EUROPEAN COMMISSION

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Subject: **State aid n° N 284/2005 – Ireland**

Regional Broadband Programme: Metropolitan Area Networks ("MANs"), phases II and III

Sir,

I. PROCEDURE

(1) By letter registered on 10 June 2005, the Irish authorities notified phases II and III of the roll-out of Metropolitan Area Networks ("MANs") under the Irish Regional Broadband Programme to the Commission. According to the notification, the Irish authorities are seeking confirmation from the European Commission that the arrangements under the measure are compatible with the EC Treaty rules on State aid.

(2) By letter of 28 July 2005, the Commission requested further information on the measure. This was provided by the Irish authorities, after the deadline had been extended, in a letter registered on 23 September 2005. A meeting between the Commission and the Irish authorities took place on 20 September 2005. The Commission requested additional information on 3 November 2005 to which the Irish authorities replied by letter registered on 6 December 2005. The Irish authorities submitted additional information by e-mails registered on 13 January 2006, 27 February and 28 February 2006 respectively.

II. CONTEXT

(3) It is generally accepted that broadband connectivity[1] is a key component for the development of knowledge-based global, national, regional and local economies

[1] Broadband services defined as 'always-on' communications services allowing transmission of large volumes of data 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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and for the development, adoption and usage of information and communication technologies (ICTs).

(4) 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. Widespread and affordable access to broadband services can contribute to productivity and economic growth through applications that promote efficiency, network effects and positive externalities, with benefits for business, the public sector, and consumers.

(5) According to the Irish government, studies and reports have been pointing out for several years that Ireland is lagging significantly behind in broadband which jeopardises the competitiveness of the Irish economy[2]. In October 2005, broadband penetration in Ireland was 5.3% of the population. This is one of the lowest penetration rates in Europe[3], notwithstanding the fact that Ireland is a country where the diffusion of ICTs has played an important role in the economic development of the last years and where PC penetration and Internet use per household are relatively high.

(6) Despite the growth of basic broadband services such as digital subscriber line (DSL) offers and increased uptake of broadband services by business users, Ireland is only slowly catching up with other Member States[4]. Moreover, according to the Irish authorities, there is little evidence that the main operators will invest in additional broadband infrastructure outside the Dublin area and the other major Irish cities[5].

(7) There are various explanations for this “broadband gap”. First, Ireland has a very distinct population distribution with a large part of the population located in the greater Dublin area. As a result, infrastructure investment by alternative operators is mainly limited to the capital and regional connectivity linking the major cities. Secondly, there is only limited infrastructure competition in the distribution and access networks as cable networks, such as in other Member States, are only present in a few cities outside Dublin. This has hampered the development of effective infrastructure competition[6], a key driver of broadband supply in other EU and OECD countries over the past years.

(8) Thirdly, due to the paucity of investment capital amongst almost all the players in the market in recent years, following the crash of the telecommunications market in 2001, there seems to be an investment backlog by telecoms operators including

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2 See for example, Forfás, (the national Irish policy advisory board for enterprise, trade, science, technology and innovation) (2005), “Benchmarking Ireland’s Broadband performance”, Forfás (2002), “Broadband Investment in Ireland: Review of Progress and Key Policy Requirements”; Peter Bacon & Associates (2002), “Cost Benefit Analysis of Proposed Investment in Broadband Infrastructure under the MANs Programme, Final Report”, Forfás (2004) “Broadband telecommunications – benchmarking study”.

3 European Commission (2006), European Electronic Communications Regulation and Markets 2005 (11th Report) COM(2006) 68 of 20.02.2006. In the EU-15, broadband take-up in Ireland ranks second lowest.

4 In the 2005 Annual Competitiveness Report, published by the Irish National Competitiveness Council, it is estimated that, compared to the average of the benchmarked countries, Ireland still has a broadband deficit of 360,000 connections.

5 Although this may in itself have been influenced by the announcement of the government, in 2003, of its intention to launch the notified measure, i.e. the Metropolitan Area Networks of phases II and III.

6 See for example OECD (2002), “Broadband infrastructure deployment: The role of government assistance”.

Eircom, the incumbent provider, which started the offer of mass market retail broadband only in 2002[7]. Fourth, wholesale broadband was basically not available before 2004 outside Dublin and Eircom continues to have significant market power, in both wholesale broadband as well as wholesale leased lines which are necessary inputs for the provision of retail broadband by alternative operators[8].

(9) Currently, telecommunications operators wishing to connect customers in the towns targeted by the notified measure, for example a business customer, and which have no infrastructure of their own in these towns have two options: a) they can build a link to this customer themselves or b) lease capacity (for instance by using wholesale leased lines) from the incumbent. Regarding the first option, in the case of fixed-line communications, the cost of civil engineering for building this infrastructure is very high[9] which renders this option in most cases economically unfeasible.

(10) As to the second possibility, Eircom does not make its "dark fibre[10]" available to other operators. According to the Irish authorities, there is no wholesale supply of alternative dark fibre for operators in the towns targeted by the notified measure. This limits the opportunity for telecommunications operators to access existing passive infrastructure over which they could provide their own services at both wholesale and retail level.

(11) Instead of dark fibre, operators may also use wholesale leased line and wholesale broadband access products at regulated prices with which to service the retail market. However, the prices for these services in towns of phases II and II of the MANs programme, where available, remain high despite the fact that prices for wholesale leased lines of the incumbent are subject to regulation. This is because regulated prices are cost-oriented and the underlying costs for Eircom for providing these services are high due to the remoteness of the towns from network connection points. Moreover, in the case of wholesale leased lines, operators would be required to invest extensively in last-mile access to customer

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7 In October 2005, broadband-enabled lines constituted only approximately 3.5% of Eircom's PSTN lines and, according to users, these lines are characterised by a high percentage of line failures, European Commission (2006), European electronic communications regulation and markets 2005 (11th report).

