



EUROPEAN COMMISSION

Brussels, 22.II.2006

C(2006)433 final

**Subject: State Aid n° N 131/2005 - United Kingdom  
FibreSpeed Broadband Project Wales**

Sir,

## **I. PROCEDURE**

- (1) By letter registered on 14 March 2005, pursuant to Article 88 (3) of the EC Treaty, the authorities of the United Kingdom (hereafter “UK”) notified the planned FibreSpeed Broadband Project Wales (hereafter “FibreSpeed” or “the measure”) to the Commission. By letter of 11 May 2005, the Commission requested additional information on the proposed measure. A meeting between the UK authorities and the Commission took place on 9 June 2005, after which the Commission requested additional information on 22 June 2005. The UK authorities requested the Commission to grant additional deadline extensions to allow them to finalise the project over summer 2005.
- (2) Following the exchanges of information between the Commission and the UK authorities, the authorities substantially modified the measure in size, budget and regarding the geographical target areas. The UK authorities submitted additional information and a modified setup of the measure by letter registered on 4 September 2005. Following various exchanges of correspondence by letter and e-mail, the UK authorities provided additional information on the modified project setup by letter registered on 23 December 2005.

## **II. CONTEXT**

- (3) Broadband connectivity<sup>1</sup> is a key component for the development of knowledge-based global, national, regional and local economies and the development, adoption and usage of information and communication technologies. Broadband is of strategic importance because of its ability to accelerate the contribution of these technologies to economic growth in all sectors, to enhance social development and to facilitate innovation.

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<sup>1</sup> Broadband services can be delivered using various combinations of communications network technologies (“platforms”). Technologies can feature either fixed or radio based transmission infrastructure, and they can substitute or complement each other according to the individual situation. Current mass-market broadband services have generally download speeds starting from 512Kbit/s/ - 1Mbit/s. For business users, much higher speeds are needed.

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- (4) Based on studies, the Welsh authorities have come to the conclusion that widespread and affordable broadband access can contribute to productivity and growth in Wales, benefiting businesses, the public sector, and consumers. Survey results and economic modelling performed on behalf of the Welsh authorities confirm these benefits and still unrealised potential of broadband for Wales.
- (5) Wales lags behind the rest of the UK in broadband deployment due to its geographical isolation, mountainous terrain and low population density. To address the current market situation and to prevent a loss of competitiveness of Wales vis-à-vis other regions, the Welsh authorities launched the Broadband Wales Programme, which outlines a vision for Wales to tackle the current gaps in broadband delivery and to fully exploit the benefits of broadband technologies. In January 2005, the Welsh Assembly Government presented its updated Broadband Wales Programme Strategy 2005-2007.
- (6) As part of this strategy, the Welsh authorities intend to facilitate and support the creation of solutions capable of delivering competitively-priced next-generation broadband services to business parks and other strategic locations. One of the targets set is to ensure the provision of “fibre-speed” broadband connectivity (at least 10 Mbits/s symmetrical) at pre-identified business parks/locations.
- (7) The Welsh authorities analysed the availability of advanced broadband connectivity in all business parks in Wales. As regards a cluster of 14 parks in North Wales (hereafter “the target locations”), according to the UK authorities, the only supplier who has infrastructure capable of providing wholesale services and advanced retail broadband services (a minimum of 10 Mbits/s symmetrical) is BT, the historic operator.
- (8) The target locations are served by leased line services provided by the historic operator (BT) in a regulated pricing environment. According to the UK authorities, the rental costs of retail leased lines (dedicated internet access products) in these areas are very high<sup>2</sup>. Hence, in spite of price regulation imposed on BT for certain products, the price for these products can be considered as unaffordable for many SMEs<sup>3</sup>. A recent pricing comparison study undertaken by the UK authorities, which compares the pricing of high-speed services in Wales to prices in other, competitive urban areas in the UK, shows that the cost in Wales is 2.7 (for a 10 Mbits/s Internet connection) to 7.2 (for a 100 Mbits/s Internet connection) times higher than in London.
- (9) As regards basic broadband services, due to the location of the business parks and their distance from the serving telephone exchange, ADSL<sup>4</sup> services can

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<sup>2</sup> In order to illustrate the high price level for these products in Wales, the authorities submitted representative pricing information (based on a quote by BT) for a specific site in North Wales: 10 Mbits/s symmetrical connection: Installation Fee GBP 7,000 plus annual rent of GBP 34,500; 34 Mbit/s symmetrical connection Installation Fee GBP 25,000 plus annual rent of GBP 94,000; 100 Mbits/s symmetrical connection: Installation Fee GBP 25,000 plus annual rent of GBP 168,300 (all data as of July 2005).

