

EUROPEAN COMMISSION

Brussels, 20.XII.2006

C(2006) 6589 def.

<p>In the published version of this decision, some information has been omitted, pursuant to articles 24 and 25 of Council Regulation (EC) No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article 93 of the EC Treaty, concerning non-disclosure of information covered by professional secrecy. The omissions are shown thus [...].</p>		<p>PUBLIC VERSION WORKING LANGUAGE This document is made available for information purposes only.</p>
--	--	--

Subject: State aid No C 53/2006 (ex N 262/05) – the Netherlands

Citynet Amsterdam – investment by the city of Amsterdam in a fibre-to-the home (FTTH) network

Sir,

The Commission wishes to inform the Netherlands that, having examined the information supplied by your authorities on the measure referred to above, it has decided to initiate the procedure laid down in Article 88(2) of the EC Treaty.

I. PROCEDURE

- (1) In April 2004, the municipality of Amsterdam contacted the Commission regarding the public procurement aspects of the roll-out of a FTTH (fibre-to-the-home) telecommunications access network. In addition, the municipality requested the Commission to confirm that the project did not entail State aid within the meaning of Article 87(1) EC Treaty. By letter of 22 July 2004, the Commission informed the municipality of Amsterdam that such a confirmation can only be given after a notification of the measure by the Dutch authorities. It supplied the Dutch authorities with a copy of this letter. The Commission requested the Dutch authorities on 23 July 2004 to provide any information necessary for an assessment of the measure under Article 87(1) EC Treaty. The authorities asked for an extension of the deadline in August 2004 which was accepted by the Commission on 7 September 2004.

Zijne Excellentie de Heer Bernard Rudolf BOT
Minister van Buitenlandse Zaken
Bezuidenhoutseweg 67
NL - 2500 EB Den Haag
Nederland

- (2) In September 2004, the Dutch authorities convened with the Commission to present and discuss the plans of the municipality of Amsterdam. On 7 October 2004, the authorities stated in their reply to the Commission's letter of 23 July 2004 that the project in Amsterdam would be notified in the near future.
- (3) The Dutch authorities notified the project - the participation of the municipality of Amsterdam in an undertaking carrying out the roll-out and owning this network – finally by letter registered on 17 May 2005. The authorities indicated that the notification was carried out to obtain legal certainty and that they were seeking a confirmation from the Commission that the investment of the city of Amsterdam in the legal entity owning the network is in line with the Market Economy Investor Principle (MEIP) and does not constitute State aid.
- (4) Following further information sent by the authorities on 23 June and a meeting which took place on 28 June 2005 between representatives of the city of Amsterdam and the Commission, the Commission sent on 15 July 2005 a letter containing elements of an explanation of the application of the Market Economy Investor Principle and a second request for information to the Dutch authorities.
- (5) The Dutch authorities stated in a letter, registered on 18 November 2005, that there was a delay in the planning and that Amsterdam was still working on the setup of the project and the investment conditions. Consequently, the agreements on the investments would not be finalised before spring 2006. The authorities declared that they would need more time in order to provide for the requested information and asked the Commission to suspend the assessment until all data would be available.
- (6) The municipality of Amsterdam informed the Commission by e-mail registered on 23 December 2005 that the City council of Amsterdam had by unanimity decided to invest in the roll-out of the FTTH network. In this e-mail, the representative of Amsterdam stated further that negotiations with BAM/DRAKA (for the construction of the network) and with BBned (for the exploitation of the network) and the negotiations with ING and five housing corporations (co-investors) were all on track and should be finalised by January 2006.
- (7) By letter registered on 27 December 2005, the Commission received a complaint regarding the project from VECAI (the association of cable operators in the Netherlands)¹. UPC Nederland BV (a cable operator present notably in Amsterdam, hereinafter: UPC²) informed the Commission for the first time about its concerns in March 2005. Both parties – with whom several meetings took place - argue that the participation of the municipality is not in line with the

¹ VECAI supplied further information by e-mails registered on 27 December 2005, 11 January and 31 January 2006

² UPC Nederland BV is a subsidiary of Liberty Global Inc. UPC Nederland BV acts under the name of UPC in the Netherlands. Liberty Global, Inc. ("Liberty Global") is an international cable operator offering video, telephone, and Internet access services. It operates broadband communications networks in 17 countries principally located in Europe, Japan, Chile, and Australia. Liberty Global's operations also include media and programming businesses such as Jupiter TV in Japan and Chello media in Europe.

