



EUROPEAN COMMISSION

Brussels, 21.IX.2005

C(2005)2720 final

**Subject: State aid N 117/2005 – United Kingdom**  
**Aggregated public sector procurement of broadband in Scotland**

Sir,

## **I. PROCEDURE**

1. By letter registered on 7 March 2005, pursuant to Article 88 (3) of the EC Treaty, the authorities of the United Kingdom (hereafter “UK”) notified a planned measure to provide advanced broadband network services for public sector use in Scotland (hereafter “the measure”). By letter of 28 April 2005, the Commission requested additional information on the proposed measure to which the UK authorities replied by letter registered on 20 May 2005.

## **II. CONTEXT**

2. Implementing the eEurope Action Plan 2005, most Member States have put comprehensive national broadband strategies in place<sup>1</sup>. The notified measure is in line with the UK National Broadband Strategy which aims at boosting investments in broadband access to improve the availability of connectivity for end users at adequate prices and to bridge the digital divide between communities and businesses that can get broadband access and those who can not.
3. In 2001, the Scottish Executive developed a Broadband Strategy<sup>2</sup> that outlines a vision on where Scotland needs to go in order to address the current gaps in broadband delivery and to fully exploit the benefits of broadband technologies. As part of the Programme, an aggregated public procurement project was developed to ensure provision of service that would not otherwise materialise or would not be affordable for the public sector.

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<sup>1</sup> Commission Communication COM(2004) 369 of 12.05.2004, “Connecting Europe at High Speed – National Broadband Strategies”

<sup>2</sup> Connecting Scotland: Our Broadband Future, 2001 and update Connecting Scotland our broadband future: Making it Happen, 2002

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4. E-Government and e-Learning services require high bandwidth, high-quality, un-contented and region-wide network services that are currently not available in the area covered by the project at affordable prices. Satellite technology has the ability to provide coverage, however the costs of receiving a satellite service today are prohibitive to many users. Some public sector end-users could also be served by leased lines and IP-VPN<sup>3</sup> type of services. However, these services are very expensive to deploy outside the main population centres due to lack of suitable and affordable backhaul and access infrastructure.<sup>4</sup> This means that services above 2Mbps cannot be delivered over the existing copper network and normally new infrastructure will be required.
5. According to the authorities, the cost of providing the infrastructure to the individual sites covered by the project at affordable prices versus the number of potential public sector end-users who would benefit from this service is not considered to be cost-effective and commercially feasible by licensed telecommunications companies. Without an aggregation of the public sector demand, broadband would not be supplied.

### III. DESCRIPTION OF THE MEASURE

6. *Objective and final beneficiaries:* The envisaged measure aims to connect various public administration bodies – so called Local Authority Partners (hereafter “LAPs”) - in certain areas of Scotland to advanced broadband services. These LAPs include: (i) schools, (ii) libraries and (iii) other sites used for public service activities. Regarding schools, the aim is to deliver every primary school with a connection to the local Scottish Schools’ Digital Network<sup>5</sup> (hereafter SSDN)<sup>6</sup> “hub” of at least 4Mbps and every secondary school with at least 8Mbps. As to libraries, the procurement of at least 2Mbps, scaleable and high quality service will be sought aiming to improve the lifelong learning opportunities provided to citizens by these institutions. Finally, the authorities wish to provide other LAPs that provide services such as social work, housing, building and development control, consumer protection, district courts, environmental health, waste regulation and emergency planning, etc. with high bandwidth connections.
7. *Procurement and service provider:* The project envisages aggregating public sector demand for such services and procuring them via two public sector procurements: (i) one covering the South of Scotland<sup>7</sup> to be administered by Dumfries and Galloway Council and (ii) the other covering the Highlands and Islands<sup>8</sup> to be administered by the Highland Council. These procurements will be implemented under Section 69 of the Local Government Act 1973 and Section 20 of the Local Government in Scotland Act 2003.

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<sup>3</sup> Internet Protocol Virtual Private Network services refer to services offered over a network of secure links over a public IP infrastructure.

<sup>4</sup> In some areas the local loop is actually aluminium or copper alloy based. This further increases the level of difficulty in obtaining these services.

<sup>5</sup> <http://www.ltscotland.org.uk/ssdn/index.asp>

<sup>6</sup> Such as online multimedia training, feature-rich content, high speed filtered and secure internet access, e-mail and videoconferencing.

<sup>7</sup> The South of Scotland procurement covers the area of Dumfries and Galloway, as well as the Scottish Border Councils.

<sup>8</sup> The Highlands and Islands procurement covers the area of Argyll and Bute, Moray, Highland, Orkney Islands and Shetland Islands.

