



EUROPEAN COMMISSION

Brussels, 16.XI.2004

C(2004)4341 final

Subject: State Aid N 199/2004 – United Kingdom
Broadband Business Fund

Sir,

I. PROCEDURE

By letter dated 5 May 2004, registered on 7 May 2004, the UK authorities notified to the Commission the above mentioned measure, pursuant to Article 88(3) of the EC Treaty. By letter dated 2 July 2004, the Commission requested additional information, which was provided by the UK authorities by letters dated 16 July and 2 August 2004. By letter dated 27 August 2004, the Commission requested additional information regarding the notified scheme. This information was submitted by the UK authorities by letter dated 6 September 2004.

II. DESCRIPTION OF THE MEASURE

1. *General objective:* The East Midlands Development Agency (EMDA) identified technology as a key driver for economic development and business growth in the East Midlands.
2. In this regard, EMDA and five public-sector Sub-regional Strategic Partnerships¹ (SSPs) consider that public service intervention is needed to address the non pervasive supply of broadband services to SMEs and citizens in areas of

¹ Northamptonshire Partnership Limited, Leicestershire Economic Partnership Limited, Derby and Derbyshire Economic Partnership, North Nottinghamshire and Welland Sub Regional Partnership (the accountable legal entity is South Kesteven District Council) as well as Alliance SSP.

The Right Hon Jack STRAW MP
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Derbyshire, Northamptonshire, Nottinghamshire, Leicestershire, Rutland and parts of South Lincolnshire that do not have access to broadband services.

3. The rural nature and geographical remoteness of the concerned areas currently make them an unattractive investment for private broadband service providers, and based on predictions and geographical coverage analysis completed in March 2004, they will not receive service before the e-Europe target date which is the end of 2005. The level of broadband coverage in the relevant areas is low when compared to other counties in the UK. The Broadband Business Fund (BBF) is a scheme set up to enable the provision of broadband services to SMEs and residential users in these areas. The measure is based on section 5(1) of the Regional Development Agency Act 1998, which sets out the purposes, functions and powers of the East Midlands Development Agency.
4. *Funding sources and budget:* Each Sub-regional Strategic Partnership in the BBF scheme has contributed a fixed amount of funding to the project. This pooled sum of State funds totals GBP1.9m to ensure service provision for at least three years. The UK authorities informed the Commission that a preferred supplier was selected in the meantime, and that the overall aid amount is likely to be limited to GBP [...]* There is no additional funding available, so the pooled sum effectively provides a maximum funding ceiling, which was applicable to each SSP sub-region. Funds are planned to be dispersed in the form of grants through the SSPs with delegated responsibilities that EMDA has approved. A dedicated fund manager has been chosen to distribute the funds and conclude grant fund agreements with the service providers.
5. *Funding mechanism:* A broadband service cost model was used to determine how well a supplier response to the Invitation to Tender (ITT) satisfied the funding criteria. The cost model was used to highlight those offers that could be selected because the cost-revenue 'gap' was within the funding ceiling and those solutions that could not be selected because the cost-revenue 'gap' exceeded the funding ceiling. The cost model was also used to determine how well solutions maximised the number of beneficiaries, both business and household, for the least amount of 'gap' funding. Payments from the fund will be made based on the 'gap' between the cost of service provision and the forecast revenues. The cost-revenue 'gap' will be met by the scheme funds. The costs of administration of the scheme are also taken from the fund. The 'cost per connection' range quoted in the notification was calculated by dividing the anticipated business demand by the various SSP funds.
6. Fund payments will be made for business connections, but no funding will be paid for residential connections. Therefore, at the locations supported by BBF funding, there is no direct 'cost' to the project for any residential connections. Further, the ITT has stated that suppliers will offer residential services and that their business cases should demonstrate how revenues from residential services help to minimise the 'gap' funding required from the BBF to support business connections.