MEIP and therefore amounts to State aid within the meaning of Article 87(1) EC Treaty.

- (8) On 3 March 2006, the Commission sent a reminder to the Dutch authorities, referring to the statement of the Dutch authorities in November 2005 that further information would be provided once further progress had been made on the setup of the project and which was foreseen for spring 2006. The Commission also reminded the Dutch authorities of the standstill obligation of Article 88 (3) EC Treaty.
- (9) The Dutch authorities replied to the Commission's letter on 3 April 2006 and sent additional information by letter of 2 May 2006. On 19 May 2006 the Commission's services sent another letter to the Dutch authorities, stating that it had received information from UPC which cast initial doubts on the application of the MEIP and reminded the authorities again of the standstill obligation³.
- (10) The Dutch authorities sent further information in May and June 2006⁴ and, following a third request for information by the Commission dated 24 July 2006, the authorities submitted several batches of information, the last one registered on 8 September 2006⁵. The information received by September 2006 raised several new questions. Further additional information was therefore requested in a fourth letter to the Dutch authorities on 29 September 2006. The authorities asked on 13 October 2006 for an extension of the deadline.
- (11) In the meantime, the roll-out of the network officially started on 12 October 2006⁶. In view of these developments, the extension of the deadline requested by the Dutch authorities was refused. The authorities submitted part of their answers before the deadline of 26 October and a substantial amount of information was provided on 30 October, 16, 20 and 21 November 2006.
- (12) UPC requested the District Court in Amsterdam in a procedure for interim measures to order the municipality of Amsterdam to respect the standstill obligation laid down in Article 88(3) EC Treaty and not to continue the project before the Commission has finalised its assessment. The request by UPC was dismissed by the District Court which stated in its judgement of 22 June 2006 that it was not obvious that the municipality's involvement in the project involved State aid. According to the Court, the mere fact that the municipality has initiated the project is not to be considered as State aid. Moreover, the Court concluded that the initial costs made by Amsterdam (studies, etc.) would be reimbursed by the joint-venture Glasvezelnet Amsterdam CV and therefore did not constitute aid.
- (13) UPC informed the Commission on 20 September 2006 by e-mail that it had appealed the decision by the District Court⁷. UPC and the municipality of

³ Information supplied by UPC on 12 May and registered on 15 May 2006.

⁴ The authorities sent information on 19 and 31 May, 1, 7, and 13 June 2006.

⁵ The authorities sent information on 18, 25 and 29 August 2006.

⁶ Cf. e.g. articles in newspapers Parool (07.10.2006) and Trouw (13.10.2006).

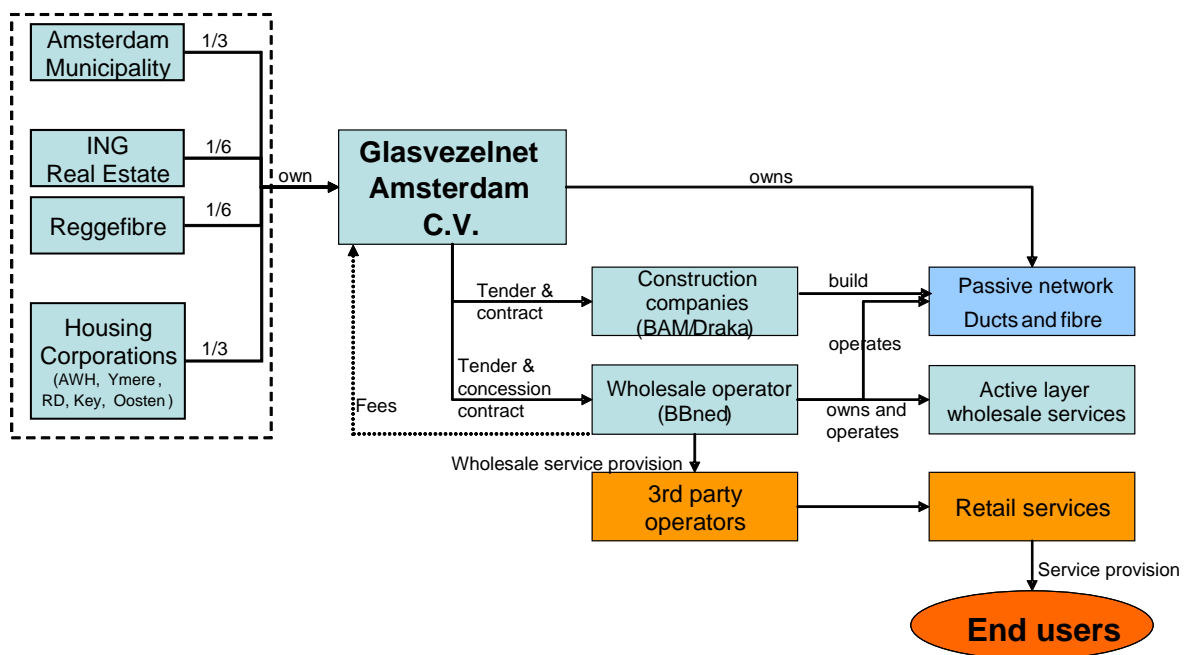
⁷ E-mail registered on 22 September 2006.

