In order to ensure a greater clarity, the European Commission has issued the so-called second SGEI package (also known as the Almunia package),<sup>49</sup> which combines hard law and soft law instruments. However, only two of four instruments are directly relevant from the compatibility assessment perspective, namely the Decision, which has a function of a block exemption, and the Framework, which reveals the European Commission's way of interpretation of the Art. 106(2) TFEU within its compatibility assessment procedure. Of course, since the both instruments follow a horizontal or let us say all-sectors approach, in some cases certain adjustments are needed when they are used in the field of broadband network.<sup>50</sup>

### 3.2.2. Art. 107(3)(c) TFEU

Art. 107(3)(c) TFEU is the most appropriate legal basis for the declaration of certain State aid, granted in the field of broadband network, as being compatible with the Internal market (except in cases of services of general interest, see *supra*, chapter 2.1.). Indeed, one could imagine broadband cases where also certain other sub-paragraphs of the Art. 107(3) TFEU could apply, like for example the Art. 107(3)(a) TFEU, however, in a daily practice the Art. 107(3)(c) TFEU is certainly most frequently used. It enables exceptional compatibility of State aids, which 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. Thus, the positive

---

<sup>49</sup> The Almunia package is consisted of four instruments:

– Communication from the Commission on the application of the European Union State aid rules to compensation granted for the provision of services of general economic interest, OJ EU, C 8, 11. 1. 2012, p. 4;

– Commission Decision of 20 December on the application of Article 106(2) of the Treaty on the Functioning of the European Union to State aid in the form of public service compensation granted to certain undertakings entrusted with the operation of services of general economic interest, OJ EU, L 7, 11. 1. 2012, p. 3;

– Communication from the Commission, European Union framework for State aid in the form of public service compensation (2011), OJ EU, C 8, 11. 1. 2012, p. 15;

– Commission Regulation on the application of Articles 107 and 108 of the Treaty on the Functioning of the European Union to *de minimis* aid granted to undertakings providing services of general economic interest, OJ EU, L 114, 26. 4. 2012, p. 8.

<sup>See</sup> Ferčič, A., Samec, N., European State Aid Law and Policy, and Local Public Services, *Lex Localis*, No. 2/2014, p. 267 – 287.

<sup>50</sup> See for example paragraphs 19 – 27 of the Communication from the Commission – EU Guidelines for the application of State aid rules in relation to the rapid deployment of broadband networks, OJ EU, C 25, 26. 1. 2013, p. 3.

impact of the aid measure in reaching an objective of common interest shall outweigh its potential negative side effects, such as distortions of competition and cross-border trade. In this regard, the principle of proportionality (which, in a nutshell, demands a legitimate aim, a measure appropriate to achieve this aim and its necessity, and an over-plus of positive over negative effects) is of crucial importance. This principle can be well recognized in the compatibility test within the Art. 107(3)(c) TFEU, which contains the following conditions:<sup>51</sup>

- contribution to the achievement of objectives of common interest,
- absence of market delivery due to market failures or important inequalities,
- appropriateness of State aid as a policy instrument,
- existence of incentive effect,
- aid limited to the minimum necessary,
- limited negative effects,
- transparency.

These conditions are defined cumulatively and, therefore, in case an observed State aid fails to comply with one of these conditions it is automatically incompatible with the Internal market. However, if in particular case all of these conditions are fulfilled, the final step has to be done, namely, weighting of positive and negative effects. Only in case the overall balance of all effects is positive, the observed State aid can be declared as compatible with the Internal market.

The above-mentioned conditions and the weighting of relevant effects are discussed in the following sub-chapters.<sup>52</sup>

### *3.2.2.1. Contribution to the achievement of objectives of common interest*

Contribution to the achievement of objectives of common interest is the first condition of the so called compatibility test within the Art. 107(3)(c) TFEU. Objectives of common interest are to be found within the ‘collection’ of EU aims as defined in the Treaties and further elaborated in EU acts, such as in the Europe 2020 Strategy and, even more specific and relevant for the broadband, in the Digital Agenda for Europe.