<sup>3</sup> Small and medium-sized enterprises. The term SME is used here in accordance with the definition in Commission Recommendation of 6 May 2003, published in OJ L 124, 20.05.2003, pages 0036 – 0041.

<sup>4</sup> Asymmetric Digital Subscriber Line.

only support download speeds of up to 2Mbits/s but more typically between 512Kbits/s-1Mbits/s. Such asymmetric services may well fit residential customers who typically download more data than they send, but do not necessarily match the needs of SMEs communicating with suppliers and customers. Satellite technology has the ability to provide coverage to 99% of North Wales. However, according to the UK authorities, the cost of receiving a fast broadband satellite service today is prohibitive to many users. Satellite services also suffer from some latency issues due to adverse weather conditions in some parts of North Wales.

- (10) BT does not make its own ducts or “dark fibre<sup>5</sup>” available to third parties<sup>6</sup>. Moreover, there is only very limited fibre of alternative operators or energy providers available in Wales. This limits the opportunity for service providers to access passive infrastructure over which it could provide its own products and services at both wholesale and retail level. Thus, the target locations are currently only served by expensive leased line services or satellite services as well as broadband services with low bandwidth which are not suitable for use by businesses.
- (11) This seriously affects the ability of small and medium-sized enterprises to compete in the global knowledge economy with businesses from other regions of the UK and Europe which have the benefit of available high-speed broadband infrastructure.
- (12) Moreover, comprehensive market testing and open consultation by the UK authorities shows that, due to topography and economics, there is little prospect of market players making any investment in Wales to create an alternative wholesale infrastructure. The economics of such an investment do not meet the return on investment criteria for telecommunications operators, due to the high cost of installing infrastructure in Wales and the comparatively small and geographically dispersed market from which it could extract revenues to provide a return on investment.
- (13) Based on this analysis, the Welsh authorities concluded that there are not enough commercial incentives for private operators to build alternative infrastructure capable of providing high-speed broadband services to the business parks targeted by the measure. Hence, the Welsh authorities decided to propose the notified FibreSpeed project to reduce the structural impediments for businesses.

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<sup>5</sup> Plain optical fibre with no optical transmission equipment connected. Operators may add their own equipment (data is transported by optical light waves), retaining complete control over the fibre. Once the fibre is connected to optical telecommunications equipment, the dark fibre becomes lit fibre.

<sup>6</sup> The regulatory framework in the UK does not impose on BT to provide access to its dark fibre or ducts. The Welsh authorities have informed the Commission that, during the market testing exercise for FibreSpeed, the wholesale business unit of BT confirmed that BT does not make dark fibre available to other operators.