Amsterdam informed the Commission in November 2006 that the Court of Appeal proposed to UPC and the municipality of Amsterdam to await the expected Commission's decision before a judgement by the Court would be rendered. Both parties have accepted this proposal⁸.

II. DESCRIPTION OF THE MEASURE

- (14) The municipality of Amsterdam decided in 2004 to investigate the possibilities for an investment in a fibre-to-the-home (FTTH) electronic communications access network. Following a report by the Commission Andriessen, a market analysis and preliminary contacts with potential investors, the municipality decided formally on the investment and the conditions under which an investment would take place in December 2005.
- (15) The project in Amsterdam is based on a “three-layer model” and is outlined in figure 1.

Figure 1: simplified overview of FTTH project in Amsterdam



- (16) The first layer is the so-called “passive network infrastructure”, which includes ducts, fibre and street cabinets. This passive infrastructure, is activated by means of telecommunications equipment (the second or “active layer”) by a wholesale operator managing and maintaining the network and providing wholesale services to retail operators.
- (17) On the third layer, these retail operators offer services (telephony, broadband, TV and radio) to residential users and businesses (“retail layer”). In order to be able to provide these services, retail service providers will have to invest, *inter alia*, in equipment, procure content and operate their own service platform (maintenance, customer care, and billing).

⁸ Minutes of the Court of Appeal, dated 21 November 2006, nr. 200601252.

- (18) The municipality started a tender procedure in 2004 for the construction of the network (“passive layer”), and in 2005 for the exploitation of the network (“active layer”)⁹. The contracts for the construction and the operation were signed in [...]*
- (19) The undertaking Glasvezelnet Amsterdam CV (hereinafter: GNA) will be the owner of the passive network which will connect an area of about 37,000 households in Amsterdam¹⁰. This area comprises three selected boroughs in Amsterdam (Zeeburg, Osdorp, Oost-Watergraafsmeer). The notified project comprises thus 10% of the city of Amsterdam. About one third of the houses (13.000) in this area are owned by the social housing corporations.
- (20) The municipality, two private investors (ING Real Estate (hereinafter: ING RE), Reggefiber¹¹ and five subsidiaries of social housing corporations¹² have established the partnership GNA¹³. To this end, a cooperation agreement (“Samenwerkingsovereenkomst) was signed by the parties on 11 April 2006 and the investment n agreement ("CV-overeenkomst") was signed on 26 May 2006.
- (21) The municipality of Amsterdam invests € 6 million, ING Real Estate and Reggefiber invest each €3 million, three social housing corporations invest each € 1.5 million and two housing corporations invest each € 750,000. The total equity investment amounts to €18 million. In addition, GNA acquired a loan amounting to € [...] from [...]¹⁴. The total planned budget for the project amounts to €[...].

⁹ The successful bidder for the construction is Van den Berg Infrastructuren (BAM)/Draka Comteq Telecom. Van den Berg is a subsidiary of BAM, a major construction company and Draka Comteq is a producer of cables. The successful bidder for the operation of the network, tender 2005/S 79-076325, is BBned.

