



EUROPEAN COMMISSION

Brussels, 04.04.2012  
C(2012)2369 final

**Subject:**        **State aid SA.34188 (2012/N) – United Kingdom**  
                         **Next Generation Broadband in North Yorkshire – alterations to**  
                         **existing aid and aid for basic broadband deployment**

Sir,

**1.        SUMMARY**

1. I am pleased to be able to inform you that the European Commission has assessed the alterations to existing aid "*Connecting North Yorkshire, addendum to N559/2009*" (hereafter: "the alterations to existing aid") and decided not to raise objections as state aid contained therein is compatible with Article 107(3)(c) of the Treaty on the Functioning of the European Union (hereafter "TFEU").

**2.        PROCEDURE**

2. Following pre-notification discussions, by letter dated 23 January 2012, pursuant to Article 108 (3) of the TFEU, the authorities of United Kingdom (hereafter: "UK") notified the alterations to existing aid and aid for basic broadband deployment to the Commission.
3. By decision of 28 June 2010, C(2010)4475 (N 559/2009)<sup>1</sup>, the Commission authorised the aid measure "*North Yorkshire Next Generation Broadband - Extension of NYNET in Rural Areas and Market Towns*" (hereafter: "the original measure"). Prior to that, by decision of 21 February 2007, C(2007) 471 final (N 746/2006)<sup>2</sup>, the Commission had authorised the planned aid measure "*NYNET North Yorkshire Advanced Broadband*".

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<sup>1</sup> [http://ec.europa.eu/eu\\_law/state\\_aids/comp-2009/n559-09.pdf](http://ec.europa.eu/eu_law/state_aids/comp-2009/n559-09.pdf)

<sup>2</sup> [http://ec.europa.eu/eu\\_law/state\\_aids/comp-2006/n746-06.pdf](http://ec.europa.eu/eu_law/state_aids/comp-2006/n746-06.pdf)

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### 3. DESCRIPTION OF THE MEASURE

4. It was envisaged that the original measure would run for two years from 2010 to 2012. It is now proposed that the network build phase be extended, both in time (until 2015) and in ambition to reach more deeply rural areas of North Yorkshire. The primary reason for the delay in the project build is the need to align the project design with the National Broadband Programme adopted by the new UK government in 2010.
5. The proposed increased funding for the measure will enable its geographic coverage to reach smaller rural communities over and above what was originally notified to the Commission in case N559/2009.
6. The original measure had three strands:
  - First, creating an additional number of Points of Presence ("PoPs") and connecting them to the network through optical links from the existing PoPs.
  - Second, connecting approximately 140 business parks and Multi Dwelling Business Units ("MDBUs") with (existing or newly created) PoPs, with the aim of providing NGA connectivity from the business parks to the nearest PoP to service providers on an open access basis.
  - Third, connecting market towns (on a case by case basis) with (existing or newly created) PoPs of the backhaul network where no operator was willing to provide the market town with NGA services in the medium term future (3 years).
7. It is with respect to the third strand that there are additional opportunities to cover white NGA areas in North Yorkshire as a consequence of additional funding now available. The first two strands of the original measure remain unchanged.
8. Given the limitations on budget under the original measure, there was not sufficient funding to cover the whole of North Yorkshire's white NGA areas. Accordingly, the most effective use of the limited funds available was felt to be to focus on the 27 largest market towns as these accounted for approximately 50% of citizens and businesses in North Yorkshire.
9. With the availability of additional funding, the UK authorities estimate that in addition to covering those market towns that are NGA white, the project will yield the following benefits:
  - 80% to 90% coverage of premises with NGA, as defined in paragraph 26 of the Commission decision of 28 June 2010 in case N559/2009 (including white NGA market towns as described in that decision) by reaching smaller villages and hamlets in North Yorkshire.
  - 100% coverage of businesses and premises at a minimum of 2Mbps, where current service is less than 2Mbps.
10. Even with the increased funding, it is unlikely that coverage of NGA will exceed 90% of the white areas included in the measure. Alongside this is the current situation in North Yorkshire where 17.1%<sup>3</sup> of premises either receive no broadband

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<sup>3</sup> <http://maps.ofcom.org.uk/broadband/table.html>

or less than 2 Mbps. The project expects that a substantial part of this 17.1% will benefit from NGA as a result of the intervention. The UK authorities estimate that this figure will drop to less than 2% of premises in North Yorkshire. However, the project is seeking to meet UK government obligations<sup>4</sup> on Universal Service Commitment for Broadband to ensure that once the procurement is complete, any premise that still is left with less than 2 Mbps service (including no broadband service at all) is provided with at least 2 Mbps. It is likely that a mixture of satellite, copper and radio solutions, at an individual premise level, will be used on a 'house by house' basis for the small number of premises in very hard to reach remote rural areas. The UK authorities have pointed out to the Commission that this part of the overall intervention is likely to service only several hundred premises in areas of North Yorkshire that are very rural and geographically isolated, to the extent that in terms of existing broadband, there is either no service, or receive bit rates substantially lower than the 2 Mbps threshold.