8. The selection of the Service Providers (hereafter “SPs”) will be conducted via a tender in accordance with EU procurement rules and an advertisement will be published in the Official Journal of the European Union. Selection will take place under the so called “negotiated procedure” due to the technically complex nature of the project and the trade-offs involved in terms of service coverage, quality and costs. Contracts will be awarded to the offers that bring the best value for money taking into account a number of well-defined criteria as to quality, price and risks. Independent external scrutiny of the procurements will be provided by Audit Scotland.
9. *Service definition:* The public procurements seek to buy a managed network service, not an infrastructure, although it is expected that some new infrastructure will need to be installed in order to reach all required sites. It will be up to the SPs to build, buy or lease the infrastructure necessary and to provide the necessary equipment to provide the required service. The tenders do not prescribe any technology. It is expected that SPs will propose solutions that utilise existing telecommunications infrastructure in the regions where this is technically and commercially feasible.
10. *Provision of service outside the scope of the procurement:* While the procurements are limited to the provision of advanced broadband services to the public administration, the authorities do recognise that the measure may have favorable secondary effects by encouraging telcos to invest in broadband in general in the rural parts of Scotland. Moreover, the price charged for the service to the LAPs by the SP is expected to be lower if the SP can also serve other users in the area. Therefore the Service Providers will have the possibility to provide services directly to businesses and residents using excess bandwidth on the infrastructure procured under the project. However, if a service provider decides to do so, (i) it must state in its bid, if, and how, these wider opportunities are reflected in their commercial offer to the LAPs and (ii) will be required to provide wholesale access to 3<sup>rd</sup> party service providers on non-discriminatory terms and; at prices and conditions which would be considered reasonable by the 3<sup>rd</sup> party providers.
11. *Budget, duration and monitoring:* The overall budget of the two procurements is expected to be around GBP100 million (about EUR145 million) depending on the outcome of the tenders. From this, the Scottish Executive will provide GBP90 million (about EUR130 million). The rest will be provided by the LAPS who will transfer a portion of their telecommunications budget to this project. Contract signature is scheduled for 2006 and the duration of the contract will be between 5 and 7 years<sup>9</sup>. The fees payable to the SPs will be subject to an annual internal review by the authorities for the purpose of reconciliation of the fees payable in light of demands reached in respect of broadband services provided.

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<sup>9</sup> The tender document however will provide some flexibility in this regards in case a better value for money was offered by an alternative duration.

#### IV. ASSESSMENT OF THE MEASURE:

12. The Commission has first examined whether the notified measure can be characterised as State aid within the meaning of the EC Treaty. Article 87(1) of the Treaty lays down the following conditions. First, there must be an intervention by the State or through State resources. Second, the intervention must be liable to affect trade between Member States. Third, it must confer an advantage on the recipient. Fourth, it must distort or threaten to distort competition.

i). Regarding the final beneficiaries

13. The project in question consists in the public procurement by the State of advanced broadband services for schools, libraries and other public authority sites. The final beneficiaries of this public procurement are Local Authority Partners such as schools, libraries, town halls etc. that are all part of the public administration and are not involved in an economic activity.<sup>10</sup> These beneficiaries provide services currently not offered by the market in the project areas e.g. tax payments or basic education; and are part of the public administration. The schools supported by the project are located in rural and remote areas where currently there are no private schools. Some of these schools have rolls as low as three pupils and 20% of them less than 30 pupils. With regards to libraries, they need advanced broadband access to meet their community learning and development obligations. They provide a service to the public in an environment where trained library staff is available to provide help and guidance required to access the lifelong learning possibilities via broadband. Even if there are private operators supplying partially overlapping services – e.g. Internet cafes – in the area, they do not provide such assisted learning opportunities. Hence the Local Authorities Partners are not considered to exercise an economic activity and, therefore, do not qualify as undertakings within the meaning of Art 87 (1) EC. Moreover, as regards the effect on trade of the measure at the level of final beneficiaries, the Commission considers that even if those beneficiaries were to exercise economic activities in competition with private operators, those operators are unlikely to be internationally active. The services on which the measure has an impact are typically of a local nature and it is therefore doubtful that at their level the measure could have any impact on trade between Member States, also because the value of any benefit for each individual final beneficiary is likely to be very limited.

ii. Regarding the Service Provider(s)

14. As to the question whether there is State aid to the Service provider(s), the Commission considers that similar considerations apply as in its decision of 16 November 2004 (C (2004) 4346 fin) N 307/2004 UK-Broadband in Scotland-remote and rural areas, in particular points 22-32 thereof. The Commission notes that an open tender procedure as employed in the case under consideration tends to minimize potential advantages to the service providers and thus possible

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<sup>10</sup> According to the case the concept of an undertaking encompasses every entity engaged in an economic activity, regardless of the legal status of the entity and the way in which it is financed. CoJ judgement C-41/90 of 23 April 1991 Hofner et Elser, ECR I-1991 page 1979 point 21

elements of state aid. But even if an element of state aid were to remain, it would be compatible with the internal market, for the following reasons.