* [...]: *the information in brackets is covered by the obligation of professional secrecy.*

¹⁰ The municipality of Amsterdam has expressed its long-term ambitions to extend the project to other parts of Amsterdam, with up to 400,000 household connections altogether. However, a potential extension from the currently 37,000 households is not part of the notified project, the underlying business plan and the resulting assessment of the Commission.

¹¹ ING RE is a subsidiary of ING, a financial services (banking and insurance) conglomerate. Reggefiber is a subsidiary of Reggeborgh which is an investment vehicle of the family Wessels which has some stakes in the building and construction group Volker Wessels. Volker Wessels is also involved in a glass fibre project in Nuenen (Netherlands) and recently acquired Eurofiber, a company that owns glass fibre in, amongst other municipalities, Amsterdam. Eurofiber won the tender for providing the backhaul connection for the GNA project. This information has been taken from public sources, the Dutch authorities have not supplied any further information.

¹² The special status and the role of the housing corporation will be further assessed below. It should be noted that the financing of the social housing corporations in the Netherlands is currently subject of an existing aid procedure carried out by the Commission (Case E-2/2005 *Bestaande woonwet en financierings-methoden voor woningsbouwcorporaties*).

¹³ Whereas the Cooperation agreement was signed by the municipality of Amsterdam, the CV agreement has not been signed by the municipality but by Participatie A.G.C. BV. It seems that Participatie A.G.C. has been set up by the municipality or by the development cooperation of Amsterdam. In the notification it is stated by the Dutch authorities that it is the municipality of Amsterdam that invests in the project.

¹⁴ [...] It provides in addition to the loan a credit facility of €[...].

- (22) The passive network of GNA will be activated and operated by BBned, based on a contract between GNA and BBned of 12 June 2006. The active layer includes all active network equipment in both equipment housing facilities and households, including the management, control and maintenance systems necessary to operate this equipment. The necessary investments in this equipment will have to be undertaken by BBned. BBned will lease fibre from GNA and have the [...] right to provide wholesale transport and related services to retail operators at its own risk. It will pay a fee [...] to GNA for the use of the passive network.
- (23) During [...] of operation, this fee is set at €[...] and in [...] BBned will only have to pay [...]% of the fee for being able to operate the passive infrastructure.[...].
- (24) The Commission notes that BBned will not only compete with KPN (the incumbent operator in the Netherlands) on the wholesale level¹⁵ but also be active, by means of its affiliated companies Pilmo and Bbeyond, as a retail operator. It is likely that a [...] fee for BBned will feed through to the retail operators which will compete aggressively, using penetration pricing strategies, with existing operators such as UPC (chello) or KPN (xs4all) to attract these operators' clients to the platform based on GNA's network. Hence, it is likely that the project will have a very strong competitive impact on existing providers.

III. THE VIEW OF THE DUTCH AUTHORITIES

- (25) The Dutch authorities have notified the measure for legal certainty because they consider that the measure does not constitute State aid. The authorities argue that the investment by the municipality of Amsterdam does not confer an advantage within the meaning of Article 87(1) EC upon GNA or any other party.
- (26) First of all, according to the Dutch authorities, the municipality of Amsterdam invests at the same time as the other investors. The public-private partnership has been taken up on 26 May 2006 with the adoption of the partnership agreement. Besides, the municipality invests under the same terms and conditions as market investors ING RE and Reggefiber. The investment was thus in line with the Market Economy Investor Principle. Besides, the authorities argue that since even a 100% State financed vehicle can successfully invoke the Market Economy Investor Principle, e.g. on the basis of expert evidence demonstrating that the business case is sound and would be attractive to a private investor, it would be irrelevant whether the private investors have a stake of 20%, 30% or 50% as long as it is not immaterial.
- (27) Secondly, the question whether the (subsidiaries of) housing corporations invest with State resources was, according to the authorities, irrelevant as housing corporations also invest in line with the Market Economy Investor Principle. In

¹⁵ KPN has to grant access to its own copper local loops to other operators and may not lower the tariffs for these products as they are subject to regulatory approval. Operators may therefore have an incentive to switch, at least in the initial phase, to the products of BBned, also to "test" product offerings based on BBned's wholesale offer.

their letter of 20 November 2006 the Dutch authorities request that, if the Commission would consider that State resources are present in the funds invested by the subsidiaries of the housing corporations in GNA, the Commission ought to assess these investments in a separate investigation and not in the context of the notified measure.