8 Eircom still has a market share of about 75% in the retail broadband market and is dominant as regards most wholesale services which are input products for broadband deployment by alternative operators. As regards the wholesale broadband access market in Ireland, Irish regulator ComReg finds that Eircom has significant market power with de facto 100% of the market (if self-supply of other providers is counted as well, 85%). No purchaser of wholesale broadband access has credible alternatives to Eircom. Source: Commission analysis based on data from Irish regulator ComReg. In the leased lines wholesale market, Eircom holds significant market power and over 85% market share in terms of circuits and 80% in terms of revenue, ComReg (2005), "Response to Consultation on Draft Decision, Market Analysis: Retail Leased Lines and Wholesale Terminating and Trunk Segments of Leased Lines (National)".

9 Depending on the location and the construction technology, the costs for building 1 km of a fixed-line telecommunications network infrastructure in Dublin is estimated to be in the range of € 72.000-250.000. See for instance: Eoin Kenny/HEA Ltd., "Practical experience of dark fibre networking" and Citigroup Smith Barney, analyst report (2005): "Eircom – Trust in the luck of the Irish".

10 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 and illuminated, the dark fibre becomes lit fibre. By using previously installed dark fibre, operators may avoid expensive civil works. The availability of dark fibre is therefore considerably lowering barriers to entry for telecommunications operators.

premises or else seek unbundled access to Eircom's local loop to make use of such access.

(12) Concerning the provision of broadband services to businesses, the Irish Business and Employers Confederation (IBEC) noted the lack of accessible high-quality broadband infrastructure across the country[11] and proposed that fibre ducting be provided to those business parks in Ireland where the initial commercial justification for broadband infrastructure investment could not be made (due to prohibitively high civil engineering costs).

(13) Based on this market situation, the Irish government argues that there are not enough commercial incentives for private operators to build an alternative wholesale infrastructure capable of providing broadband services in towns outside the main cities of Ireland. Hence, there is a lack of competitive supply of specific wholesale services necessary for the provision of broadband and not enough competitive pressure to develop the supply of retail broadband in the market outside Dublin and the major cities.

(14) As a result, the Irish government is taking a leading role in the rollout of open access high-speed wholesale broadband infrastructure. The Irish Government has put in place its Regional Broadband Programme to help the private sector to address the existing deficiencies in communications infrastructure and services throughout Ireland, in both urban and rural areas. In particular, under the National Development Plan 2000-2006, an indicative €200 million has been set aside for broadband infrastructure projects, principally the MAN programme, part-funded by European structural funds (E-Commerce and Communications Measure of the Border, Midland and Western Regional Operational Programme).

(15) The main goal of the Metropolitan Area Networks programme is to provide a communications infrastructure (ducts, fibre) and wholesale services to operators in towns outside Dublin to reduce the high fixed cost of building own infrastructure for telecommunications operators, which represents the most important barrier to entry in this market. The MANs tackle a major bottleneck, the so-called "middle mile" between local loop and regional networks and serve as a backhaul network collecting and transporting traffic in these towns to the regional networks between the cities concerned.

III. Description of the measure

(16) *General objective:* The primary objective of the MANs programme, phases II and III, is to support the construction of an open[12] carrier-neutral wholesale infrastructure (optical fibre rings) to enable the provision of ducts, dark fibre, co-location space and wholesale high-speed electronic communications services to operators in towns of Ireland where such an open neutral wholesale infrastructure is not available. The measure aims at facilitating the provision of retail broadband services and competition, thereby also contributing to a range of policy and

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[11] IBEC (2001): "Investment in Telecoms in Ireland – an Ongoing Imperative".

[12] "Open" in this context means available to all telecommunications operators under transparent and non-discriminatory conditions.

strategic objectives for Ireland ("secondary objectives"), supporting the economic, social and rural development of Ireland.

(17) *Legal basis:* The project is based on the Community Support Framework (CSF) underpinning the National Development Programme (2000-2006), the Ministers and Secretaries Acts 1924 to date, and the Local Government Act 2000.

(18) *Different phases of the project:* The MANs programme is implemented in three distinct geographical phases: In 2002, the authorities launched phase I, which concerned the rollout in first 19 and later 26 towns of Ireland[13]. In 2003, the authorities announced phase II (up to 93 towns) and phase III (up to 30 towns) of the programme. In all towns with a population of above 1,500 not yet covered by phase I and which, according to the Irish authorities do not feature an open-access neutral wholesale broadband infrastructure, MANs will be built. Tenders for the construction of the additional MANs of phase II have been issued and construction is expected to take place between 2006 and 2008. Phase III is still at the planning stage.

(19) The project consists of two layers, the MAN[14] infrastructure and the management/ wholesale service layer.

(20) *First layer - MAN infrastructure:* The central government makes funds (including structural funds) available to local and regional authorities. They, in turn, add their own funding and tender out the construction of passive network infrastructure (civil works, ducts, fibres) to civil engineering companies. The public authorities also build operator-neutral co-location facilities ("broadband exchanges") where telecom operators may install their equipment. Several operators will be able to use the infrastructure simultaneously as they will have access to sub-ducts and fibre pairs to allow expansion of their own network infrastructure[15]. While the passive MAN infrastructure is entirely funded by the public authorities and remains in the ownership of the state, state bodies are not directly involved in the management of the infrastructure (second layer).

(21) *Second layer - management of MAN infrastructure and wholesale services:* The network infrastructure of phases II and III will be managed, activated

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13 Phase I covered initially 19 towns and was notified by the Irish authorities to the Commission as regional aid under the National Development Plan (N611/2000). Since, at that stage, there were virtually no broadband services available outside Dublin, the Commission's services concluded that the project did not distort competition and was outside the scope of Article 87(1) EC. The Irish authorities subsequently withdrew the notification.

