



EUROPEAN COMMISSION

Brussels, 27.10.2011

C(2011)7841 final

Subject: **State aid n° SA.32829 (2011/N) – United Kingdom
Rural Broadband Project in Devon and Somerset**

Sir,

1. PROCEDURE AND DESCRIPTION OF THE MEASURE

- (1) Following pre-notification discussions, by letter dated 26 September 2011, the authorities of United Kingdom (hereafter: "UK") notified to the Commission the above-mentioned aid measure. The measure was notified under the Notice on simplified procedure, in particular point 5 (b) (v) of the Notice¹.
- (2) A description of the relevant features of this measure can be found in the summary of the notification, as published on the website of the Commission http://ec.europa.eu/competition/state_aid/cases/241968/241968_1250761_16_1.pdf and annexed to the present decision.

2. ASSESSMENT OF THE MEASURE

2.1. Existence of aid

- (3) As shown by the features of the measure described in the summary of the notification, the current measure will be financed by state resources. It will provide selective economic advantage to the electronic communication operator selected via the tender procedure and also for third party electronic communication operators that will be able to offer their services via wholesale access to the subsidized network. The measure has the potential to distort competition by

¹ OJ C136, 16.06.2009, p. 3-12

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enabling local undertakings to subscribe to the services offered via the subsidized network instead of more expensive market-based solutions. Insofar as the intervention is liable to affect providers of electronic communications services from other Member States, the measures has an effect on trade.

- (4) The Commission therefore concludes that the notified aid measure constitutes State aid within the meaning of Article 107 (1) of the TFEU² as moreover confirmed by the notifying Member State during the notification.

2.2. Compatibility of the aid

- (5) The Commission's compatibility assessment of the notified measure in this case did not imply any serious difficulties. The Commission has assessed the compatibility of the notified measure with the common market in the light of the Broadband Guidelines³, 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 measures 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, the aid must pursue an objective of common interest in a necessary and proportionate way.
- (6) 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 Community policy objectives laid down in paragraphs 37 to 40 of the Broadband Guidelines. Moreover, part of the funding for the measure will be provided through the European Rural Development Programme for England (RDPE). Hence the objective of the measure is in line with the Digital Agenda⁴ 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 Strategy⁵.
- (7) The Commission's analysis confirms that the measure is well designed to deliver those common interest objectives.
- (8) 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"⁶ 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.

² With effect from 1 December 2009, Articles 87 and 88 of the EC Treaty have become Articles 107 and 108, respectively, of the TFEU. The two sets of provisions are, in substance, identical. For the purposes of this Decision, references to Articles 107 and 108 of the TFEU should be understood as references to Articles 87 and 88, respectively, of the EC Treaty where appropriate.

³ Community guidelines for the application of State aid rules in relation to rapid deployment of broadband networks, *OJ C 235, 30.9.2009, p.7.*

⁴ A Digital Agenda for Europe. COM/2010/0245 f/2.

⁵ The Europe 2020 Strategy has underlined the importance of broadband deployment to promote social inclusion and competitiveness in the EU.

⁶ 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 or N461/2009.

- (9) 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 (see also paragraph (10))- 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.
- (10) 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*".

In particular, (1) UK verified that the targeted consumers cannot be reasonably served by existing service providers at affordable costs; (2) UK conducted a public consultation with the existing service providers who were given the opportunity to offer such services to the consumers in question on market terms (the consultation was opened over a 3 month period, from October 2010 to December 2010). All information related to the project has been published on the joint web site www.connectingdevonandsomerset.co.uk. Within this web site, a specific web page has been created to publicise the project, entitled "the Rural Connection". The public consultation allowed all stakeholders to comment on the planned measure.

- b) Open tender process: the aid will be awarded on the basis of an open tender in accordance with the EU procurement rules⁷.

Service providers submitted bids and the granting authority will select a bidder who will be required to provide broadband services to consumers who qualify under the measure. The minimum required service will have the following characteristics *inter alia*: 99% network availability; dealing with demand and contention levels to produce a high level of end user service; improve broadband to a minimum of 5Mbps download speed and 2.5Mbps upload speed.

- 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 specified in advance the relative weighting which it gives to each of the criteria chosen.