- (28) Finally, the authorities argue that the fact that the municipality invests under the Market Economy Investor Principle is further supported by GNA's business plan, which has been accepted by all investors. The Dutch authorities have submitted written declarations by ING RE and Reggefiber in which these investors support GNA's business plan and the underlying assumptions.
- (29) The authorities have not brought forward arguments that, if the investment by the city would not meet the Market Economy Investor Principle and State aid would be present, this aid could be deemed compatible with the EC Treaty under either Article 87(3) or Article 86(2) EC.

IV. THE VIEW OF THIRD PARTIES

- (30) The complainants VECAI and UPC claim that the investment of the city of Amsterdam is not in line with the Market Economy Investor Principle and hence, State aid is present. Both parties argue that such aid would be incompatible with the EC Treaty.
- (31) UPC has commissioned a study which highlights a number of doubts related to the business plan for the project¹⁶. The study finds that the GNA business case is based on an unrealistically high penetration rate, a customer churn rate much lower than comparable figures in combination with relatively high (wholesale) revenue per user. The business plan was also deemed unrealistic as the operators using the GNA network via BBned will compete in an environment where the price of bandwidth is decreasing, consumers are price sensitive and the roll-out of the new network will to a large extent take place in a market where competitors including UPC, KPN and Tele2 are already present, offering high quality triple play (TV, broadband, telephony) services at competitive prices.
- (32) The study comes to the conclusion that "the assumptions underlying the business case are unrealistic and therefore that the investment in GNA does not appear to be commercially viable". According to UPC this would lead to the conclusion that none of the shareholders of GNA are investing in accordance with the Market Economy Investor Principle. For both Amsterdam and possibly the housing corporations this would mean that their participation amounts to State aid.

¹⁶ The study "Amsterdam's investment in the FTTH Citynet project and the Market Economy Investor Principle" of April 2006 was carried out by RBB Economics on the basis of data included in the ING analyst report "European Telecoms" of 24 February 2006 which used publicly available data. The hypothetical business plan used for the study features some similarities with the actual business plan submitted by the Dutch authorities, nevertheless some assumptions are different. A supplement to this report, "Supplement to the RBB Report on Amsterdam's investment in the FttH CityNet project – an assessment of the retail services provided and its implications for CityNet's business case" was submitted by UPC in November 2007.

- (33) VECAI has in several letters provided the Commission with information about the Citynet project. VECAI highlights that its members have in the last years made major investments in their cable networks, and these investments are to be continued in the coming years. VECAI refers to a report by the Ministry of Economic Affairs and the Central Plan Bureau which both state that there is no need for financial state support for investments in broadband networks¹⁷.
- (34) VECAI is moreover very concerned about the distortion of competition caused by the participation of the commercial subsidiaries of the housing corporations in GNA. First, the considerable financial resources which have been allocated to those commercial subsidiaries have been built up by the holdings of the housing corporations through state resources. Second, according to VECAI, the housing corporations carry out as a core activity, thus with State resources, the financing of the connection from their dwellings to the nearest connection point of the network. Hence, according to VECAI, by combining their financial resources and certain core activities related to their social housing business with an investment in GNA, the housing corporations bring a unique advantage to the partnership GNA which also benefits the other investors as well as BBned.
- (35) The Commission also obtained the views of KPN on the Citynet project. According to KPN, FTTH deployment is at this stage too expensive and there are currently no services which would require such a network as all services can be deployed via the existing networks. KPN also announced plans to replace its copper network with fibre, but chooses "Fibre to the street Cabinet" (FTTC) rather than deploying fibre to the home and connecting every building with fibre. KPN will on the basis of this plan gradually bring the fibre closer to the customers, i.e. to one connection point in every street. The existing copper network will be used for the final connection with the end-users¹⁸.
- (36) In addition, KPN highlighted that any new network operator would have to attract new customers first in order to achieve a minimum penetration rate. KPN, however, can build on its extensive customer base for the roll-out of its network.