14 A fibre MAN is a network of ducting and fibre optic cable laid within a metropolitan area which can be used to connect different sites (businesses and other organisations), providing high-capacity electronic communications services. MANs interconnect users in local area networks (LANs) to wide area networks (WANs) and the Internet. The typical length of MANs is between 10 km and 100 kms and the data transfer capacity that can be delivered over the optical fibre it carries is practically unlimited. The Irish MANs mainly serve as backhaul networks, collecting traffic from local traffic concentration points and transports the traffic to interconnection points with regional telecommunications networks (co-location site). They may also be used for point-to-point connections between different locations connected to the MAN. Each MAN is equipped with co-location facilities to allow operators to install and connect their equipment and interconnect with other networks.

15 Historically, telecommunications operators have resisted infrastructure sharing, resulting in the frequent redigging of streets as new service providers come to the market. The planned MANs will reduce the need for service providers to install their own ducting infrastructure as these MANs will be operated on the principle of open access; see Department of Communications, Marine and Natural Resources *"The National Development Plan, fibre-optic Metropolitan Area Networks: what they are and how they work"*.

(telecommunications equipment is added) and commercialised within the framework of a public-private-partnership by a private-sector management service entity (hereafter "MSE"). The MSE will have to offer wholesale services and infrastructure to operators including ducts, dark fibre and very high bandwidth services over fibre. The MSE will be precluded from being owned or controlled by an authorised electronic communications operator.

(22) *Procurement:* Both the tenders for the construction of the networks as well as for the management concerning phase I[16] have been published in the Official Journal of the European Union. The tender specifications and the concession agreement for phase I provide that the authorities have the option (but not the obligation) to add further MANs to the existing concession agreement with the company E-Net in accordance with the terms and conditions agreed in relation to phase I. Nevertheless, the Irish authorities indicated that they have decided that the management of the MANs of phase II and III will be, similar to phase I, subject to an open tender conducted in accordance with EU rules. A tender notice for a service concession will be published in the Official Journal of the EU.

(23) *Concession agreement:* The future relationship between the selected MSE to manage the MANs of phase II and III will be similar to the agreement in place between the authorities and E-Net for phase I, for which a detailed concession agreement was signed in 2004[17]. For the MANs of phase I, E-Net is commercializing the networks on an exclusive basis and does not receive any direct state funding. The operational maintenance, technology and incremental build-out risks associated with the project rest solely on E-Net. At the end of the contract period, E-Net has to hand over the network (including added investments), its customers, software, contacts, systems and the network to the Government. A similar arrangement will apply for the MSE selected to manage the MANs of phase II and III.

(24) *Payment mechanism:* As regards phase I, E-Net invests own funds in the project and has to make payments to the authorities in the form of a Service Concession Fee. This fee comprises three elements: first, a revenue share representing a progressive percentage of gross fibre, duct, sub-duct, co-location space and lit fibre sales subject to a minimum annual amount. Second, a bonus revenue share representing a fixed percentage of the gross fibre, duct, sub-duct, co-location space and lit fibre sales subject to predetermined profitability levels being achieved by E-Net. The third element is a variable amount in the form of infrastructure reinvestments by E-Net which will be agreed annually between the authorities and E-Net, based on the financial plan agreed at the moment of the signature of the concession agreement.

(25) E-Net proposes infrastructure investments in the MANs and agrees a programme of works and the budget attached with the authorities. This reinvestment in the MANs may cover additional network components and extensions such as drop

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16 For instance, the tender for the concession to manage phase I including the possibility for an extension to additional MANs was published in 2003 as a non-mandatory notice. Offers from three parties for the MSE concession for phase I were received and the contract was finally awarded to the company E-Net. E-Net was set up specifically to manage, maintain and operate the MANs of phase I and does not carry out any other commercial activity.

17 For purposes of clarification, in the remainder of this document, MSE shall mean "the MSE selected to manage the MANs of phases II and III" whereas E-Net is the managing entity for the MANs of phase I.

connections, additional MAN fibre in sub-rings or additional co-location space. As the MAN networks are owned by and returned to the State after the end of the concession agreement, these reinvestments increase the value of the network for the state. Any additional revenues from these reinvestments are shared between the government and E-Net according to the financial plan and the payment mechanism described above. A similar mechanism as outlined in paragraphs 24 and 25 will also apply for the MSE selected to manage the MANs of phases II and III.

(26) *Product or service markets affected:* the MSE will, inter alia, offer dark fibre and high-bandwidth services over fibre. At present, the market for the wholesale access to dark (unlit) fibre is not listed in the Commission Recommendation on relevant markets[18] for electronic communications services. There is therefore, at least currently, no regulatory obligation to offer third party access to fibre infrastructure. However, other markets, as defined in the Commission Recommendation on relevant markets are affected by the proposed measure. These appear to be, in particular, the market for the provision of retail leased lines (market 7) and the two markets for the provision of wholesale leased lines, that is market 13 (wholesale terminating segments of leased lines) and market 14 (wholesale trunk segments of leased lines) of the Commission Recommendation.

(27) *Beneficiaries:* Beneficiaries of the measure will be the MSE, providers of electronic communications services (in particular licensed telecommunications operators, service providers and system integrators) which may use the wholesale services provided by the MSE, as well as end users.

(28) *Target areas:* MANs will be built in the identified towns with a population of above 1,500 not yet covered by phase I and where, according to the Irish authorities, an open neutral metropolitan wholesale infrastructure is not available. A list of these towns was submitted to the Commission. Moreover, the Irish authorities have made certain commitments that no aid will be granted to build MANs in these areas if the conditions described in those commitments apply (see paragraph 75 of this decision).

(29) *Overall budget:* Phase II targets 93 towns with an estimated € 125 million of public funds, phase III targets 30 towns with a total budget of € 45 million. The local or regional authorities will be expected to provide 10% of the construction costs for each phase of the programme. About 50% of total public funds on the MANs programme is contributed by the ERDF under the Regional Operational Programmes. The budget figure related to the overall project including the private-sector investment of the MSE and the revenues generated by the MSE will only be known after the conclusion of the tender procedure and the concession contract for the management of the MANs of phases II and III.