* Business secret

7. *Eligible costs:* Eligible costs claimed by suppliers seeking to justify a grant were presented in tender responses. The tender responses have been evaluated by an independent telecommunications consultancy to confirm that the costs are directly attributable to the project and cover only the cost of providing the services for the period of the Fund Agreement. Costs for marketing, operational and administration costs will not be eligible. The chosen service provider will not receive State aid from other sources in respect of service delivery in the target areas.
8. *Reverse payment mechanism:* The authorities involved in this project have assessed the costs and benefits of a reverse payment mechanism. The contract to be concluded between the fund manager and the service provider will provide for a level of public expenditure dependent upon the level of demand for the services. A reverse payment mechanism will ensure that as demand for broadband services grows, the contribution of the public sector diminishes. This will minimize the overall aid amount involved in the project.
9. *Beneficiaries:* The project aims to provide broadband services to the 5,000 SMEs² and 57,000 households in the designated areas. The SSP funding was approved by the East Midlands Development Agency (EMDA) based on the economic benefits that will be derived from businesses having access to broadband, with the added value that technical solutions will also provide access for residential users. Large firms will not be beneficiaries, as they normally require services and service levels that exceed the selected broadband specifications. Any single company or consortium, including telecom operators, service providers and system integrators, can participate in the tender to become the selected service provider and receive a grant.
10. *Geography:* According to the UK authorities, the areas eligible for funding are based on postcodes identified as being unlikely to have service by the end of 2005. In arriving at eligible postcodes the project considered a press release by British Telecommunications PLC (BT) on 27 April 2004³, which announced that specific exchanges schemes would be given dates to be enabled and that they would be enabled by summer 2005. For the ITT issued to suppliers on 21 May 2004 the authorities took account of the press release and assumed that these exchanges would indeed be enabled by summer 2005 and excluded the service areas from the ITT. The plans for exchanges were subsequently confirmed by the BT announcements on 30 June 2004 in which the 'ready for service' date for each exchange was published⁴. Therefore, the BBF funding is targeted at only those areas which cannot reasonably be expected to have access to services after summer 2005 and where no market players have plans to provide services.

² In accordance with Commission Recommendation 96/280/EC of 3.04.96, published in OJ L 107, 30.4.96, SME is defined as having <250 employees, annual turnover <=EUR40m or annual balance sheet of <=EUR27m and not more than 25% owned by an enterprise that is not itself a SME. This definition is currently under review.

³ BT presses Broadband accelerator, BT News Release NR0421, 27 April 2004

⁴ BT confirms timetable for Broadband roll out, BT News Release NR0454, 30 June 2004

11. The target region has been partitioned into smaller geographical areas (“Lots”) that each contain clusters of businesses to which broadband services shall be supplied. Prior to including an area in a tender process, a feasibility assessment was carried out to assess current market conditions, such as changes to the exchange ADSL-enablement programme, local supplier activity and other public sector telecommunications initiatives, to confirm that no service in the target area is likely before the end of 2005.
12. *Retail service definition:* The service provider is required to roll-out a retail broadband service in a minimum coverage area and connect end-users who request the service. For the purposes of the project, broadband services have been defined in a service specification. Suppliers were asked to deliver a broadband business service featuring a minimum of 512kbps downstream and preferably 256kbps upstream as well as a maximum contention ratio of 20:1 for business users. The service shall also cover other specifications which are set in the agreement between the fund manager and the service provider. Suppliers were asked to contract with users for an initial commitment period of no longer than one calendar year. This provision also facilitates competition between the service provider and resellers using the wholesale access provided by the chosen service provider. According to the UK authorities, the tender requirement to offer “a default Internet Service Provider (ISP) service” was included to encourage smaller suppliers to respond and to increase the likelihood of the most unattractive areas having at least one service available.
13. *Wholesale service:* Referring to the tender specifications, the UK authorities confirmed that the chosen supplier solution will offer a choice of ISPs to end users and a wholesale service on a non-discriminatory basis to other ISPs wishing to connect customers opting for a different retail service other than the winning supplier’s retail service.
14. *Technology:* The project does not prescribe any technology; it is up to the service provider to propose the most suitable solution. The funding authorities do not seek to procure or take ownership of any infrastructure or telecommunications equipment. The project aims at service provision and it is up to the service provider to build, buy or lease the infrastructure necessary and to provide the necessary equipment to provide the required service.
15. *Procurement:* The selection of the service providers was conducted in accordance with EU procurement rules relating to the coordination of procedures of the award of public service contracts.⁵ A contract notice for the scheme was published on 2 March 2004 in the Supplement to the Official Journal of the European Union, Ref.2004/S43-037693. The grants were to be awarded to the most economically effective tender. The so-called “Restricted Procedure” was followed with a public notice calling for expressions of interest, to which a number of companies responded. Eligible costs claimed by suppliers seeking to justify a grant were presented in tender responses and assessed by an independent telecommunications consultancy. Suppliers had to show that their business case for providing services can be sustainable over a three-year-period. Payments will only be made to suppliers after service delivery evidence has been