V. THE SCOPE OF THIS PROCEDURE

- (37) The notification of the Dutch authorities concerns the investment by the municipality of Amsterdam in GNA. In this procedure, it has therefore to be assessed whether this investment constitutes State aid within the meaning of Article 87(1) EC Treaty.
- (38) In its complaint, VECAI has stated its concerns regarding the distortion of competition caused by the participation of the commercial subsidiaries of the housing corporations in GNA. The allegation by VECAI might warrant an assessment of the granting of loans by the housing corporations' holdings to

¹⁷ References are made to the report " *Voortgangrapportage breedband*" of December 2005 and the report by the Central Plan Bureau: " *Do market failures hamper the perspectives of broadband*", December 2005.

¹⁸ Using VDSL (very high digital subscriber line) technology and in the context of the upgrading of its infrastructure, cf. OPTA: *KPN's Next Generation Network: All-IP*, Issue Paper, 22 May 2006.

their commercial subsidiaries if the resources used by the housing corporations' holdings constitute State resources¹⁹ and if the loan has not been granted under market conditions. Since the granting of these loans is not directly related to the question whether Amsterdam invests according to the Market Economy Investor Principle, the issue raised by VECAI can be assessed separately from that question and outside the scope of this procedure²⁰.

- (39) The Commission, however, notes that housing corporations have several limitations as to the type of investments that they are allowed to make and in certain circumstances they must seek government authorisation. This means that their choices of investment are not fully comparable to those of a normal market economy investor. For this reason, the Commission considers that the investment carried out by ING Real Estate and Reggefiber constitute a more reliable benchmark for assessing whether Amsterdam invests according to the Market Economy Investor Principle.

VI. STATE AID ASSESSMENT

1.1. State resources

- (40) The municipality of Amsterdam invests € 6 million in the partnership GNA. Since a municipality is to be considered as an emanation of the State, this is to be considered as an investment with State resources within the meaning of Article 87(1) EC Treaty²¹.

1.2. Advantage

- (41) The second question which needs to be addressed is whether the investment by the municipality of Amsterdam in GNA constitutes an advantage within the meaning of Article 87(1) EC Treaty. Furthermore, it needs to be assessed to whom these advantages are being granted.

¹⁹ Cf. case E-2/2005 regarding the financing of the Dutch housing corporations. The lack of sufficient separation of accounts is one of the main issues in that procedure.

²⁰ The Commission asked for the loan agreements on 27 September 2006 and the Dutch authorities replied that the loan agreements had not been drafted yet. The authorities provided the Commission with loan agreements on 21 November 2006 and it is stated that the interest charged is equal to [...]. The loan agreement between GNA and [...] could provide for a benchmark in order to assess whether the loan has been granted under market terms. [...] charges GNA an interest rate which is equal to [...]. Prima facie, it seems thus that the conditions for the commercial subsidiaries are more favourable than the conditions imposed by [...] on GNA. It can thus at this stage not be excluded that the loan provides for an advantage to these commercial subsidiaries..

²¹ See also footnote 13. Legally, the municipality does not seem to invest itself in GNA but through a special purpose vehicle that has been set up for this project (Participatie A.G.C. BV) and that seems to be owned by the municipality of Amsterdam or the Development Corporation Amsterdam (OGA, an undertaking owned by the municipality of Amsterdam). It is therefore assumed at this stage that the investment stems from State resources and that these State resources are imputable to the State (the subsidiary seems to be owned by municipality and the decision to invest itself has been taken by the municipality and is channelled through its subsidiary upon initiative by the municipality. It can be assumed at this stage that the conditions outlined in case C-482/99, Stardust Marine have been met).

- (42) For the purpose of establishing whether a financial transaction between the state and an undertaking involves an advantage within the meaning of Article 87 (1) EC Treaty, the Commission applies the Market Economy Investor Principle. According to this principle, a transaction does not involve State aid if it takes place at the same time and under the same terms and conditions that would be acceptable to a private investor operating under normal market economy conditions.
- (43) In order to analyse whether this principle applies, the Commission will assess the measure at hand on the basis of several criteria and on the basis of the business plan. The criteria used for the assessment are stemming from the jurisprudence of the Court of Justice, the Communication on the application of Articles 92 and 93 to public undertakings in the manufacturing sector and the Commission's decision making practice²².
- (44) First, when the authority concerned invests together with other investors, it has to be identified whether these investors are market investors and whether the investments by the private investors have real economic significance. Such significance should be assessed in absolute terms (a significant portion of the total investment) and in relation to the financial strength of the private investor.
- (45) Secondly, it has to be assessed whether there is so-called “concomitance”. This means that the investments of all parties all take place at the same time²³.
- (46) Third, it has to be identified whether the terms and conditions of the investment are identical.
- (47) Fourth, in cases where the State, other investors or the beneficiary have other relationships outside this investment (for example through a side-letter, providing for a guarantee by the State), there is at least room for doubt whether such equivalence in the mere investment terms suffices²⁴. In the case at hand, it has to be assessed whether there are any other relationships outside the cooperation and investment agreement which are relevant for the assessment whether the investment meets the Market Economy Investor Principle.