---

<sup>51</sup> Some of the elements of the ‘general’ principle of proportionality are dissected and supplemented with specifics of sectoral approach, however, the core logic and elements of the principle of proportionality are still to be recognized.

<sup>52</sup> See also the paragraphs 36 – 54 of the Communication from the Commission – EU Guidelines for the application of State aid rules in relation to the rapid deployment of broadband networks, OJ EU, C 25, 26. 1. 2013, p. 3.

It should be emphasized, however, the mere fact that a certain aim can be found within the Treaties or in other EU acts, which in particular case principally labels such aim as a legitimate one, does not automatically mean it has to be followed and realized without any further considerations. Namely, there are numerous legitimate aims and not all are compatible with each other. In case of a collision between two or more legitimate aims a case-by-case trade-off or ranking between the conflicting legitimate aims shall be carefully exercised. As to this ranking, it should be explicitly pointed out that in the model of social market economy, as underlined in the Art. 3(3) TEU, economic goals should not enjoy *a priori* primacy over non-economic goals and *vice versa*.

### 3.2.2.2. *Absence of a desired market delivery due to market failures or important inequalities*

Absence of a desired market delivery due to market failures or important inequalities are often discussed as parallel undesired situations, although at the end of the day also the inequality can be at least to certain extent attributed to market failure. Market has economic nature and it is certainly not capable to realize all legitimate aims, in particular not those of social policy or of other non-economic public policies.

In the broadband sector, similar like in many other (infrastructure) sectors, positive externalities arise where market players do not internalize the whole benefit of their investment or actions. Consequently, private investment is not as appealing as desired. What is more, due to economics of density, the deployment of broadband networks is generally more profitable in cities, that is to say in urban areas with high density of population, while rural areas with low density of population cannot be supplied with profit because of high fixed costs of investment which cannot be recovered by small number of users.<sup>53</sup> Consequently, in (rural) areas with low density of population there is no service at all or perhaps there is a service, however its price is significantly higher than in urban areas. Of course, none of these two scenarios are in line with the Digital Agenda for Europe and its ambitious aims, and at the end of the day, the public intervention is needed with respect of valid legal framework, including also State aid rules. As already said, there are a lot of the so called white spots in Slovenia, in many cases also because of the reckless spatial policy, which have to be supplied with state support in one way or another, in most cases with direct use of public funds.

---

<sup>53</sup> Unit costs would be simply too high.



### 3.2.2.3. Appropriateness of State aid as a policy instrument

Appropriateness of State aid as a policy instrument is usual element of the proportionality test. That is to say, an observed measure shall be designed in a way which makes it capable to realize the legitimate aim in question. In some cases, State aid is only measure which can overcome the lack of broadband connectivity.<sup>54</sup>

From the appropriateness perspective, one shall also consider the importance of proper horizontal and vertical coordination between various public authorities and their organs in order to avoid duplications and incoherence of measures. It is highly welcome that a competent (central) body at the state level issues a national framework scheme and guidelines for broadband development across the whole territory of the state, which enables transparency as a precondition for coherent activities.

In addition, one shall also point out special roles in designing of pro-competitive State aid measures of both, national regulatory authority and national competition authority. On one hand, the former shall in particular support public authorities with regard to the State aid schemes and should be consulted when target areas are being identified. They should be consulted with regard to determining the wholesale access prices and conditions as well as with regard to solving disputes between access seekers and the subsidized infrastructure operator. Moreover, national regulatory agency shall issue guidelines for local authorities, which include recommendations on market analysis, wholesale access products and pricing principles. On the other hand, national competition authority shall for example give advice regarding large framework schemes to help establishing a level playing field for the bidding operators and to avoid that a disproportionately high share of State funds is earmarked to one operator, thereby strengthening its market position (which usually already corresponds to the concept of dominant position within the meaning of the Art. 102 TFEU). Of course, in addition to these two authorities there is still space for other bodies offering support, *e.g.* for national competence centers whose mission is to help small (usually local) authorities, facing with lack of staff, knowledge and experiences,<sup>55</sup> to design adequate State aid measures and to ensure consistent application of State aid rules.