(30) *Aid amount and intensities:* In the case at hand, the amount of state aid to the MSE does not coincide with the total amount of public funding invested in the first layer of the project, but is rather represented by the difference between the conditions for access to the MANs granted to the MSE by the authorities and

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[18] 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., OJ L114 of 8 May 2003, p.45.

those which would have been granted by a hypothetical private market investor owning the facility. Some of this aid is passed on indirectly to telecommunications operators using the services provided by the MSE and to the end users. These aspects are further discussed in section V below.

(31) *Duration and timing of the measure:* It is foreseen that the MSE for phases II and III will provide services for an initial duration of 15 years from the start of service delivery. It is anticipated that the construction of the MANs of phase II of the Programme will be completed during 2007/2008 and Phase III may be launched in the period 2006 – 2008.

(32) *Monitoring*: The MSE will be required to report on a regular basis to the Irish government, in compliance with numerous performance indicators which are assessed on a quarterly basis. There will be penalty provisions specified in the concession agreement if there is a failure to achieve those performance objectives.

IV. OBSERVATIONS BY THE IRISH AUTHORITIES

(33) The Irish authorities bring forward several arguments why, according to them, the measure does not involve State aid within the meaning of Article 87 (1) EC Treaty: The MAN networks represent a "general infrastructure", built to remedy the lack of market investments. This infrastructure will be managed by the MSE which does not receive financial support from the government but which, on the contrary, will make payments to the authorities in the form of a fixed payments and a share of the MSE's revenues. Moreover, with reference to the decision by the Commission in the case *Pyrénées-Atlantiques*[19]*,* the management and commercialization of the networks by the MSE on the basis of the MANs could be characterised as a Service of General Economic interest[20]. As the criteria set out in the Altmark judgement[21] are met, the project would not involve aid.

(34) In a subsidiary line of argument, the Irish authorities submit that, if the Commission were to find that the measure constitutes aid, this aid would be compatible as the project targets market failure and economic cohesion objectives and boosts economic development and competition by providing necessary infrastructure and wholesale services not offered by market players. All operators have access to the wholesale infrastructure at open and equal conditions, the construction of the networks and their management are tendered out.

V. PRESENCE OF STATE AID

V.A. General infrastructure?

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[19] Commission decision of 16 November 2004 in case N381/04, "Pyrénées-Atlantiques" (France).

[20] "To provide, by means of the MANs programme open access to a modern high-speed resilient broadband communications infrastructure comparable to that available in Dublin", letter of Irish authorities of 23.09.2005.

[21] Judgement of 24 July 2003, Case C-280/00, Altmark Trans und Regierungspräsidium Magdeburg, Rec.2003, p.I-7747.

(35) According to the Irish authorities, this type of State intervention does not fall within the scope of Article 87(1) EC, but should rather be seen as a typical task of the public authority of providing general infrastructure. The Commission considers that this would be the case of an infrastructure which is needed to provide a service that is considered as falling within the responsibility of the State towards the general public and is limited to meeting the requirements of that service. Moreover it should be a facility that it is unlikely to be provided by the market because not economically viable and the way it is operated should not selectively favor any specific undertaking.

(36) Accordingly, the Commission is of the opinion that phases II and III of the project cannot be qualified as a general infrastructure which is outside the scope of State aid control. Contrary, for example, to certain infrastructures in the transport sector, which are open to all potential users on equal and non-discriminatory terms and which are not provided (constructed and/or managed) by the market on purely commercial terms, this type of infrastructure is actually deployed by market operators who intend to provide telecommunications services, although not necessarily on the conditions that will apply to the MANs (see below). Accordingly, phases II and III of the MANs programme can potentially distort competition by competing with existing private infrastructures or by discouraging future private investment in similar facilities. The absence of distortion of competition is not an inherent feature of this type of facilities, but rather has to be verified on a case by case basis.

V.B. The provision of a Service of General Economic Interest (SGEI)?

(37) Member States have a large power of appreciation concerning the identification of a service as SGEI, but the case-law of the EU courts indicates that some general principles have to be respected[22].

(38) In the measure at hand, the Commission does not concur with the interpretation of the Irish authorities. The contractual relationship between the MSE and the Irish government reflects rather a classical private-public-partnership than the entrustment and implementation of a Service of General Economic Interest. This is also reflected in the communication and documentation of the Irish government regarding the measure which never mentions the term public service or similar, but rather refers to "public-private partnership". Unlike *Pyrénées-Atlantiques,* the MSE has no clear SGEI mandate to enable broadband access to the general public, citizens and businesses, in rural and remote areas.

(39) In the case of *Pyrénées-Atlantiques*, the direct objective of the measure was to enable access to broadband services to the general public, although through a wholesale infrastructure. In that case the concessionaire of the service was under the obligation to provide wholesale access to broadband services connecting all residential and business users who wish to be connected. In the notified measure, although residential users may benefit from the measure, the wholesale services provided by the MSE are high-bandwidth services, dark fibre or sub-ducts which are targeted not at the general public and citizens, but are offered to operators of electronic communications services to provide, first of all, high speed services to

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[22] As expressed by the Commission previously in the area of access to broadband services, for instance in paragraph 46 ff. of the decision in *Pyrénées-Atlantiques*, cf. footnote 19.

businesses[23]. This is confirmed by the fact that the only users for which a direct connection via the MANs will be economically viable are large businesses located close to the MANs. In order to connect "mass market" end users (SMEs and residential users) operators still have to bridge the last mile using local loops of Eircom or alternative local access technologies like wireless services.

(40) As the Commission does not concur with the analysis of the Irish authorities on the character of the measure as a Service of General Economic Interest, it does not deem necessary to assess the measure in light of the other criteria laid down in the Altmark jurisprudence.