5 Directive 92/50/EEC of 18.06.92 as amended by Directive 97/52/EC and implemented in the UK by S/1993/3228.

provided. This approach meant that supplier propositions were likely to be more sustainable. The UK authorities informed the Commission that negotiations with a selected Service Provider are currently under way but the contract has not yet been finalised.

16. *Duration of the scheme:* Funding will only be made in respect of services commenced on or before 31 March 2005. Funding will only be provided to suppliers who can demonstrate that their business case for providing services is sustainable over – at least – a three-year period. Monitoring will cover the three-year-period from commencement of the service to 31 March 2008.
17. **FUND AGREEMENT:** The supplier fund agreement will have a maximum amount of grant available and a finite time period based on the provider's predicted service delivery profile. This was part of the tender evaluation criteria and sustainability assessment. The maximum grant was negotiated with the selected supplier based on the tender response and limited by the funds available. The agreement will be guided by the project objectives and approved business cases, which give a range of approximately £600 to £1000 grant fund per business connection. The grant agreement includes penalty clauses to recover grants paid, if the service is subsequently found to fall below minimum service specifications.

III. ASSESSMENT OF THE MEASURE: PRESENCE OF AID

18. According to the EC Treaty and consolidated case-law there is State aid within the meaning of Article 87(1) when:
 - there is an intervention by the State or through State resources;
 - it confers an advantage on the recipient and
 - the intervention is liable to affect trade between Member States;
 - it distorts or threatens to distort competition.

State resources

19. The East Midlands Development Agency (EMDA) and the Sub-regional Strategic Partnerships are UK local government bodies and hence their resources, which are used to finance the “Broadband Business Fund”, are to be considered as State resources.

Economic advantage

20. *Service provider:* An open tender procedure tends to minimise potential advantages to the service provider in terms of excessive returns. However, it should be noted that the procurement procedure followed included a negotiation phase and has involved qualitative elements. Moreover, even if the service provider would not receive an excessive return on its overall investment, it receives financial support which provides the possibility of entering the market and establishing its business as a “first mover”. Moreover, the subsidy will allow the service provider to offer the services at lower prices than it would have been

able to offer had it had to bear all the costs itself and, as a consequence, such a service provider will be able to attract more customers than under normal conditions.

21. The UK authorities have claimed that the reverse payment mechanism is designed to avoid over-compensation by ensuring that revenues in excess of a reasonable profit are used to recover the project costs. However, even if eventually all public funds were repaid, which is an unlikely scenario for the project at hand, their availability upfront is essentially comparable to an interest-free loan. Further, there is no certainty with regards to if and how such a repayment will happen and the absence of interest might imply a substantial reduction in the net present value of the repayment, particularly in view of the fact that no deadline is imposed on reimbursement.
22. As a result of the State contribution, the selected bidder is likely to acquire ownership of part of the infrastructure necessary to provide the services. The service provider will be in a position to exploit this infrastructure and equipment as well as customer relationships partly acquired with State funds even after the lifetime of the project. Hence, it may benefit from continuing residual advantages from the project.
23. *End users*: The objective of the State subsidy is to provide broadband services to SMEs and residential users which are currently not available in the designated project areas. Residential users, however, are not subject to State aid rules. Businesses in the targeted geography will benefit from service coverage beyond what would be provided purely on a commercial basis. In addition, they will enjoy an advantage in comparison to businesses located in other underserved regions of the UK. Considering that at least 5,000 SMEs are to be connected to the service, it seems that the advantage for each individual end-user beneficiary could be below the “de minimis” thresholds. However, the UK authorities did not provide any assurance relating to the respect of article 3(1) of the “de minimis” Regulation regarding cumulation and monitoring. Therefore it cannot be excluded that aid granted to end-users could exceed the limits set out in the aforementioned “de minimis” Regulation.⁶
24. *Resellers*: In addition, third party providers of broadband services are also expected to benefit from the State resources, given the wholesale access requirement. They, just like the SMEs, will be customers of the service provider, in this case of a wholesale service. In the areas covered by the project, there is currently no broadband infrastructure and therefore no wholesale offer at all, preventing market entry of third parties such as resellers without own infrastructures. The implementation of the BBF will alter the market situation to the advantage of resellers.