---

<sup>54</sup> There are, however, cases where also other measures are appropriate and in such cases the mildest measure among appropriate measures shall be used (element of necessity).

<sup>55</sup> And at the same time with lack of financial resources needed to acquire consulting services on the market.

#### 3.2.2.4. Existence of incentive effect

Existence of incentive effect, as one of the conditions of the compatibility test in the field of broadband network, is mainly centered at the examination of whether the desired broadband network investment would not have been undertaken within the same time-frame without any State aid. There is for example no relevant incentive effect in case an operator is already subject to certain obligations to cover the target area.<sup>56</sup>

#### 3.2.2.5. Aid limited to the minimum necessary

Aid limited to the minimum necessary is a condition which can only be assessed with careful consideration of different areas, *i.e.* white, grey and black areas, and of different types of broadband networks, *i.e.* basic networks<sup>57</sup> and next generation access networks.<sup>58</sup>

In case of basic broadband networks the following shall be, *inter alia*, considered.

- White areas: in principle, the public intervention is welcome here from the territorial cohesion and economic development perspective or more precisely, because of the ambitious aims set by the Digital Agenda for Europe discussed in the first chapter of this article. However, such intervention has to be performed according to the strict legal framework which demands:

---

<sup>56</sup> This is even more so, if operator has already received financial aid to cover necessary investments in the network since double financing of the same thing is not allowed.

<sup>57</sup> Several different technology platforms can be considered as basic broadband networks including asymmetric digital subscriber lines (up to ADSL2+ networks), non-enhanced cable (e.g. DOCSIS 2.0), mobile networks of third generation (UMTS) and satellite systems.

<sup>58</sup> Networks which rely wholly or partly on optical elements and which are capable of delivering broadband access services with enhanced characteristics as compared to existing basic broadband networks. NGA networks are understood to have at least the following characteristics: (i) deliver services reliably at a very high speed per subscriber through optical (or equivalent technology) backhaul sufficiently close to user premises to guarantee the actual delivery of the very high speed; (ii) support a variety of advanced digital services including converged all-IP services; and (iii) have substantially higher upload speeds (compared to basic broadband networks). At the current stage of market and technological development, NGA networks are: (i) fibre-based access networks (FTTx); (ii) advanced upgraded cable networks; and (iii) certain advanced wireless access networks capable of delivering reliable high speeds per subscriber. It is important to bear in mind that in the longer term NGA networks are expected to supersede existing basic broadband networks and not just to upgrade them. See the Communication from the Commission – EU Guidelines for the application of State aid rules in relation to the rapid deployment of broadband networks, OJ EU, C 25, 26. 1. 2013, p. 3.

detailed mapping and analysis of coverage, public consultation, competitive selection process, use of most economically advantageous offer criteria, technological neutrality, use of existing infrastructure, wholesale access (pricing), monitoring and clawback mechanism, transparency and reporting.<sup>59</sup> A failure to meet any of these conditions would most likely require an in-depth assessment within the procedure according to the Art. 108(2) TFEU, which could result in a conclusion that the aid is incompatible with the Internal market.

- Grey areas: the public intervention in grey areas can generate either positive effects (neutralization of market failure or strengthening of territorial cohesion) or negative effects (distortion of competition and obstruction of market dynamics), therefore, even more detailed assessment as in case of white areas is needed. This assessment is performed at two levels. At first level it has to be proved that no affordable or adequate services are offered to satisfy the needs of citizens or business users, and that there are no less distortive measures available (including *ex ante* regulation) to reach the same goals.<sup>60</sup> In case in particular case both conditions are satisfied, the second level assessment follows where the same conditions, as those for public intervention in white areas, are examined.
- Black areas: in principle, the public intervention in black areas is not needed and there is also no need for the assessment since it is assumed that no market failure exists. With other words, in the absence of a clearly demonstrated market failure, the European Commission will take a negative view of measures to fund the roll-out of an additional broadband infrastructure in a 'black area'.