V.C. The Irish authorities do not act like a market investor

(41) The Irish authorities claim that public investment from state funds in the towns covered by phases II and III is necessary precisely because market players are not willing to invest in order to deploy an infrastructure similar to the MANs, at least not on similar conditions. Therefore, the Commission's view is that the Irish government's action as regards the investment in the network infrastructure is not guided only by revenue or profit-maximising behaviour but primarily by the aim to lower entry barriers for alternative operators to boost competitive supply of certain electronic communications services. Based on the Commission's analysis of the financial plan of E-Net for phase I of the MANs and the information available for phases II and III, it is most likely that the investment by the government authorities in phases II and III of the MAN infrastructure will not yield an overall return in line with market rates.

(42) Indeed, the MSE for phases II and III will have access to these networks at conditions which will most likely not reflect the underlying costs incurred by the government for making this infrastructure available and which are not set to maximise the revenues from the project for the government authorities. Therefore, the investment by the State in the MANs and a likely future agreement with the MSE for phases II and III along the lines of the current agreement with E-Net for phase I do not pass the "market investor test": a market operator would have either not invested in the project or not concluded a contract with the MSE at the envisaged conditions.

V.D. State aid assessment

(43) 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.

[23] In the notification, the Irish authorities confirm that the MANs are supposed to facilitate the provision of "*high-end broadband*" and are primarily "*not targeted at the broadband mass market as the MANs allow speeds up to 100.000 times those of currently available services such as DSL*".

V.D.1. State resources

(44) The MAN network infrastructure is partly financed with European structural funds, which qualify as state resources once they come under the control of a Member State, and partly by resources of central and local Irish government authorities. The authorities may also forgo some revenues by allowing reinvestment of funds into the network infrastructure via the MSE. Hence State resources are involved.

V.D.2. Economic advantage

a) First layer – MAN infrastructure

(45) The mere construction of the MAN infrastructure, which is owned by the public authorities, does not provide an economic advantage to an undertaking as long as market compensation is paid for its construction. In this respect, it is noted that the public authorities have tendered out the construction of the passive networks to civil engineering companies in accordance with open and competitive tendering procedures. It can therefore be excluded that state aid is present at the level of the construction of these facilities. A possible state aid issue can arise at a following stage when the public authorities make these facilities available to undertakings. It should then be assessed whether the terms on which the MAN infrastructure is made available provides an economic advantage to its manager – the MSE – to third party operators and ultimately to commercial end users.

b) Second layer – MSE, operators and final users

(46) *Advantage for the MSE:* It is generally accepted that an open tender for the management and marketing of an infrastructure such as the MANs tends to minimise a potential advantage to the winning bidder, in terms of excessive returns. In particular, the Commission considers that when a concession under a public-private-partnership is tendered out following an open, transparent and non-discriminatory procedure, it is, in principle, presumed that the level of any public sector support can be regarded as representing the minimum necessary for the execution of a project. The principles of openness, transparency and equality of treatment will be respected because the proposed contract concerning the MSE will be duly advertised in the Official Journal of the European Communities and any modifications or new elements introduced during negotiations respect the parameters of the notices and contract documents, as defined by the Irish authorities.

(47) However, although as a result of the tender, the MSE would not obtain an excessive return from the project it would, nevertheless, - as outlined above - be able to establish its business based on the government-funded MAN infrastructure and enter the market for wholesale services on conditions not otherwise available on the market. The intervention of the State therefore confers an economic advantage to the MSE.

(48) *Third party operators*: The MSE for phases II and III will, similar to E-Net, make its services available at transparent price conditions, which, for some services, will be benchmarked against the prices of similar services in Dublin. The roll-out

of the MANs built in phase I enabled telecoms operators, such as Smart Telecom[24], to avoid significant capital investment by using the government-funded infrastructure and puts them at a advantage vis-à-vis an operator which has invested in own infrastructure. Hence, operators using the MSE's wholesale network will be granted indirectly an economic advantage since they have access to infrastructure and services made possible by State funding and at prices which would not be available without State support.

(49) *End users*: The objective of the provision of ducts, dark fibre and wholesale broadband services by the MSE is to enable operators to provide high-speed broadband and similar services to businesses and retail broadband to companies and residential users at prices which may be lower than the ones currently available in the target areas. Whereas residential users are not subject to State aid rules, businesses in the targeted geography might benefit from service coverage beyond and at 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 Irish 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.[25]

V.D.3. Distortion of competition

(50) *Wholesale markets:* Although some of the products and services which will be offered by the MSE for phases II and III (such as ducts or dark fibre) are not available in the towns of phases II and III, the intervention of the State alters the existing market conditions on the wholesale markets by enabling the selected MSE to enter the market for certain wholesale services, competing with the historic operator, Eircom.

(51) *Downstream markets:* The fact that a new infrastructure and wholesale services become available at prices which can be expected to be 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 MSE'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.

(52) The measure is also selective in that it is addressed to operators active only in certain regions or in certain markets for electronic communications services[26]. These selectivity elements also induce a potential distortion of competition. Moreover, business end users will only benefit from the measure if they are

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[24] Smart Telecom, one of the first operators using the MANs, announced that its business strategy is based on the use of infrastructure investments undertaken by the government and which is available at prices below the ones of, for instance, Eircom, Teather & Greenwood, analyst report, Smart Telecom, 11.11.2004.

[25] 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.

[26] As regards the sectoral specificity, see: Judgement C-143/99, Adria Wien Pipeline, Slg. 2001, I-8365.

located in the geographic target areas which might distort competition vis-à-vis businesses located in areas not covered by the measure.

V.D.4. Effect on trade

(53) 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.

V.D.5. Conclusion

(54) In view of the above, the Commission considers that the notified measure grants an economic advantage to the MSE, third party operators 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.

(55) 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.

VI. COMPATIBILITY ASSESSMENT

(56) 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 Ireland 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 under Art. 87 (3) (a) of the EC Treaty, and thus are eligible for regional aid. However, other areas are outside these assisted regions and hence the measure cannot be assessed under the Regional Aid Guidelines[27].