⁶ Commission Regulation (EC) No. 69/2001 on the application of Articles 87 and 88 of the EC Treaty to de minimis aid, OJ L 10, 13.01.2001, p.30-32

Selectivity

25. The scheme is selective in that it is addressed to undertakings active in the telecommunications sector providing broadband connectivity. The scheme therefore provides a selective advantage.

Distortion of competition

26. The intervention of the State alters the existing market conditions by allowing the provision of broadband services by the selected service provider and, potentially, third party providers. A number of SMEs may be subscribing to the services provided by the selected suppliers instead of more expensive market-based solutions (for instance satellite or leased line offerings) that are not affordable to SMEs and residential users. Therefore, the fact that a new broadband service becomes available at a much lower price than existing albeit expensive solutions has the effect of distorting competition.
27. In addition, while the local government authorities involved decided to intervene precisely in view of the lack of private initiatives in the concerned areas, it cannot be excluded that market initiatives could become viable in the medium term. By securing this project, the chosen service provider will be capable of establishing its business and developing its customer base, enjoying a first mover advantage over prospective competitors.

Effect on trade

28. Insofar as the intervention is liable to affect telecom operators and service providers from other Member States, the measures have an effect on trade. The telecom market is more and more open to competition between operators and service providers, which generally engage in activities that are subject to trade between Member States. There may also be an effect on competition between the SMEs using the broadband services enabled by the BBF and their competitors in other Member States, although the importance of that effect will probably be low.

Conclusion

29. In view of the above, the Commission considers that the project grants a selective economic advantage to the selected service provider, SMEs and residential users and third party service providers. The project is publicly funded, distorts competition and has an effect on trade between Member States. Therefore the Commission regards the notified measure as constituting State aid within the meaning of Article 87 (1) of the EC Treaty.

IV. ASSESSMENT OF THE MEASURE: COMPATIBILITY

30. Having established that the project involves aid within the meaning of Article 87(1) of the EC Treaty to the selected service provider, the re-sellers and the end users, it is necessary to consider whether the measure can be found to be compatible with the common market.

31. The Commission notes that the project aims to ensure the widespread availability and use of high-speed broadband services in rural and remote areas. The Commission acknowledges that the existing frameworks and guidelines cannot be applied to assess aid measures that specifically target this objective. The Commission therefore considers that the assessment of the compatibility of the measure with the common market needs to be based directly on Article 87(3)(c) of the EC Treaty.
32. Article 87(3)(c) of the EC Treaty 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

33. 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 e-Government, e-Learning and e-Health projects. Implementing the eEurope Action Plan 2005, EU15 Member States have put comprehensive national broadband strategies in place. This process is now extended to all 25 EU Members⁷.
34. Broadband connectivity is a type of service that by its nature is capable of positively affecting the productivity and growth of a large number of sectors and activities. Regional economic development benefits resulting from greater broadband deployment can include job creation and retention, more industrial growth, improved education and health systems and even reduced traffic congestion⁸. Moreover, its economic impact is closely linked to the extent to which it is diffused across a country or a region. This is partly because in network technologies, the more people and firms that use a network, the more benefits it potentially generates for its users.⁹ Finally, the social and economic case for broadband takes on added significance for rural and remote communities, where improved communications can address a variety of challenges posed by distance¹⁰.
35. Furthermore, the Commission has recognised the need to encourage the deployment of broadband infrastructure in less favoured areas, where geographical isolation and low density of population can make the cost of upgrading the existing infrastructure unsustainable¹¹. The Commission has stressed the need to enable less favoured areas to come to the forefront of information society development by accelerating broadband deployment. The