### III. DESCRIPTION OF THE MEASURE

- (14) *Primary objective:* The primary objective of FibreSpeed, phase I<sup>7</sup>, is to ensure the availability of affordable advanced broadband services (defined as a minimum of 10 Mbits/s symmetrical) for businesses located in 14 business parks in rural areas of North Wales. This will be achieved by the construction of an open, carrier-neutral, regional fibre-optic network linking these business parks over which wholesale services will be offered to retail operators who will serve business end users.
- (15) *Secondary objective:* The measure will ensure that North Wales has access to an open regional wholesale broadband network, generating knock-on effects regarding the broadband accessibility in the concerned areas in general<sup>8</sup> thereby contributing to a range of policy and strategic objectives for Wales, supporting the economic, social and rural development of Wales.
- (16) *Legal basis:* The measure is based on Section 1(2)(a), 1(2)(b), 1(3)(c) and (1)(3)(f) of the Welsh Development Agency Act 1975, as amended.
- (17) *Target areas:* The measure will link the following strategic locations/business parks: Ty Mawr, Llandudno Junction, Parc Caer Seion, St. Asaph Business Park (including OpTIC Technium), North Wales Business Park, Deeside Industrial Park, Hawarden Industrial Park, Warren Hall, St. Davids Park, Parc Menai (including CAST Technium), Victoria Dock (Caernarfaron), Parc Bryn Cegin, Wrexham Industrial Estate and Wrexham Technology Park.
- (18) *Service definition:* The selected operator of the network (“wholesale operator”) will be required to build/buy and operate a backbone network linking the business parks with a series of local access networks on the targeted business parks. The project covers both the passive and the active network architecture, i.e. the underlying physical infrastructure and the electronic/optical networking equipment needed to provide wholesale services over the network. The wholesale operator will have to offer dark fibre and wholesale high bandwidth services to operators of electronic communications services who will serve the business end users. The wholesale operator will itself not offer services to end users. Access to the network and the provided wholesale services will be on an open, carrier-neutral, non-discriminatory basis and all service providers will be treated equally, i.e. the terms, conditions and contractual arrangements will be the same for all operators using the wholesale operator’s services. The network infrastructure will remain in public ownership and has to be returned to the authorities by the wholesale operator after the end of the project.
- (19) *Procurement:* The selection of the wholesale operator will be conducted in accordance with EU procurement rules. The procurement will be awarded to the candidate making the economically most advantageous offer, in accordance with the planned invitation to tender and the associated terms and conditions. It

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<sup>7</sup> The Welsh authorities envisage to fund broadband-capable infrastructure to additional business parks in the West and South of Wales at a later stage which, if realized, will be the subject of a separate State aid notification.

<sup>8</sup> For instance by providing backhaul for local loop unbundling or wireless operators.

is possible that the procurement will involve a negotiated element. This will be clearly defined in the terms and conditions for the procurement process.

- (20) *Technology:* The UK authorities follow a procurement exercise in respect of FibreSpeed on the basis of technology neutrality, i.e. the technology will not be specified in the invitation to tender. However, according to the UK authorities, on the basis of a cost-benefit analysis, fibre is the most commonly used medium for backbone networks, which typically transfers very large amounts of data over long distances, as evidenced by the design of the major UK and pan-European network operators and should thus be considered as industry best practice. Therefore, a fibre-based solution is the most likely outcome of the procurement exercise.
- (21) *Beneficiaries:* The direct recipient of the aid will be the selected wholesale operator. Indirect beneficiaries will be third party providers of telecommunication services and business end users in the targeted areas.
- (22) *Budget and aid intensity:* The maximum amount of public funds to be allocated to the measure will be [...]<sup>9</sup>. This will be made up of a [...]<sup>10</sup> European Regional Development Fund (hereafter “ERDF”) grant and the balance will be provided by the Welsh Assembly Government which is the Project Sponsor. The aid intensity level (including ERDF funds) will depend on the outcome of the procurement exercise, but would in any event not exceed [...]<sup>11</sup> of total project costs.
- (23) *Eligible costs:* Eligible costs will be both capital costs of putting in place the necessary infrastructure and also costs relating to the subsequent operation of such infrastructure by the wholesale operator. Existing infrastructure proposed by bidders will not be viewed as an eligible expenditure in respect of public funding.
- (24) *Funding instrument:* Public funds will be paid to the selected wholesale operator in the form of a service grant.
- (25) *Duration of the measure:* The lifetime of FibreSpeed has not been defined yet, as it will depend on the outcome of the procurement process. The expected lifetime of the project is between 10 and 20 years. According to the authorities, the period of ten years represents the length of similar concessions for broadband projects. The period of 20 years represents an estimate of the expected life of fibre assets, which indicates the maximum length of the concession period.
- (26) *Product or service markets affected:* The selected wholesale operator will offer dark fibre and high-bandwidth services over fibre. Several markets, as defined in the Commission Recommendation on relevant markets<sup>12</sup> for electronic

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<sup>9</sup> Covered by the obligation of professional secrecy.