11. Under the original measure, it was estimated that the project would receive GBP 10 million to GBP 20 million of public funding, mainly from the UK government's Rural Development Programme for England and the ERDF.
12. The new proposal is that the project will receive additional approximately GBP 19 million from UK government funds and GBP 1 million from North Yorkshire County Council, giving a total from public funds of GBP 40 million, depending on the amount of EU funds available.
13. Under the original measure, it was envisaged that the negotiated procedure set out in Directive 2004/18/EC would be used to appoint the contractor to build the network. The UK authorities now consider the competitive dialogue procurement process provided for in the Directive to be the most effective approach to a procurement of this scale and complexity. There are no changes to the contract award criteria or other aspects of the process. Therefore, the contract will be awarded to the economically most advantageous offer.
14. As a result of the delay referred to above, it is now expected that the lifetime of the project will be between 10 and 15 years.
15. The Commission recalls that under paragraph 28 of its decision of 28 June 2010 in case N559/2009, the following obligations were placed upon the project company (NYnet): *"NYnet will also (timely in advance of the tender) publish any plans on the NYnet website along with the maps indicating precisely the areas where the new measures will take place. NYnet will then invite third parties to submit within a reasonable period of time their observations on whether they are planning to roll out such measures on commercial terms without support from NYnet."*
16. In compliance with this obligation, the project has undertaken activity to update the intervention with respect to ensuring limitation to white NGA areas in North Yorkshire. The project has been consulted with operators with respect to changes since March 2010. The UK authorities have thus executed a new consultation exercise, and submitted an updated map of January 2012 of white, grey and black areas in line with point 51 (a) of the Broadband Guidelines. Consequently, they excluded a number of areas covered by the exchanges at Filey, Skipton, Malton, Northallerton, Scarborough, Selby, Stokesly and Thirsk in respect of which BT,

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<sup>4</sup> [http://cdn.hm-treasury.gov.uk/national\\_infrastructure\\_plan291111.pdf](http://cdn.hm-treasury.gov.uk/national_infrastructure_plan291111.pdf)

having stated in the course of the consultation for the purposes of the notification in case N559/2009 that it had no plans to upgrade these exchanges to NGA in the medium term, has subsequently announced an intention to implement an upgrade to NGA within the next three years. No other operators have any intention to invest in North Yorkshire within the next three years. There have been no changes to existing telecommunications infrastructure since March 2010 that impact the project. The announcements of BT for the areas of Filey, Skipton, Malton, Northallerton, Scarborough, Selby, Stokesly and Thirsk, that will be excluded from the intervention, are not planned for roll out until later in 2012.

17. In addition, BT have announced that the exchanges covering the Castleford, Otley and Ilkley areas of West Yorkshire that connect premises in neighbouring areas of North Yorkshire have been, or will shortly be, upgraded to support NGA. Accordingly, any premises located in North Yorkshire but served by exchanges outside the boundaries of North Yorkshire, will be considered to be located in NGA grey areas and thus excluded from the project.
18. With regard to the above, the alterations to existing aid consist particularly of the following changes to the original measure: (1) increase of the budget from between GBP 10 million and GBP 20 million to GBP 40 million resulting in greater coverage of white NGA areas, (2) prolongation of the duration of the measure until 2015, and (3) change in the type of procurement procedure from a negotiated procedure to a competitive dialogue.
19. The UK authorities confirmed that all other elements of the original measure remain the same as notified previously to the Commission. In this respect, reference is made to the decisions referred to in paragraph 3 above.

#### **4. ASSESSMENT OF THE MEASURE**

##### **4.1. Existence of state aid**

20. As already set out in the state aid cases referred to in paragraph 3, the measure constitutes state aid within the meaning of Article 107(1) TFEU.