---

<sup>59</sup> See paragraph 78 of the Communication from the Commission – EU Guidelines for the application of State aid rules in relation to the rapid deployment of broadband networks, OJ EU, C 25, 26. 1. 2013, p. 3.

<sup>60</sup> For this reason the European Commission assess in particular whether:

- the overall market conditions are not adequate, by looking, inter alia, into the level of current broadband prices, the type of services offered to end-users (residential and business users) and the conditions attached thereto;
- in the absence of *ex ante* regulation imposed by an national regulatory authority, effective network access is not offered to third parties or access conditions are not conducive to effective competition;
- overall entry barriers preclude the potential entry of other electronic communication operators; and
- any measures taken or remedies imposed by the competent national regulatory or competition authority with regard to the existing network provider have not been able to overcome such problems.

See the Communication from the Commission – EU Guidelines for the application of State aid rules in relation to the rapid deployment of broadband networks, OJ EU, C 25, 26. 1. 2013, p. 3.

In case of next generation access networks the following shall be, *inter alia*, considered.

- White areas: the public intervention is only admissible in case two special conditions, in addition to all general conditions as presented above (in case of white areas concerning basic broadband networks), are met. Namely, effective wholesale access for third-party operators, and fair and non-discriminatory treatment, what is of particular importance in case the observed network operator is vertically integrated.
- Grey areas: in assessing whether other network investors could deploy additional next generation networks in a given area, account should be taken of any existing regulatory or legislative measures that may have lowered barriers for such network deployments (access to ducts, sharing of infrastructure, *etc.*). The European Commission will need to carry out a more detailed analysis in order to verify whether State intervention is needed since State intervention in such areas carries a high risk of crowding out existing investors and distorting competition.<sup>61</sup>
- Black areas: State aid is not necessary; it can seriously distort competition, save as otherwise proved, and therefore it is incompatible with the internal market under Article 107(3)(c) of the TFEU. However, it has to be emphasized that the situation is significantly different in case of next generation access network enabling ultra-fast speeds above 100 Mbps; namely, in such case the State aid is deemed to be compatible with the Internal market if special conditions are met, which can ensure, in a nutshell, a significant durable and sustainable technological progress which improves competition.<sup>62</sup>

### *3.2.2.6 Limited negative effects*

Limited negative effects are related to competitors and their behavior regarding the existing of future investments and, in some cases, even their (non-)presence within the market. State aid shall not affect competitors in a way that they decrease the extent of planned investments or even retreat from the market.

---

<sup>61</sup> See the Communication from the Commission – EU Guidelines for the application of State aid rules in relation to the rapid deployment of broadband networks, OJ EU, C 25, 26. 1. 2013, p. 3.

<sup>62</sup> See paragraphs 83 – 85 of the Commission – EU Guidelines for the application of State aid rules in relation to the rapid deployment of broadband networks, OJ EU, C 25, 26. 1. 2013, p. 3.

### 3.2.2.7. Transparency

Transparency means, first of all, that state aid shall be awarded in a (sufficiently) transparent manner; it must be ensured that the Member States, economic operators, the interested public and the European Commission have easy access to all relevant acts and pertinent information about the aid awarded thereunder.

### 3.2.2.8. Overall weighting or balancing of relevant effects

Overall weighting or balancing of relevant effects is a final step of the above-mentioned compatibility assessment. The final step of the assessment follows the same logic as the general principle of proportionality (more precisely, its final element, *i.e.* proportionality in the narrow sense). Of course, the State aid can only be declared as compatible with the Internal market in case positive effects as attached to the achievement of the legitimate aim in question outweigh negative (side) effects.<sup>63</sup>

## 4. CONCLUSION: KEY FINDINGS AND THESES

Conclusion of this article contains key findings and theses articulated with respect of previous chapters. The findings and theses are as follows:

- The ambitious aim defined by the Digital Agenda for Europe concerning access to Internet speeds of above 30 Mbps and subscription to Internet connections above 100 Mbps until the year 2020 shall be considered as a legitimate aim.
- EU State aid rules as contained in the TFEU and legislative acts of the EU are well supported by the so called sectorial soft law.
- EU State aid rules are flexible enough not to hinder the realization of the above-mentioned legitimate aim, however, there is no guarantee or automatism in this regard since the ‘potential’ of EU State aid rules largely depends on proper public policy.
- What is more, a realization of the above-mentioned aim does not depend on the interplay between broadband policy and state aid policy only, but also on interplay with various other public policies; even with public policies which, at least at first sight, do not have a direct connection with broadband and state aid measures, like for example with spatial public policy.

---

<sup>63</sup> See paragraphs 49 – 54 of the Commission – EU Guidelines for the application of State aid rules in relation to the rapid deployment of broadband networks, OJ EU, C 25, 26. 1. 2013, p. 3.

**APPENDIX**

**Graph No. 1: fixed broadband (access) penetration<sup>64</sup>**

	2014, 1 <sup>st</sup> q	2014, 2 <sup>nd</sup> q	2014, 3 <sup>rd</sup> q	2014, 4 <sup>th</sup> q	2015, 1 <sup>st</sup> q	2015, 2 <sup>nd</sup> q	2015, 3 <sup>rd</sup> q	2015, 4 <sup>th</sup> q
inhabitants	27,2 %	27,3 %	27,5 %	27,7 %	27,9 %	28,0 %	28,3 %	28,5 %
households (EU-SILC)	70,6 %	70,9 %	71,3 %	72,0 %	71,6 %	71,9 %	72,6 %	73,3 %
households (RS-SURS)	-	-	-	-	-	-	71,1 %	71,8 %

**Graph No. 2: structure of the broadband market – market shares of four biggest operators<sup>65</sup>**

	2014, 1 <sup>st</sup> q	2014, 2 <sup>nd</sup> q	2014, 3 <sup>rd</sup> q	2014, 4 <sup>th</sup> q	2015, 1 <sup>st</sup> q	2015, 2 <sup>nd</sup> q	2015, 3 <sup>rd</sup> q	2015, 4 <sup>th</sup> q
Telekom Slovenije	35,9 %	35,5 %	35,4 %	35,1 %	34,5 %	34,5 %	34,4 %	34,5 %
Telemach	16,1 %	19,4 %	19,6 %	19,7 %	19,9 %	19,8 %	20,2 %	20,2 %
T-2	18,0 %	18,3 %	18,4 %	18,4 %	18,6 %	18,6 %	18,6 %	18,7 %
Amis	11,7 %	11,6 %	11,5 %	11,5 %	11,7 %	11,5 %	11,4 %	11,3 %

<sup>64</sup> Access to the Internet, IP telephony and IP television.

<sup>65</sup> Access to the Internet.

**Graph No. 3: fixed broadband technologies<sup>66</sup>**

	2014, 1 <sup>st</sup> q	2014, 2 <sup>nd</sup> q	2014, 3 <sup>rd</sup> q	2014, 4 <sup>th</sup> q	2015, 1 <sup>st</sup> q	2015, 2 <sup>nd</sup> q	2015, 3 <sup>rd</sup> q	2015, 4 <sup>th</sup> q
ADSL	33,9 %	32,8 %	32,0 %	30,9 %	29,6 %	28,5 %	27,4 %	26,3 %
VDSL	12,4 %	12,8 %	13,2 %	13,7 %	14,2 %	14,8 %	15,4 %	16,2 %
cable modem	24,3 %	24,0 %	23,1 %	23,1 %	21,6 %	21,6 %	20,3 %	20,0 %
DOCSIS 3.0	6,5 %	6,9 %	7,9 %	7,9 %	9,6 %	9,6 %	11,1 %	11,1 %
FTTH	20,5 %	21,0 %	21,2 %	21,8 %	22,4 %	23,0 %	23,4 %	23,9 %
other techn.	2,5 %	2,6 %	2,5 %	2,5 %	2,5 %	2,5 %	2,4 %	2,5 %