<sup>10</sup> Covered by the obligation of professional secrecy.

<sup>11</sup> Covered by the obligation of professional secrecy.

<sup>12</sup> Commission Recommendation 2003/311/EC of 11 February 2003 on relevant product and service markets within the electronic communications sector susceptible to ex ante regulation in accordance with Directive 2002/21/EC.

communications services are affected by the measure, directly or indirectly. The most directly affected markets will be wholesale leased lines: market 13 (wholesale terminating segments of leased lines) and, to a lesser extent market 14 (wholesale trunk segments of leased lines). However, the measure also has knock-on effects on other markets, for instance wholesale broadband access and retail leased lines.

- (27) *Monitoring:* The wholesale operator will be required to report to the Welsh authorities on a regular basis, taking into account numerous performance criteria.

#### **IV. STATE AID ASSESSMENT OF THE MEASURE**

- (28) 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 economic advantage on the recipient;
- it distorts or threatens to distort competition;
- the intervention is liable to affect trade between Member States;

##### State resources

- (29) FibreSpeed Wales is partly funded by European structural funds and partly by resources of the Welsh government, hence State resources are involved. Structural fund monies have been taken into account when calculating the aid intensities.

##### Economic advantage

- (30) *Wholesale operator:* The UK authorities claim that they intervene precisely because market players are not willing to invest in order to deploy an infrastructure similar to FibreSpeed. Hence government action as regards the investment in the network infrastructure is not guided by revenue or profit-maximising behaviour but by the aim to lower entry barriers for alternative operators to boost competitive supply of certain electronic communications services.
- (31) Although an open tender tends to reduce any potential advantage in terms of excessive profits, the wholesale operator may establish its wholesale business with the support of government funds, entering the market for wholesale services based on conditions not otherwise available on the market. In addition, the subsidy will allow the wholesale operator 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, the wholesale operator will be able to attract more customers than under pure market conditions. The intervention of the State therefore confers an economic advantage to the wholesale operator.

- (32) *Third party operators:* The wholesale operator will make its services available at transparent prices, which are benchmarked against the prices of similar services in large cities of the UK. The roll-out of FibreSpeed will enable telecommunications operators to avoid significant capital investment by using the government-funded infrastructure and puts them at a advantage vis-à-vis operators who have invested in own infrastructure such as BT or satellite operators. Hence, operators using the FibreSpeed wholesale network will be granted an economic advantage since they have access to infrastructure and services made possible by State funding at prices which would not be available without State support.
- (33) *End users:* The objective of the provision of the wholesale services by the FibreSpeed is to enable operators to provide high-speed broadband and bandwidth services to businesses at lower prices than the ones currently available in the target areas. Hence, businesses in the targeted geography will benefit from service coverage beyond and prices below what would be provided on a purely commercial basis like, in some areas, currently offered leased lines or satellite connections. Considering the number of users to be connected to the service, it seems that the advantage for each end-user beneficiary will be below the “de minimis” threshold. 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<sup>13</sup>.

#### Distortion of competition

- (34) *Wholesale level:* Some services which will be offered by FibreSpeed are not yet available on the market (dark fibre, some high-speed bandwidth services). Others are already provided by BT, although at different conditions than envisaged under the project. Hence, the intervention of the State alters the existing market conditions by enabling the wholesale operator to offer wholesale services in competition with BT.
- (35) *Retail level:* The fact that a new infrastructure and wholesale services become available and *prima facie* below market prices has the effect of distorting competition also in downstream markets (e.g. retail leased lines, broadband, mobile services). Corporate users or small and medium-sized enterprises may be subscribing to retail services provided by the operators using the wholesale operator’s wholesale infrastructure instead of more expensive market-based solutions (for instance satellite or leased line offerings). Therefore, there is also a potential distortion of competition on the retail level.
- (36) The scheme is also selective in that it is addressed to undertakings active only in certain regions or in certain markets for electronic communications services. These selectivity elements also induce a potential distortion of competition.<sup>14</sup>

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<sup>13</sup> 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

<sup>14</sup> Judgement C-143/99, *Adria Wien Pipeline*, Slg. 2001, I-8365.