##### **4.2. Compliance with the Treaty on the Functioning of the EU**

###### Basic broadband

21. The Commission has assessed the compatibility of the notified aid for basic broadband deployment with the internal market in the light of the Broadband Guidelines, which contain a detailed interpretation of Article 107 (3) (c) of the TFEU in this area of State aid law. As regards the applicable substantive provisions, the Commission has essentially analysed the measure in the light of the criteria developed in paragraphs 31 to 51 of the Broadband Guidelines. In order to be compatible under Article 107 (3) (c) of the TFEU, aid must pursue an objective of common interest in a necessary and proportionate way.
22. Since the objective of the measure is to deploy basic broadband services to consumers located in rural locations which do not currently have such broadband service option, the measure at stake pursues well defined Union policy objectives laid down in paragraphs 37 to 40 of the Broadband Guidelines. Hence the objective

of the measure is in line with the Digital Agenda<sup>5</sup> which calls Member States to use public financing in line with EU competition and State aid rules in order to meet the coverage, speed and take-up targets defined in Europe 2020 Strategy<sup>6</sup>.

23. The Commission's analysis confirms that the measure is well designed to deliver those common interest objectives.
24. First, it is an appropriate instrument because in the targeted areas of UK the provision of adequate broadband services remains unprofitable for commercial operators in the near future. Hence, the measure targets only "white areas"<sup>7</sup> within the meaning of paragraphs 41 and 42 of the Broadband Guidelines and there are no valid alternatives to public funding to overcome those obstacles.
25. Second, since the measure targets "*white areas*", where – as demonstrated by the market research and the consultation with existing providers conducted by the UK authorities - the broadband network investment concerned would not have been undertaken within the same timeframe without any State aid. Furthermore, the Commission considers that the aid should provide a direct and appropriate investment incentive for the selected operator due to the use of a public tender process to select the beneficiaries.
26. Third, the measure at stake is considered proportionate because, amongst other features, the following can be identified:
  - a) A detailed mapping and coverage analysis and consultation with existing operators was conducted by UK in order to clearly identify the targeted "*white areas*".
  - b) Open tender process: the aid will be awarded on the basis of an open tender in accordance with the EU procurement rules.
  - c) Selection of the most economically advantageous offer: in line with footnote 55 of the Broadband Guidelines, for the purposes of determining the most economically advantageous offer, the awarding authority will specify in advance the relative weighting which it gives to each of the criteria chosen.
  - d) The measure is technological neutral: bidders are entitled to propose the provision of broadband services using whatever technology they deem most suitable.
  - e) The measure ensures the use of existing infrastructure to the extent possible: since the targeted areas are "white areas", hence underserved by broadband networks, there are limited possibilities to use such network infrastructure.
  - f) The contractor is required to provide a wholesale access on the subsidized broadband network that will enable third party operators to compete with selected service providers thereby strengthening choice and competition in the

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<sup>5</sup> A Digital Agenda for Europe. COM/2010/0245 f/2.

<sup>6</sup> The Europe 2020 Strategy has underlined the importance of broadband deployment to promote social inclusion and competitiveness in the EU.

<sup>7</sup> In line with Commission's case practice if no adequate basic broadband services of 2 mbps are available, the area shall be considered as a "white area" within the meaning of the Broadband Guidelines. See for instance, Commission decisions N238/2008 and N461/2009.

areas concerned by the measure. Third party operators will have wholesale access to the passive and retail layers to encourage a variety of communication providers and service providers to run services over the network. This access will be provided in a non-discriminatory way for a period of at least seven years.

- g) Benchmarking pricing exercise: the broadband product to be provided by the measure will be benchmarked using the National Regulator (Ofcom) price surveys, which details prices currently available from national wholesale players. Wholesale Local Access (i.e. access to the passive infrastructure) products will be benchmarked annually against both the prices offered by BT Openreach (regulated by Ofcom) and a basket of prices from across the EU to determine a fair market value in other comparable, more competitive areas. Wholesale Broadband Access pricing will be benchmarked annually against Ofcom price surveys.
- h) Monitoring and claw-back mechanism to avoid over-compensation: UK will undertake a regular monitoring in order to ensure the compliance of the selected operator with the contract and the performance of the selected operator. The award contract will include a clawback provision (Reverse Payment Mechanism) to ensure that the selected bidder is not over-compensated if demand for broadband in the target area grows beyond anticipated levels. Any extra profit generated through the operation of the networks will be clawed back. The clawback provisions will operate for the duration of the project and the mechanism will be calculated annually and at the end of the project.

27. On the basis of the foregoing assessment, the Commission's analysis confirms that the compatibility criteria set out in the Broadband Guidelines are met, hence aid involved in the notified measure is compatible with Article 107 (3) (c) of the TFEU.