⁷ Commission Communication COM(2004) 369 of 12.05.2004, “Connecting Europe at High Speed – National Broadband Strategies”

⁸ US Department of Commerce, Office of Technology Policy, “Understanding Broadband Demand”, September 2002

⁹ OECD “The Economic Impact of Information and Communication Technologies (ICT)”, 2004

¹⁰ OECD “Broadband Driving Growth: Policy Responses”, October 2003

¹¹ Commission staff working paper, Guidelines on criteria and modalities of implementation of structural funds in support of electronic communications, 28.7.2003, SEC(2003) 895.

present project concerns a rural and remote area with low population density, which acts as significant disincentive to the private sector development of infrastructure necessary for the provision of broadband, given that the cost of rollout per potential customer increases as population density decreases.

36. The costs characteristics of broadband networks are such that services are generally much more cost effective to roll-out, and hence available at cheaper terms, where demand is higher and concentrated, i.e. in densely populated and in relatively wealthy areas. High “economies of density” have usually been a key success factor in countries and regions where there has been rapid deployment of broadband¹². On the downside, such economics may have the effect of increasing the disadvantage for less developed or scarcely populated areas such as the East Midlands. As seen from various broadband demand registration schemes in the UK, operators are often unwilling to make the necessary investment in upgrading the infrastructure unless a certain level of demand concentration is guaranteed beforehand.
37. The reason for such “economies of density” is that most broadband technologies today are inherently uneconomic in low population density areas since unit costs escalate dramatically as population densities drop. Examining monthly costs per subscriber as a function of population density for various currently available technologies (e.g. DSL, cable, fixed wireless access)¹³ shows that the cost curves turn sharply upward when site densities drop below a certain number of sites per square kilometre. High average costs per user for broadband services are mainly driven by high capital costs, especially in the access network. In the case of fixed networks, 65-70% of the costs associated with the deployment of broadband in the access network is related to civil infrastructure¹⁴. These costs are particularly high in rural areas. In addition, although equipment costs fall as volumes increase, they remain a significant cost and a major barrier to roll-out.
38. Public sector intervention may thus be needed to support broadband rollout in rural areas by stimulating demand, as well as providing seed money to jumpstart private investment in areas otherwise underserved. With the increasing public support for broadband initiatives, there is growing evidence that public intervention may accelerate the establishment of broadband networks in less profitable areas, whilst ensuring, by means of open access requirements, that competition is preserved in the future. This view is shared, inter alia, by the UK Broadband Stakeholder Group¹⁵, which considers that judicious intervention by the public sector, especially coupled with open access requirements, can help support broadband in rural areas.

¹² For Instance, Korea has experienced rapid roll-out partly due to its demographics (e.g. 480 people/square kilometre versus 245 in the UK, large number of people living in high rise buildings, Brunel University and UK Department of Trade and Industry “Investigating Broadband Technology Deployment in South Korea”, July 2002

¹³ The costs per user of a satellite solution is largely unaffected by site density, however, at current overall subscriber volumes this technology remains expensive when compared to DSL or cable, mainly due to high set-up and installation costs.

¹⁴ UK Broadband Stakeholders Group “Broadband in Rural Areas”, 2003

¹⁵ UK Government's advisory group on promoting the roll-out and take-up of broadband services. Its members include corporations and organisations throughout the broadband value chain.

39. In summary, the BBF scheme offsets a geographical and commercial handicap due to the rural nature of the target geography and is objectively justified to address the lack of provision of a service due to the insufficient density of potential and actual subscribers to make delivering broadband services economically viable on a purely market-driven basis. The target group of the scheme includes both local businesses and citizens who will benefit from the availability of broadband services in both their day-to-day business activity and in the lifestyle benefits that access affords to citizens. The geographical disadvantage is the rural nature of the target areas and the commercial handicap is the sparse and distributed population.