### Effect on trade

- (37) Insofar as the intervention is liable to affect providers of electronic communications services and service providers from other Member States, the measure has an effect on trade. The markets for electronic communications services are open to competition between operators and service providers, which generally engage in activities that are subject to trade between Member States.

### Conclusion

- (38) In view of the above, the Commission considers that the notified measure grants an economic advantage to the wholesale operator, third party providers and final users that exercise an economic activity. The project is publicly funded, has the potential to distort 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.
- (39) Having established that the project involves aid within the meaning of Article 87(1) of the EC Treaty, it is necessary to consider whether the measure can be found to be compatible with the common market.

## **V. COMPATIBILITY ASSESSMENT**

- (40) The Commission notes that the project aims to ensure the availability of an open, carrier-neutral, fibre infrastructure and high-speed wholesale broadband services in certain areas of Wales and, as such, does not fall under one of the existing frameworks and guidelines. It should be noted that some areas covered by the project are located within areas eligible under the European Regional Development Fund, as well as Art. 87 (3) (a) assisted areas within the meaning of the Regional Aid Guidelines.<sup>15</sup> However, other areas are outside these assisted regions and hence the measure cannot be assessed under the Regional Aid Guidelines. Moreover, while the aid to be granted under the scheme may in some cases qualify as aid for initial investment within the meaning of those guidelines in so far as it benefits the wholesale provider, the same cannot be said in respect of its impact on the third party operators and end users, for whom the benefit is not linked to any initial investment.
- (41) 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<sup>16</sup> which states that:

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<sup>15</sup> OJ 1998 C 74, p.9.

<sup>16</sup> This approach was also followed by the Commission in other cases, see for instance: State aid decisions for the UK: N126/04 “Broadband for SMEs in Lincolnshire” of 14.12.2004, N199/04 “Broadband business fund” of 16.11.2004, N307/04 “Broadband in Scotland – remote and rural areas” of 16.11.2004 (See: [http://europa.eu.int/comm/secretariat\\_general/sgb/state\\_aids/](http://europa.eu.int/comm/secretariat_general/sgb/state_aids/)).



*“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.

- (42) The UK authorities submit that, if the Commission were to find that the measure constitutes aid, this aid would be compatible under Article 87 (3) (c) as the project targets economic cohesion objectives and boosts economic development and competition by providing necessary infrastructure and wholesale services at conditions not offered by market players.
- (43) In order to be compatible under article 87(3)(c) an aid must pursue an objective of common interest in a necessary and proportionate way. In particular, the measure shall be assessed with respect to the following questions:
- (1) Is the aid measure aimed at a well-defined objective of common interest (i.e. does the proposed aid address a market failure or other objective)?
  - (2) Is the aid well designed to deliver the objective of common interest? In particular:
    - (a) Is the aid measure an appropriate instrument, i.e. are there other, better-placed instruments?
    - (b) Is there an incentive effect, i.e. does the aid change the behaviour of firms?
    - (c) Is the aid measure proportional, i.e. could the same change in behaviour be obtained with less aid?
  - (3) Are the distortions of competition and the effect on trade limited, so that the overall balance is positive?

## **1. The support of broadband rollout is in line with the common interest**

### ***Community policy***

- (44) As outlined in its Communication “i2010 – A European Information Society for growth and employment”<sup>17</sup> and the eEurope Action Plan 2005<sup>18</sup>, the Commission actively supports the widespread availability of broadband services. There is clear evidence for the regional economic development benefits resulting from greater broadband deployment, including job creation and retention as well as improved health and education services<sup>19</sup>. In order to achieve better broadband coverage and take-up, the Commission encourages Member States to put comprehensive national broadband strategies in place.<sup>20</sup>

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<sup>17</sup> COM(2005)229 final, 1 June 2005.

<sup>18</sup> COM(2002)263 final, “eEurope 2005: An information society for all”.

<sup>19</sup> For an overview, see: Lehr, Osorio, Gillet and Sirbu (2005): “Measuring Broadband’s Economic Impact”, and Orazem, Peter, University of Kansas Business School (2005), “The Impact of High-Speed Internet Access on Local Economic Growth”.