15. The Commission notes that the project intends to ensure the availability of broadband services to the final beneficiaries. The Commission assesses the compatibility of the measure with the common market directly on the basis of Article 87 (3)(c) of the EC Treaty since the existing frameworks and guidelines are not applicable to this objective.
16. That article states that “aid to facilitate the development of certain economic activities or of certain economic areas, where such aid does not adversely affect trading conditions to an extent contrary to the common interest” may be considered to be compatible with the common market.

#### *Necessity of the measure*

17. Broadband access is seen as a necessary step for the modernisation of the EU society and economy and is a crucial aspect of the Lisbon agenda. It is a prerequisite for the development of in particular e-Government and e-Learning projects.<sup>11</sup> Implementing the eEurope Action Plan 2005, EU15 Member States have put comprehensive national broadband strategies in place. This process is now being extended to all 25 EU Members.
18. Broadband is capable of positively affecting the public service activities of the final beneficiaries of the project. In particular, it is likely to lead to improved education and the speedy and effective delivery of public services in all kinds of areas such as the justice system and environmental protection.
19. It is indeed likely, as the Member State’s authorities argue, that the cost of providing the infrastructure to the individual sites covered by the project at affordable prices versus the number of potential public sector end-users who would benefit from this service is not considered to be commercially feasible by licensed telecommunications companies. It is therefore probable that without an aggregation of the public sector demand, broadband would not be supplied. The Commission therefore considers that the project is necessary to facilitate broadband use by certain public administration bodies in Scotland.

#### *Proportionality*

20. In order for an aid measure to be compatible with Article 87(3)(c) of the EC Treaty, it must moreover be proportionate to the objective and must not distort competition to an extent contrary to the common interest. The trade-off between the advantages – in terms of support to the development of the information society in public administration bodies in Scotland - and the disadvantages – in terms of distortion of competition and possible disincentives to private investment – has to be assessed. The extent of the measure in terms of service definition, as well as project design features, should also be evaluated to ensure that the least distorting model, which will nevertheless produce the required results, is adopted.

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<sup>11</sup> Commission Communication COM(2004) 369 of 12.05.2004, “Connecting Europe at High Speed – National Broadband Strategies.”

21. In this respect the Commission notes the following positive elements:

(1) Open tender. The selected SP(s) will be solicited from the open market in accordance with EC rules and principles on public procurement, as established in the EC Treaty and in Directive 92/50/EEC (Directive on Public Procurement of Services), including a notice in the Official Journal of the European Union. The tender, seeking the economically most advantageous proposal, appears designed to minimise the cost of investment and the associated public funding, while still ensuring an appropriate level of service. The procurement will be scrutinised by an independent body, Audit Scotland, providing a first stage review.

(2) Technological neutrality. The project is technologically neutral, i.e. it does not favour a priori any given technology.

(3) Non-discriminatory access on reasonable terms for third party SP(s). Moreover, in case the infrastructure procured under the project is also used to serve users outside the scope of the public procurement, the open access requirement will allow 3<sup>rd</sup> party service providers to have equal access to this infrastructure and hence also benefit from it.

(4) Existing infrastructure. The SP(s) is free to choose the most efficient way of procuring the necessary infrastructure, either by building it, buying it, or leasing it from third parties. By avoiding specific requirements to build new infrastructure, the project minimises duplication.

22. In view of these considerations, and taking into account the characteristics of the project already mentioned, the Commission considers that in this particular case, possible distortive effects of the project that might remain would not be of such an extent as to be contrary to the common interest.

### Conclusion

23. In view of the above, the Commission considers that, with regard to the final beneficiaries, the notified measure does not fall under Article 87(1) since they are not undertakings in the sense of Article 87 (1) of the Treaty and/or the aid will not affect trade between Member States. Regarding the selected Service Providers, possible state aid would, for the reasons explained above, be compatible with the common market pursuant to Art. 87 (3)(c) of the Treaty.

## V. DECISION.

The Commission has accordingly decided:

- that regarding the final beneficiaries the measure does not constitute aid and that regarding the Service Provider(s) possible aid would be compatible on the basis of Art. 87(3)(c) of the Treaty.

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Yours faithfully,  
For the Commission

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