**Graph No. 4: NGA connections to broadband penetration<sup>67</sup>**

	2014, 1 <sup>st</sup> q	2014, 2 <sup>nd</sup> q	2014, 3 <sup>rd</sup> q	2014, 4 <sup>th</sup> q	2015, 1 <sup>st</sup> q	2015, 2 <sup>nd</sup> q	2015, 3 <sup>rd</sup> q	2015, 4 <sup>th</sup> q
households (EU-SILC)	26,9 %	27,9 %	29,3 %	30,4 %	32,2 %	33,1 %	35,3 %	36,6 %
households (RS-SURS)	-	-	-	-	-	-	34,6 %	35,8 %

<sup>66</sup> Access to the Internet.<sup>67</sup> Access to the Internet.

## **LITERATURE:**

1. Biondi, A., Eeckhout, P. & Flynn, J. (2004) *The Law of State Aids in the European Union* (Oxford: Oxford University Press).
2. Bousin, J. & Piernas J. (2008) *Developmenta in the Notion of Selectivity, European State Aid Law*, 7(4), pp. 634-653.
3. Craig, P. & De Búrca, G. (2008) *EU Law: Text, Cases, and Materials* (Oxford: Oxford University Press).
4. Ferčič, A. (2011) *Državne pomoči podjetjem: Teorija, praksa in predpisi [State Aids: Theory, Cases, and Materials]* (Ljubljana: Uradni list Republike Slovenije).
5. Heidenhain, M. (2010) *European State Aid Law: Handbook* (München: Verlag C.H. Beck).
6. Hancher, L., Ottervanger, T. & Slot, P. J. (2012) *EU State Aids*, 4th edition (London: Sweet & Maxwell, Thomson Reuters).
7. Jans, J.H., de Lange, R., Prechal, S. & Widdershoven, R.J.G.M. (2007) *Europeanisation of Public Law* (Groningen: Europa Law Publishing).
8. Jones, A. & Sufrin, B. (2011) *EU Competition Law, Text, Cases, and Materials*, 4th edition (Oxford: Oxford University Press).
9. Kurcz, B. & Vallindas, D. (2008) *Can general measures be... selective? Some thoughts on the interpretation of a State aid definition*, *Common Market Law Review*, 45(1), pp. 159-182.
10. Lenaerts, K. & Van Nuffel, P. (2011) *European Union Law* (London: Sweet & Maxwell, Thomson Reuters).
11. Mederer, W., Pesaresi, N. & van Hoof, M. (2008) *EU Competition Law, volume IV, State Aid, book one* (Leuven: Claeys & Casteels).
12. Prosser, T. (2005) *The Limits of Competition Law: Markets and Public Services* (Oxford: Oxford University Press).
13. Quigley, C. (2009) *European State Aid and Policy* (Oxford: Hart Publishing).
14. Roth, P. & Rose, V. (2008) *Bellamy & Child European Community Law of Competition*, 6th edition (Oxford: Oxford University Press).
15. Ruthig, J. & Storr, S. (2011) *Öffentliches Wirtschaftsrecht*, 3. Auflage (Heidelberg: C.F. Müller).
16. Sánchez-Graells, A. (2011) *Public Procurement and the EU Competition Rules* (Oxford: Hart Publishing).
17. Schröter, H., Jakob, T. & Mederer, W. (2003) *Kommentar zum Europäischen Wettbewerbsrecht* (Baden-Baden: Nomos Verlagsgesellschaft).



18. Schwarze, J. (2006) *European Administrative Law*, revised 1st edition (London: Sweet & Maxwell, Thomson).
19. Szyszczak, E. (2011) *Research Handbook on European State Aid Law* (Cheltenham: Edward Elgar).
20. Whish, W. (2009) *Competition Law*, 6th edition (Oxford: Oxford University Press).
21. Winter, J.A. (2004) Re(de)fining the notion of State aid in Article 87(1) of the EC Treaty, *Common Market Law Review*, 41(2), pp. 475-504.