<sup>20</sup> Commission Communication COM(2004) 369 of 12.05.2004, “Connecting Europe at High Speed – National Broadband Strategies”.

The measure at hand forms an important part of the Broadband Wales Programme which is related to the UK broadband strategy. Therefore, as the measure helps to promote broadband access for businesses in a disadvantaged area of the European Union by supporting the provision of an open carrier-neutral wholesale infrastructure in the targeted business parks, it is in line with the common interest. Due to its secondary objectives, the measure is also expected to support the development of broadband in general, e.g. by providing backhaul capacity, in the areas covered by the network.

***Cohesion objective and market failure considerations: Bridging the digital divide***

- (45) Due to economics of density, broadband networks are generally more profitable to roll-out where potential demand is higher and concentrated, i.e. in densely populated areas. Because of high fixed costs, unit costs escalate dramatically as population densities drop. Hence, by funding the establishment of an open wholesale infrastructure in rural areas of Wales (areas eligible under the European Regional Development Fund objectives 1 and 3), the authorities pursue genuine cohesion<sup>21</sup> and economic development objectives by supporting the rollout of alternative infrastructure which in turn will allow entry by additional operators which will have a positive impact on supply and competition in the geographic areas covered by the measure.
- (46) The telecommunications sector features, similar to other network industries, a number of typical economic characteristics which may lead, under certain circumstances, to an inefficient level of supply and/or a lack of competition. For example, due to the high cost associated with the deployment of fixed network infrastructure, some parts of this infrastructure may not be (economically or technically) duplicated. In addition, although equipment costs have fallen as volumes increase, they remain a significant cost and major barrier to roll-out. In areas where demand is not very developed and coverage of cost is uncertain, private operators might find it difficult to secure funding for infrastructure projects, which have a long life and amortisation period.
- (47) These characteristics and the previous existence of a state monopoly have led to the presence of market power by BT in the UK and, as regards the business parks targeted by the measure, BT is de facto the only supplier of wholesale services. Moreover, BT has a very strong market position as regards retail services on these business parks. BT is a vertically integrated provider, offering retail and wholesale services (although through a distinct subsidiary). Although ex-ante tariff and access regulation of wholesale services addresses some of these issues, BT does not provide access to some elements of its core infrastructure, such as dark fibre<sup>22</sup>. As a consequence, business parks located in North Wales are currently only served by expensive leased lines or satellite services as well as broadband services offering low bandwidth which do not respond to the needs of businesses and are not provided at conditions similar to those in areas with a greater density of population/businesses.

**2. Well-designed aid**

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<sup>21</sup> The measure is also supported by EU structural funds.

<sup>22</sup> See footnote 6.

***(a) Is aid the appropriate instrument?***

- (48) On the supply side, tariff and access regulation imposed on BT, as applied by regulator OFCOM, is another instrument of state intervention. Indeed, regulation has led to the availability of a number of (broadband) wholesale products and prices have been decreasing over the past years. However, regulation was a necessary but not sufficient instrument to enable the supply of alternative infrastructure or prices similar to other areas of the UK as alternative providers need to combine the use of wholesale products from the incumbent with own network investments which may not be profitable in areas where demand is low.
- (49) Demand-side measures in favour of broadband (such as vouchers or tax breaks) could be another instrument. However, these measures do not solve the illustrated problems on the supply side and are likely to favour the incumbent operator.
- (50) On balance, in view of the market situation on the concerned business parks and in North Wales in general, the Commission concludes that, in this specific context, the development of an open wholesale infrastructure with government support is an appropriate instrument to achieve the set objectives.

***(b) Is the aid providing the right incentives to operators?***

- (51) Although public investment carries a risk of crowding out similar private-sector initiatives – which are, as market studies show, highly unlikely in the areas concerned by the measure - the project promotes competition: all operators have, at non-discriminatory conditions, open access to wholesale services and fibre via the wholesale operator. The measure therefore creates a significant and direct incentive effect for operators: the provision of a neutral open wholesale infrastructure and wholesale services reduce the high fixed cost of establishing a network, which represents the most important barrier to market entry to alternative operators.