The UK authorities confirmed that the most economically advantageous offer will be selected and recommended for contract award. As explained by UK, the award criteria of the tender procedure are designed to ensure that the most economically advantageous proposal is selected⁸. UK anticipates awarding a contract for a duration of 3 years, with an option for a further 1 year contract extension.

- d) The measure is technological neutral: bidders are entitled to propose the provision of broadband services using whatever technology they deem most suitable.

⁷ The open tender was published on 31 March 2011 in the OJEU:
<http://ted.europa.eu/udl?uri=TED:NOTICE:102451-2011:TEXT:EN:HTML>.

⁸ The contract award will be based on the following percentage weightings: 40% in relation to price (tender price is measured in terms of total cost) and 60% in relation to qualitative proposals (measured in terms of technical merit, implementation & operations, customer service & support, open access, end user application and financial sustainability).

- 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. The UK authorities confirmed that the physical infrastructure of the incumbent (ducts and poles) could be used, where it exists, by third parties, to enable deployment of FTTC networks, in accordance with applicable regulatory framework. The granting authority also considers giving access to its public 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 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)⁹ to ensure that the selected bidder is not over-compensated if demand for broadband in the target area grows beyond anticipated levels. 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.
- (11) 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 the aid involved in the notified measure is compatible with Article 107 (3) (c) of the TFEU.
- (12) The Commission did not receive any substantiated comments of third parties upon publication of a summary of the notification on its website.

3. CONCLUSION

- (13) In the view of the above, the Commission finds that the aid granted on the basis of the measure in question is compatible with the common market in accordance with Article 107 (3) (c) of the TFEU and has accordingly decided not to raise objections to the notified measure.

⁹ The formula for the Reverse Payment Mechanism is as follows: $\text{Overage} = [(\text{Revenues} - \text{Operating Expenditure}) - (\text{Capital Expenditure} - \text{Public Funding})] - [(\text{Capital Expenditure} + \text{Operating Expenditure} - \text{Public Funding}) \times \text{IRR}]$, where IRR is the internal rate of return percentage value, as set by the bidder in their response to the Open Tender.

- (14) The Commission reminds UK to submit annual reports on the application of the aid measure. The Commission moreover reminds 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.
- (15) The Member State has indicated in the context of the notification process that the summary nature of this decision implies that it does not contain any confidential information.

Yours faithfully,
For the Commission

Joaquín ALMUNIA
Vice-President

Annex: Summary of the notification based on the information provided by the Member State according to the standard form provided in Annex to the Notice on simplified procedure.

Summary of notifications

On 26/09/2011, the Commission received a notification of an aid measure pursuant to Article 108 of the Treaty on the Functioning of the European Union. On preliminary examination, the Commission finds that the notified measure could fall within the scope of the Commission Notice on a simplified procedure for treatment of certain types of State aid (JO C136, 16.06.2009, p. 3-12).

The Commission invites interested third parties to submit their possible observations on the proposed measure to the Commission. The main features of the aid measure are the following:

Reference number of the aid	SA.32829
Member State	United Kingdom
Member State reference number	
Region	DEVON, SOMERSET
Granting authority	Devon County Council, AB2 Lucombe House, County Hall, Topsham Road, Exeter, Devon, EX2 4QD, www.devon.gov.uk
Title of the aid measure	Devon and Somerset Rural Broadband Project
National legal basis	UK Communication Act 2003, UK Local Government Act 2003, UK Regional Development Act 1998
Proposed Community basis for assessment	Broadband - Broadband Communication, 2009
Type of measure	Individual aid
Amendment of an existing aid measure	
Duration	30.06.2012 to 30.06.2012
Economic sector(s) concerned	Telecommunications
Type of beneficiary	Only large enterprises
Budget Overall amount:	EUR 0,86 (in millions)
Annual amount:	EUR 0,86 (in millions)
Aid instrument	
(grant, interest rate subsidy, ...)	Direct grant

Observations raising competition issues relating to the notified measure must reach the Commission no later than 10 working days following the date of this publication and include a non confidential version of these observations to be provided to the Member State concerned and/or other interested parties. Observations can be sent to the Commission by fax, by post or email under reference number SA.32829 to the following address:

European Commission
Directorate-General for Competition
State Aid Registry
B-1049 Brussels
Fax (32-2) 296 12 42
Stateaidgreffe@ec.europa.eu