(57) Moreover, while the aid to be granted under the measure may in some cases qualify as aid for initial investment within the meaning of these guidelines in so far as it is related to the MAN infrastructure, 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. 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[28] which states that:

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27 OJ 1998 C 74, p.9.

28 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/).

"*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.

(58) 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 is 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?

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

Community policy

(59) As outlined in its Communication "i2010 – A European Information Society for growth and employment"[29] and the *e*Europe Action Plan 2005[30], 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[31]. In order to achieve better broadband coverage and take-up, the Commission encourages Member States to put comprehensive national broadband strategies in place.[32] The measure at hand forms an important part of the Irish national broadband strategy. Therefore, as the measure helps to improve ubiquitous broadband access for Irish citizens and businesses it is in line with the common interest, it helps achieving greater cohesion and tackles the lack of infrastructure competition in the targeted towns.

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29 COM(2005)229 final, 1 June 2005.

30 COM(2002)263 final, "eEurope 2005: An information society for all".

31 For an overview, see: Lehr, Osorio, Gillet and Sirbu: "Measuring Broadband's Economic Impact", 2005 and Orazem, Peter, University of Kansas Business School, "The Impact of High-Speed Internet Access on Local Economic Growth", August 2005.

32 Commission Communication COM(2004) 369 of 12.05.2004, "Connecting Europe at High Speed – National Broadband Strategies".

Cohesion objective and market failure considerations

(60) 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 towns outside Dublin, the authorities pursue genuine cohesion[33] 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 towns covered by the measure. Thus, they aim to "bridge the digital divide" by ensuring affordable high-speed broadband, in particular for business users, in the towns or phase II and III of the MANs programme.

(61) The lack of competition (both between and within platforms) was identified as an important reason for the relatively poor performance in relation to broadband supply and take-up in Ireland[34]. 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.

(62) 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. As evidence in all European markets shows, the historic operators with market power in "traditional" services such as voice telephony also had first mover advantages by offering broadband to their existing clients, thereby leveraging their market power into a new market. These characteristics of the sector and the previous existence of a state monopoly have led to market failure in the form of market power[35] by Eircom in a number of markets[36]. In part – see below - this issue is been addressed by market analysis decisions of the national regulator and by certain regulatory obligations aimed at creating a competitive market.

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33 The measure is also supported by EU structural funds.

34 Forfás (2005).

35 Market power can result in output restrictions, for example in the form of delayed supply of broadband services, if there is no competitive pressure to do so. Eircom started the roll-out of its mass-market broadband products significantly later (2002) than most incumbents in other European countries. In this respect, it has to be noted that Eircom had and still has a very strong market position regarding dial-up Internet services. This may have provided a disincentive for Eircom to invest in broadband, which - to a certain degree – may substitute dial-up Internet services.

36 ComReg notes for instance as regards wholesale leased lines, that "*Analysis of the wholesale market for both trunk and terminating segments finds Eircom to have SMP.*" "*The analysis shows that Eircom holds over 85% market share in terms of circuits and 80% in terms of revenue. Despite the presence of some alternative infrastructure in the market, it would be difficult for any other operator to overcome the ubiquity of Eircom's network and the economies of scale and scope which accompany this within the timeframe of this review. The infrastructural advantage presents a barrier to entry, which is more prevalent in terminating segments*." ComReg (2005): "Response to Consultation on Draft Decision, Market Analysis: Retail Leased Lines and Wholesale Terminating and Trunk Segments of Leased Lines (National)".

(63) Nevertheless, in the towns targeted by phases II and III of the MANs programme, Eircom is the only operator present with an infrastructure that can partially compete with the future MANs, hence there is currently an absence of infrastructure competition. Eircom is a vertically integrated provider, offering retail and wholesale services and does not provide access to those elements of its core infrastructure – such as dark fibre – for which there is no regulated access for other providers.

VI.2. Well-designed aid

(a) Is aid the appropriate instrument?

(i) Regulation imposed by ComReg

(64) On the supply side, tariff and access regulation imposed on Eircom, as implemented by regulator ComReg, is another instrument of state intervention. Indeed, regulation has led to the availability of a number of (broadband) wholesale products and broadband prices have been decreasing over the past years.

(65) In view of the significant market power of Eircom, access and pricing obligations were imposed on Eircom in the leased lines, wholesale broadband access and local loop unbundling markets. This was done after a market analysis, with the aim to create better conditions for wholesale access under which alternative operators can compete with Eircom on the retail broadband markets. The remedies imposed were designed by the national regulator, and accepted by the Commission, as useful measures to address the absence of competition originating from the market power of Eircom in the relevant markets that serve the retail broadband market.

(66) With regard to the two wholesale markets for terminating and trunk leased lines, despite the gradual roll-out of the MANs of phase I, ComReg concluded that "*the structure for trunk and terminating segments is conducive to Eircom charging rates above the competitive level if unregulated*". According to ComReg, even with mandated access products, there have been problems of refusal to deal by Eircom leading to de facto denial of access in the wholesale leased lines markets, giving rise to regulatory interventions during 2002, 2003 and 2004[37]. As a result, Comreg imposed a range of regulatory obligations in accordance with the Access Directive[38], namely access, non discrimination, transparency, accounting separation, price control and cost accounting.

(67) The price control obligation specified that Eircom's prices were to be at least 8% less than the retail price charged to retail customers for lines up to 2 Mbps, and equivalent to the price offered to Eircom's retail arm for capacities above 2

[37] Idem, par. 11.7.

[38] Directive 2002/19/EC on access to, and interconnection of, electronic communications networks and associated facilities; OJ L108; 24.4.2002.

Mbps, which would be the case for leased line services provided over optical fibre.

ii) Why regulation alone is not sufficient in this case

(68) Despite the important role of regulation in ensuring more competition and supply in the Irish market for electronic communications, the market evidence shows that regulation has so far neither ensured effective competition in various Irish markets for electronic communications nor led to sufficient investments to bridge the "broadband gap". Indeed, regulation was a necessary, but not a sufficient instrument for the development of broadband services 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.