Proportionality

40. In order for the aid measure to be compatible with Article 87(3)(c) of the EC Treaty, it must 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 local economic development, support to information society and enhancement of competition between telecom operators and service providers – 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 would nevertheless produce the required results, is adopted.
41. In this respect the Commission notes the following positive elements:
- (1) *Open tender*: The selected service provider benefiting from the subsidy was solicited from the open market in accordance with EC rules and principles on public procurement. The tender, seeking the Economically Most Advantageous proposal, was designed to minimise the cost of investment and the associated public funding, whilst still ensuring an appropriate level of service.
 - (2) *Technology neutrality*: The project is technology neutral, i.e. it does not favour a priori any given technology.
 - (3) *Open access*: The selected service provider will lease capacity to resale operators and service providers on a transparent and non-discriminatory basis guaranteeing an open access. The wholesale access provision is, according to the information provided by the UK authorities, not limited in time and thus will continue after the end of the funding period. The pricing of these wholesale services is expected to be in line with market terms.
 - (4) *Existing infrastructure*: The service provider is free to choose the most efficient way of procuring the necessary infrastructure, either by building, buying or leasing it from third parties. By avoiding specific requirements to build new infrastructure, the project minimises duplication. Since leasing facilities is expected to be more cost effective than building new infrastructure, existing operators have the possibility to contribute their infrastructure to the project, which limits the economic impact of the project for operators that already have infrastructure in place.

- (5) *Aid amount and intensity:* Whereas up to GBP 1.9 million in State funds has been earmarked for the project, it is likely that this amount will be reduced to GBP [...] as a result of the tendering process. The selected provider is expected to contribute a sizeable amount of the total project costs. The ITT stated maximum prices for connection and monthly rental charges based on comparable market offerings. The assessment of tariffs to both SMEs and residential end users was part of the selection process. In addition, a reverse payment mechanism, under which the proportion of public funding relative to private is expected to diminish as demand for services picks up, ensures that only the minimum necessary public funds are used.¹⁶ Finally, given the size of the project and the number of enterprises concerned, the aid amount potentially reaching resellers and end-users is limited.
 - (6) *Cost allocation transparency:* The specifications of the tender, the grant fund agreement and the operation of the reverse payment mechanism will ensure that only eligible and attributable costs are allocated to the project. This will permit calculation and justification of the payments to the service provider and will minimize the overall aid amounts.
 - (7) *Duration:* Whilst ensuring sustainable solutions with a duration of at least three years, the funding will be granted as a one-off payment during the initial launching phase for services commenced on or before 31 March 2005. Monitoring will continue until 31 March 2008.
 - (8) *Monitoring:* According to the UK authorities, the project will be able to provide annual reports about the implementation of the fund to the Commission. Reporting shall provide enough details to monitor whether the project distorts competition to an extent contrary to community interests. Reports to the Commission will be submitted at the end of year one when the fund dispersal will take place and subsequently at the end of years two and three of service delivery.
42. At the same time, the Commission notes the following aspects which could raise concerns:
43. *End-to-end service provision:* The project aims to procure an end-to-end service. This means that the selected bidder will not only have the task of arranging the necessary infrastructure for granting access to third party providers, and as such make broadband available to end-users, but will also have the obligation of providing itself the end service on customers' request. In general, the chosen approach differs from a pure infrastructure project in several respects:
- on the one hand, an end-to-end service typically involves a lower detail of specification as to the type of infrastructure and technical means required by the authorities. This has the advantage of allowing better exploitation of existing installations and greater technological neutrality;

¹⁶ Since the scheduling of repayment depends on market evolution, it is not possible to quantify the aid amount ex-ante.

