

Managing State Aid Exposure

The following describes how the use of Janet may be managed by a university in such a way as to minimise the risk of a challenge under State Aid rules, or at least to provide a robust defence against challenge. It is based on the *JISC Legal* publications referenced earlier.

Janet has consulted with BIS regarding this advice and is confident that it represents a reasonable approach for universities to take in the present regulatory environment. However, if in doubt due to the overall scale of the activity (which may involve significantly more than just the use of Janet), or if the university wishes further to reduce its risk, BIS should be consulted prior to commencing any project or service provision. If advised by BIS to do so, the proposal should be notified to the European Commission for approval.

A summary of the decision-making process is given at the end of the factsheet.

Determining the nature of the activity

The key decision when considering whether to use Janet as part of any particular business or community engagement project or service provision is whether the university is acting as an economic undertaking or not. In the case of use of Janet this would be activity in the ISP market available to the university's business or community partner.

The primary test for this is whether the university is conducting its primary activities. The European Commission has given specific guidance as to what this might consist of:

- education for more and better skilled human resources;
- the conduct of independent research and development for more knowledge and better understanding, including collaborative research and development;
- the dissemination of research results;
- technology transfer (i.e. licensing, creation of spin-offs or other forms of management of knowledge created by the university) where these are of an internal nature and all income is re-invested in the primary activities of the university.

If the project or service provision can be categorised according to these criteria the activity will be regarded as non-economic and the university will not be competing in the market.

However, it is still necessary to establish that the university's business or community partner (i.e. its customer) is not receiving an undue advantage compared to others who might in principle be partners but are not.

Establishing a market rate

The normal means of tackling this latter aspect is to ensure that the partner is charged at least the market rate for the service provided. If the service is just the use of Janet as an ISP

service, the comparable market is the commercial ISP market.

This raises the question of what the market rate is in any particular circumstance. Janet has obtained guidance from BIS that a market rate can be established by using published tariffs or similar data in an area of the UK where there is an established ISP market. Janet has undertaken this analysis and maintains suitable reference data for this purpose on its website.

It is recommended that the university uses this data to set a minimum charge for the service or access to Janet, though the university is of course free to charge more than this amount. The university should not provide the service or access to Janet below the market rate, or free of any charge at all, unless it is prepared to defend this as appropriate to market conditions. Note that a defence in terms of local condition may not be adequate, as this might still be construed as a market distortion in favour of the local partner compared with its competitors in other parts of the UK.

Managing an economic activity

If the university cannot categorise its project or service provision as a non-economic activity, it will need to take steps to establish that it is not competing unfairly with those who might be its competitors. This is in addition to applying the market-rate test above to ensure that it is not giving its partner an undue advantage. The normal means of tackling this is to ensure that this economic activity is completely separate from its non-economic activities. Three steps need to be taken in this respect:

- The activity should be separated from the non-economic activities in the university's finance systems (e.g. by use of separate cost centres); and
- all costs of providing the service or access to Janet, including full overheads should be recorded against this cost centre; and
- these total costs should be reflected in the charge being made to the partner.

This separation may of course be established by the using of a trading subsidiary rather than managing the process through the university's internal systems. If so, the trading subsidiary must be treated as if it were any other customer of the university and charged full overheads on the costs of any services the university provides to it, including use of Janet.

The purpose of these steps is to demonstrate that there is no subsidy of the economic activity from the University's principal and non-economic activities. In this context the use of Janet as part of the project or service provision will also be a cost, albeit the university is not paying the full cost of its Janet connection itself. This is funded principally through the JISC by the national funding body concerned.

Janet maintains a tariff for the provision of connections to those of its customers which do not enjoy this central funding in whole or in part. The tariff is based on full recovery of the costs of provision to such customers. Therefore it is a suitable benchmark for the cost of any portion of the university's overall Janet bandwidth that is passed onto its business or community partner. A copy of the relevant part of the tariff is maintained on the Janet website, alongside the market-rate information.

Other Considerations

There are two other means by which a university might determine for itself that there is no

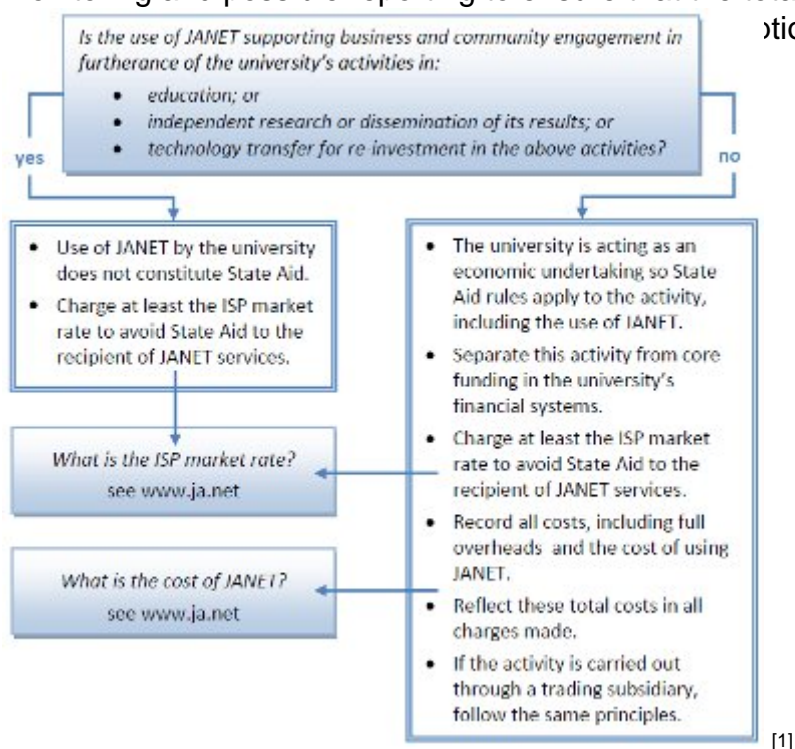
State Aid involved at all, and therefore that the steps above need not be taken. The first of these is to determine that there is no market for ISP services in the geographical area where the university is conducting its business or community engagement.

Given the well established ISP market in the UK this is only likely to succeed if either the activity is being carried out in a rural area where broadband services are presently unavailable in the commercial marketplace and not foreseen to become available, or if the nature of the project or service provision requires use of advanced facilities of Janet that are not available on the market. As noted earlier, either of these are likely to be difficult to prove, or to defend against challenge, and may require explicit approval by the Commission.

The second means could be to rely on the *de minimis* exemption in the State Aid rules. This allows State Aid to be granted in amounts not exceeding €200,000 over any three-year period, provided that this is the total amount of State Aid provided to the partner. That is, the State Aid provided as a result of the university's provision of services using Janet, plus any other State Aid from the university, *plus* any State Aid provided from any other organisation to the partner must not exceed this amount over this period.

At first sight it might seem that the value of Janet services provided will by itself fall well short of this threshold. However, advice from BIS is that it would require a very high level of monitoring and possible reporting to ensure that the total State Aid to the partner does not

exceed this amount over this period. This is a very onerous condition unworkable in practice.



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[1] <http://community.ja.net/system/files/images/bce-process.jpg>