(69) As mentioned above, where high-capacity wholesale leased lines of the incumbent are available in towns of phases II and II of the MANs programme, these services remain expensive[39], despite the fact that prices and access conditions are subject to regulation. Prices are considerably higher than in Dublin due to the remoteness of the towns from network connection points as leased line prices depend on distance. Accordingly, even to the extent that regulation may have been successful in establishing a competing offer, the geographical remoteness and demand characteristics in the areas served by the future MANs still prevent the achievement of supply conditions close to the ones prevailing in Dublin.

(70) In addition, although the European regulatory framework has been implemented in Ireland and despite the pro-active approach of the Irish regulatory authority, alternative operators are often facing appeals[40] and delays when requesting access to wholesale products or the incumbent[41]. As the Commission has highlighted in its recent implementation report[42] "*a number of structural obstacles stand in the way of the further promotion of competition, especially in the fixed and broadband markets, in light of the NRA's*[43] *limited enforcement powers, and the manner in which the appeals procedures have been functioning so far*."

(71) Hence, despite the important role of regulation in opening up the electronic communications markets in Ireland over the past years, operators are still facing obstacles and restrictions in their daily business practice when requesting access to wholesale products from Eircom.

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39 In order to illustrate the high price level for wholesale leased lines in remote towns of Ireland, the authorities submitted representative pricing information. For instance, for a 155 Mbit/s wholesale leased line over a network length of approximately 10.5 km, the annual price of Eircom per year in a specific town targeted by the MANs programme would be € 110,000. The price of E-Net for a similar product was quoted by the Irish authorities as € 10,000.

40 Some market observers note that slow appeal procedures to decisions of the Irish regulator have led to a suboptimal impact of regulation. For instance, a very low number of Eircom's local loops are unbundled whereas further unbundling would be instrumental in improving Ireland's poor broadband performance.

41 See for instance, Citigroup Smith Barney, analyst report (2005): "Eircom – Trust in the luck of the Irish".

42 European Commission (2006), European Electronic Communications Regulation and Markets 2005 (11th Report) COM (2006)68 of 20.02.2006.

43 National Regulatory Authority.

iii)Demand-side measures

(72) Demand-side measures in favour of broadband (such as vouchers, tax breaks, awareness-raising measures or demand aggregation) could be another instrument of public intervention. However, these measures do not solve the illustrated problems on the supply side and are likely to favour the incumbent operator. Moreover, some of these potential measures are likely to be administratively cumbersome to implement and therefore to entail substantial administrative cost.

(73) On balance, in view of the severe broadband gap in Ireland, 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*?**

(74) Although public investment carries risks of crowding-out similar private-sector initiatives – which are highly unlikely to materialize in the towns concerned –, this particular measure is more likely to have an overall positive impact on investment. By providing the so-called "middle mile" between local loop and regional networks, the MANs form a key input for operators providing broadband connectivity to businesses and retail broadband to residential customers. Thus the measure creates a significant and direct incentive effect for operators: the provision of a neutral open wholesale infrastructure and wholesale services reduces the high fixed cost of establishing a network, which represents the most important barrier to entry in this market.

(c) Proportionality

(75) The Irish authorities have designed the measure in such a way as to 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 tenders:* the Irish authorities conducted/will conduct open tenders for the construction and management of the fibre optic networks, in accordance with EC rules and principles on public procurement. They have indicated that they apply carefully defined and publicized award criteria aimed at ensuring competitive proposals by market players. In particular, and as outlined above, the selection process of the MSE will minimise any economic advantage for this entity.

(b) *Detailed concession agreement:* A detailed concession agreement will determine the obligations of the MSE within the framework of a public-private partnership concerning the implementation of the measure (for instance service specifications, financial terms, pricing, wholesale access, reporting).

(c) *Minimising effects on other infrastructure providers:* According to the Irish authorities, local and regional authorities were required to include evidence of avoidance of displacement concerning existing networks when submitting

detailed proposals for funding of MANs in their respective towns[44]. This evidence relied on the locally available knowledge of authorities and their advisors. The proposals, including the evidence provided, were evaluated by an independent consultancy employed by the national ministry in charge to ensure, inter alia, that these conditions were fulfilled.

Moreover, the Irish authorities have confirmed to the Commission that they will not approve proposals to build MANs in locations where existing local fibre in ring configuration similar to that deployed on the MANs or high speed wholesale transmission capacity are already offered under conditions of open access and non-discrimination on commercial terms (in particular pricing and service conditions) comparable to those available in the Dublin area.

(d) *Wholesale character of the project:* Contrary to subsidies for the provision of broadband services to end users, the project does not interfere directly into retail markets. The MSE will provide open wholesale access to its full range of products to service providers on a transparent and non-discriminatory basis, subject to the strict rules of the concession agreement. This limits the number of markets in which State intervention is taking place.

(e) *Neutrality of the MSE:* The State retains ownership of the infrastructure and attributes its management to an independent MSE 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 a private integrated operator has proprietary control over the infrastructure. The Irish authorities have confirmed that, for the duration of the agreement, the MSE will not be able to provide retail services to end users, including business, public sector or residential customers, directly or via a separate entity.

(f) *Minimisation of price distortion*: The appropriate pricing of the wholesale services provided by the MSE is important to ensure that third party operators and business end-users benefiting from the measure are not put in a position which is disproportionately more favourable than that of their competitors located elsewhere. For this purpose, the tender as well as the concession agreement will foresee provisions concerning the benchmarking of prices applied by the MSE to those in the Dublin area.