#### NGA broadband

28. The alterations to existing aid are an increase of the budget, a delay in the implementation, and a change in the type of procurement procedure. Prior to these alterations, the aid was approved by the Commission under Article 107(3)(c) of the TFEU as compatible with the internal market.
29. The preceding decision of the Commission of 28 June 2010 in case N559/2009 referred to in paragraph 3 above approving the original measure was based on the *Community Guidelines for the application of State aid rules in relation to rapid deployment of broadband networks*<sup>8</sup> (hereinafter the "Broadband Guidelines"). The compatibility criteria set out in the Broadband Guidelines are still valid, so that the Commission's statement on the compatibility of the measure remains valid.
30. The UK authorities confirmed the following points: (1) The target area remains unchanged as a result of the anticipated additional funding and is as described in paragraph 9 of the Commission decision of 28 June 2010 in case N559/2009; (2) The state funding will be used exactly as described in the Commission decision of 28 June 2010 in case N559/2009 to provide NGA to white NGA areas in North Yorkshire only. The project has no intention to intervene in NGA grey areas. The impact of additional funding is to reach white NGA areas of further rurality in

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<sup>8</sup> OJ C 235 of 30.9.2009, p. 7.

North Yorkshire that were unlikely to be affordable with the original anticipated funding.

31. As regards the increased budget and the delay in the implementation, the UK authorities confirmed that the increased funding will be used to cover areas that are specified already in the Commission decision of 28 June 2010 in case N559/2009 and the delay is due to allow coverage of these additional areas as well. From state aid point of view, as the target areas will not change, the additional funding will allow achieving higher coverage in the respective "white NGA areas" as originally foreseen, and the additional duration is necessary to complete the investment.
32. Since time has elapsed since the decision of 28 June 2010 in case N559/2009, the Commission has requested information from the UK authorities about all other changes of the relevant circumstances of the project. The Commission is satisfied that the maps of the UK authorities, referred to in paragraph 16, are adequate to identify the white, grey and black NGA areas within the meaning of paragraphs 68 to 70 of the Broadband Guidelines. As set out in paragraph 16, the UK authorities executed a consultation exercise to find out whether industry would on its own expand the existing fibre based backhaul network to the market towns in question. This market research showed that no such plans exist to date.
33. As regards the selection procedure, the Commission decision of 28 June 2010 in case N559/2009 specifies in paragraph 14 that that aid shall be "*allocated on the basis of an open tender in line with the applicable national and EU procurement principles*". Since the UK authorities confirmed that regardless of the type of procurement procedure (competitive dialogue procedure or negotiated procedure) the tender procedure will be conducted in compliance with the applicable national and EU procurement principles and the aid will be awarded to the most economically advantageous bidder fully in line with the Commission decision of 28 June 2010 in case N559/2009, the replacement of a negotiated procedure by a competitive dialogue does not alter the Commission's state aid assessment.
34. Since all other conditions specified in the Commission decision of 28 June 2010 in case N559/2009 remain unchanged, the Commission's state aid assessment concerning the measure – as included in paragraphs 48 (c) to (h), 49 and 50 of the Commission decision of 28 June 2010 in case N559/2009 - does not change.
35. The alterations to existing aid are compatible with the Broadband Guidelines because the conditions for providing grants for the next generation broadband support in North Yorkshire have not changed substantially.

#### **4.3. Conclusion**

36. The Commission therefore concludes that the alterations to existing aid and aid to be granted for basic broadband deployment on the basis of the measure in question constitute State aid within the meaning of Article 107(1) TFEU which is compatible with the internal market pursuant to Article 107(3)(c) TFEU.

## 5. DECISION

37. In view of the above, the Commission finds that the alterations to existing aid for the support of next generation broadband and aid for basic broadband deployment in North Yorkshire are compatible with the internal market in accordance with Article 107(3)(c) of the TFEU and has accordingly decided not to raise any objections.
38. The Commission reminds the UK to submit annual reports on the application of the aid measure. The Commission moreover reminds the UK to inform the Commission pursuant to Art 108 (3) of the TFEU on all plans to approve a new or to modify this aid measure.
39. If this letter contains confidential information, which should not be published, please inform the Commission services within 15 working days after receipt of this letter by providing reasons. If the Commission does not obtain a reasoned request within this delay, it will presume that you agree with the publication towards third parties and with the publication of the entire wording in the authentic language on the following internet website :

[http://ec.europa.eu/eu\\_law/state\\_aids/state\\_aids\\_texts\\_en.htm](http://ec.europa.eu/eu_law/state_aids/state_aids_texts_en.htm).

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Yours faithfully,  
For the Commission

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