- an end-to-end service might also be preferable in cases where there is less need for building and managing new infrastructure and focus is on the rapid availability of the service to end users. By tendering the final service, the authorities have greater certainty on the scope and timing of the final service;
- a project that includes the provision of the final services allows greater commercial opportunities to the selected bidder and is likely to attract a greater amount of private funding. This might entail lesser use of public resources and lower aid intensities.
- on the other hand, this type of project can be seen as more distortive than one merely consisting of the provision of infrastructure, since it will intervene in a greater number of markets, including those downstream markets in which public intervention appears less needed. This is in line with the views of the UK Broadband Stakeholder Group (“BSG”), which considers that in most cases public support for third party infrastructure (especially civil infrastructure), sold on a non-discriminatory wholesale basis to service providers, should be sufficient to reduce overall investment costs and lower barriers to service provision;
- it should also be noted that in certain ‘infrastructure projects’ the State retains ownership of the infrastructure and attributes its management – through a concession of limited duration – to an independent party that cannot act as service provider. This solution preserves the neutrality of the infrastructure manager, as opposed to a situation in which a service provider has control over the infrastructure.
- finally, an end-to-end service requirement may put the Internet service provider operations or the selected broadband service provider at an advantage, who is likely to be in a position to roll-out end-user services prior to the entry of third party providers benefiting from the open access. Under certain circumstances, this might lead to market foreclosure effects.
- However, in this particular case, the distortive effects of the provision of an end-to-end service, as opposed to the mere establishment of an infrastructure, appear to be not of such an extent as to be contrary to the common interest.

Price distortion: The Commission notes that the project intends to ensure the widespread availability and use of advanced broadband services at conditions closer to those in areas with a great density of population and business. In this respect, the Commission took notice of the fact that the tender to select the service providers left open the level of retail and wholesale tariffs charged for the subsidized services. Candidates were invited to put forward price proposals as part of their bid, with lower prices scoring higher in the selection process. As noted in the Commission's decision "*Cumbria Broadband - Project Access*", appropriate pricing of the services is especially important to ensure that commercial end-users benefiting from the aid are not put in a position more favourable than their competitors located in regions where the same advanced broadband services are already available on pure market terms.¹⁷ The issue of sending the wrong price signals to the market as a result of tariffs charged for a State funded service was also raised by several stakeholders during the public consultation on the modalities of spending structural funds on broadband.¹⁸ Finally, disproportionately low prices may necessitate more aid than the minimum necessary to address the undersupply of the service in certain areas. The criteria spelled out in the ITT together with the funding mechanism and the monitoring provided in the fund provide some safeguards that the prices offered to SMEs and residential users will be comparable with tariffs offered by service providers in other areas in the UK with no aid scheme in places. Therefore potential discrimination between customers being provided with the relevant services within the designated project area and users in other areas will be minimized.

44. In view of the above, the Commission considers that the public investment in the "Broadband Business Fund" will only be provided to the extent necessary to develop the use of broadband services by SMEs and residential users. This is in line with Community priorities as indicated in the e-Europe 2005 Action Plan. The intervention is designed in a way that does not distort competition to an extent contrary to the common interest.

Conclusion

45. In the light of the above, the Commission has come to the conclusion that the "Broadband Business Fund" is compatible with Article 87(3)(c) of the EC Treaty.

¹⁷ In "Project Access" the UK authorities provided a benchmark rate equal to the cheapest available rates for the specific broadband service being offered on a retail basis to a majority of users at a national level. Commission decision N282/08 of 10/12/03 published OJ C16 22/01/04

¹⁸ Public consultation organised by the Commission on the "Guidelines on Criteria and Modalities of Implementation of Structural Funds in Support of Electronic Communications", 2003

V. DECISION

On the basis of the foregoing assessment, the Commission has accordingly decided that the aid involved in the “Broadband Business Fund” is compatible with Article 87(3)(c) the EC Treaty.

If this letter contains confidential information which should not be disclosed to third parties, please inform the Commission within fifteen working days of the date of receipt. If the Commission does not receive a reasoned request by that deadline, you will be deemed to agree to the disclosure to third parties and to the publication of the full text of the letter in the authentic language on the Internet site:

http://europa.eu.int/comm/secretariat_general/sgb/state_aids/. Your request should be sent by registered letter or fax to:

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Yours faithfully,

For the Commission

Mario MONTI

Member of the Commission