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

(76) The aim of the project is to promote the competitive supply of broadband services. In the light of the characteristics of the project and of the safeguards

[44] As an example of how this was done during phase I of the programme, the Irish authorities informed the Commission that at that time, the incumbent (Eircom) had suggested that it had infrastructure similar to the proposed MANs in two locations, Cork and Letterkenny. A joint high level review of the networks by the technical advisers of the Irish government and Eircom's engineers revealed that, while the networks followed the same routes in some sections, Eircom's infrastructure differed significantly from the proposed MANs in terms of construction quality and capacity. Due to the age and design of Eircom's networks, they would have needed to be rebuilt to meet the standards of the proposed MANs in terms of capacity and scalability to allow them the full product set available on the MANs on an open access basis.

applied by the Irish authorities, the overall expected impact on competition is deemed to be positive.

(77) The measure is not only likely to benefit users through facilitating market entry. It may benefit users also through an indirect effect on the incumbent provider Eircom[45] which, at the same time as phase I of the MANs was launched, decided to accelerate its investments in broadband infrastructure and started the mass market roll-out of retail broadband in 2003, decreasing prices in 2004 and 2005. Whilst there can be many reasons for this behaviour, price decreases are consistent with the hypothesis that investment in the MANs facilitates competition and that Eircom is trying to reduce the attractiveness of the market to new entrants.

(78) It has to be noted that some of the MANs of phase II and III will be located in towns where the incumbent is offering co-location facilities and leased line capacity at cost-oriented prices as he has now the regulatory obligation to do so. However, as outlined above, neither the extent and reach of the existing infrastructure, nor the conditions under which this infrastructure is made available to third parties are comparable with those of the MANs. The specific context in Ireland (low broadband penetration, lack of alternative infrastructures, population distribution patterns) vis-à-vis other Member States[46] and the design of the measure – which aims at minimising distortions of competition - need to be taken into account when assessing the notified measure. Even in the towns of phase II and III in which basic residential broadband services are available, these are not supplied under conditions of infrastructure competition.

(79) The Commission is also aware of the argument made regarding the appropriateness of the MANs to tackle the existing "broadband gap". It is claimed that the MANs, being isolated local urban fibre networks, are ineffective to address the "broadband gap" unless supported by further government investment in access and core infrastructure throughout the national market. The Commission, however, does not share this view. By providing the so-called "middle mile" between local access networks and regional networks, the project provides a key input for operators. These operators may then either use the unbundled local loops of Eircom or install their own equipment (e.g. Wimax technology) for the local link and connect via telecommunications networks on the regional and national level.

(80) Some market observers have highlighted that the MANs programme cannot be assessed in isolation, but has to be seen as a part of a wider intervention by the Irish government including further funding measures for regional and national networks and the separate Irish government-owned telecommunications backbone networks of the electricity and gas utilities. Due to this, it was difficult

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45 The measure might in principle also benefit Eircom if it uses the MANs – according to information available to the Commission, Eircom does use third-party fibre infrastructure, for instance in Dublin. Eircom might also benefit from an overall uptake in broadband services or if regulation is reduced following the measure.

46 For instance, the situation on the Irish market and in particular in the towns targeted by phase II and III of the MANs programme as outlined above is different from the market situation in the case of state support for a broadband network in the Dutch town of Appingedam (Opening decision in case C35/05 of 20.10.2005). In the case of Appingedam, various broadband offers are provided by market parties and there is infrastructure competition due to the existence of two alternative physical networks (telecommunications network of the incumbent as well as cable).

for private investors to plan capital investment in a competitive market with great uncertainty as to how widespread future government subsidies would be. This argument suggests that government plans for public infrastructures may have been partly responsible for the lack of infrastructure build-out since they may have stalled or crowded-out private investments.

(81) However, the Commission does not consider that these observations are sufficient to raise doubts on the compatibility of the notified measure. Whereas these observations confirm the presence of a potential distortion of competition due to the measure, the fact that these observations refer to possible future alternative investments rather than to actual ones and the fact that the MANs are open on non-discriminatory terms to all operators and subject to the safeguards described in paragraph 75, allow to conclude that the MANs do not distort competition to an extent contrary to the common interest.

(82) It has also been pointed out that, where the State is active both as an infrastructure owner and a regulatory authority, under some circumstances, there could be a potential conflict of interest. The Guidelines on criteria and modalities of implementation of structural funds in support of electronic communications[47] specifically state that, where local authorities have regulatory functions, for example granting of rights of way and building permits, the principles of transparency and non-discrimination need to be respected. The Irish authorities have replied to a question raised by the Commission concerning this aspect, highlighting that the different roles of the public authorities are completely separated.

(83) On the effect on trade, the Commission does not identify significant negative spillovers for other Member States: although the measure might indirectly favour foreign direct investment to Ireland which might have other Member States as alternative destination, the type and size of the advantage – in terms of availability of communication facilities at affordable price – is not such as to be considered against the common interest. As described above, the benefits for final business users in the towns concerned are likely to be below the "de minimis" threshold. Therefore, no undue effect on trade is expected. Moreover, the availability of an open wholesale infrastructure facilitates market entry for telecommunication operators from other Member States on the Irish markets for electronic communications, which positively affects Community trading conditions.

(84) On balance – and in view of the peculiarities of the Irish market for electronic communications – the Commission concludes that the overall effect of the measure on the broadband market is positive. The measure is also clearly in line with the objectives of Article 87 (3) (c) EC Treaty as it facilitates the development of certain economic activities (wholesale and, indirectly retail high-speed broadband services) in certain economic areas (cohesion objective; towns which are lagging back compared to Dublin and other large Irish cities). The intervention is designed in a way that does not distort competition or affect trading conditions to an extent contrary to the common interest.

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[47] 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, p.11.

Conclusion

(85) 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.

VII. DECISION

On the basis of the foregoing assessment, the Commission has accordingly decided that the aid contained in phases II and III of the MANs programme of the Irish Regional Broadband Programme is compatible with Article 87(3)(c) of the EC Treaty.

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

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

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Yours faithfully,

For the Commission

Neelie KROES

Member of the Commission