***(c) Proportionality***

- (52) The Welsh authorities have designed the measure in such a way as to, for the given project, minimise the State aid involved and potential distortions of competition arising from the measure. In this respect, the Commission notes, inter alia, the following positive elements in the overall design of the measure:

- (a) *Open tender:* the Welsh authorities will conduct an open tender for the construction and management of the fibre optic network, in accordance with EC rules and principles on public procurement. There will be carefully defined and publicized award criteria aimed at ensuring competitive proposals by market players. A concession agreement will determine the obligations of the wholesale operator concerning the implementation of the measure (for instance service specifications, financial terms, pricing, wholesale access, reporting).

- (b) *Minimizing effects on infrastructure providers and operators:* In preparation of the project, the Welsh authorities performed an extensive market testing and consultation exercise involving all market players. The result of this consultation is reflected in the current project setup. Moreover, the authorities have confirmed that all owners of dark fibre in the area concerned by the measure will be given the opportunity to offer their fibre to the project, subject of being capable of supporting the requirements of FibreSpeed.
- (c) *Wholesale character of the project:* Following the results of the market testing exercise, the Welsh authorities decided to support the provision of wholesale bandwidth services in addition to dark fibre as this was deemed necessary by the consulted operators. The wholesale operator will provide open wholesale access to its full range of products to service providers on a transparent and non-discriminatory basis. Contrary to subsidies for the provision of broadband services to end users, the project does not interfere directly in the retail markets which is left to commercial operators which limits the number of markets in which State intervention is taking place.
- (d) *Neutrality of the wholesale operator:* The State retains ownership of the infrastructure and attributes its management to an independent wholesale operator which cannot act as a retail service provider. This solution preserves the neutrality of the infrastructure manager and wholesale operator which has to provide access to all third party operators, as opposed to a situation in which an integrated operator has proprietary control over the infrastructure.
- (e) *Clawback mechanism:* According to the UK authorities, a clawback mechanism related to the Internal Rate of Return of the wholesale operator for the project will ensure that the wholesale operator is not making excessive returns should demand exceed expectations. This mechanism will help to reduce the aid amount involved in the measure. The UK authorities stated that they will update the Commission with details concerning the clawback mechanism as they emerge from the tender and subsequent contract negotiations.
- (f) *Minimisation of price distortion:* The appropriate pricing of the wholesale services provided by the wholesale operator is important to ensure that third party operators and businesses benefiting from the measure are not put in a position which is disproportionately more favourable than that of their competitors located in other areas of the UK. For this purpose, the tender foresees provisions concerning the benchmarking of prices applied by the wholesale operator to prices in London.

**3. Are the distortions of competition and effect on trade limited, so that the overall balance is positive?**

- (53) The aim of the project is to promote the competitive supply of high-speed broadband services to business users. In view of the characteristics of the project and of the safeguards applied by the Welsh authorities, the overall impact on competition is deemed to be positive. On the effect on trade, the Commission does not identify negative spillovers for other Member States. In particular, the availability of an open wholesale infrastructure facilitates market

entry for operators from other Member States on the Welsh markets for electronic communications.

- (54) On balance – and in view of the peculiarities of the particular market situation in the target areas – the Commission concludes that the overall effect of the measure on competition and supply of broadband connectivity in North Wales is deemed to be positive. The intervention is designed in a way that does not distort competition or affect trading conditions to an extent contrary to the common interest.

## **Conclusion**

- (55) In the light of the above, the Commission has come to the conclusion that the aid involved in the notified measure is compatible with Article 87(3)(c) of the EC Treaty.

## **VI. DECISION**

On the basis of the foregoing assessment, the Commission has accordingly decided that any aid contained in FibreSpeed Wales, phase I, is compatible with Article 87(3)(c) of the EC Treaty.

The Commission reminds the UK authorities that any modification of the notified measure has to be submitted to the Commission.

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/](http://europa.eu.int/comm/secretariat_general/sgb/state_aids/).

Your request should be sent by registered letter or fax to:

European Commission  
Directorate-General for Competition  
State Aid Greffe  
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Yours faithfully,  
For the Commission

*Neelie KROES*  
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