1.2.1. Significant participation by private investors

- (48) Besides the municipality, both Reggefiber and ING RE invest in GNA. In ING RE and Reggefiber can be considered without any doubt as “private investors”. ING RE and Reggefiber invest in absolute terms a substantial amount, albeit for both ING RE and for Reggefiber €3 million is in relative terms probably a small

²² Cf. Communication of the Commission to the Member States 93/C 307/03, Application of Articles 92 and 93 of the EEC Treaty and of Article 5 of Commission Directive 80/723/EEC to public undertakings in the manufacturing sector, OJ 1993 C 307/3, Commission decision of 12 October 1994 (94/1073/EC) concerning the grant of State aid by France to the Bull group in the form of a non-notified capital increase, OJ L386/1, 31/12/1994, p. 1-12, and more recent, Commission Decision of 2 August 2004 (2006/621/EC) on the State Aid implemented by France for France Télécom, OJ L 257/11, 20.09.2006, p. 11-67.

²³ Cf. Commission Decision on aid implemented by France to France Telecom, referred to above.

²⁴ In other words, the terms and conditions can be identical in one agreement but, at the same time, other agreements can lay down additional clauses with different rights and obligations.

investment. Nevertheless, they take up together one third of the total investment and that is in this context a significant portion of the overall expenditure for the project.

1.2.2. *Concomitance*

- (49) Based on the Commission's preliminary assessment, the municipality invests *de jure* at the same time as the private investors in the partnership GNA. The investment is made after all at the moment of establishing GNA. Nevertheless, *de facto* the municipality of Amsterdam has as of 2004 prepared the project ahead of the investment by the private investors.
- (50) The municipality commissioned several studies in 2003 and 2004 to prepare the project. To a certain extent this could still be considered as an assessment of the feasibility of the project for its own considerations. Nevertheless, the municipality took initiatives which seem to go beyond these preliminary steps. Despite the absence of a commitment by private investors, the municipality published and organised tenders and even negotiated contracts for the construction and the exploitation of the network. In addition, Amsterdam financed certain digging activities, purchased software for the construction of the network [...]²⁵.
- (51) As the Commission stated in the decision regarding the State aid implemented by France for France Telecom²⁶, in applying the concomitance criterion, the assessment of the State's conduct (in this case the municipality of Amsterdam) should be based on the conduct of private investors whose behaviour was not influenced by the State's conduct. Given the fact that the municipality had undertaken already several initiatives before a final agreement with all other investors was concluded, it is questionable whether there is concomitance in this case.

1.2.3. *Terms and conditions*

- (52) If an assessment of the investment terms and conditions would be carried out on a "stand-alone basis", i.e. exclusively based on the cooperation agreement and the CV agreement between all investors, it would seem that private and public investors invest under the same terms and conditions.
- (53) However, the development of the project, the context of the agreements and investments by all parties has to be taken into account as well.
- (54) For instance, the costs related to the initiatives undertaken by the municipality before the establishment of GNA (for example preparation of project and tenders, purchase of software, pre-financing of preliminary digging activities and [...]) have been paid by the municipality.

²⁵ This concerns the connection between parts of the access network built by GNA as well as the connection with other networks.

²⁶ See footnote 22.

- (55) In the Letters of Intent (hereinafter: LoI) between the Amsterdam on the one hand, and the private investors on the other hand, a general reference is made to these costs and to the fact that these costs will be finally borne by GNA²⁷. In one of the agreements an overview of the costs is annexed. However, in documents received by the Commission in different submissions by the Dutch authorities, varying amounts and cost-categories for these “pre-investments” by the municipality of Amsterdam were indicated.
- (56) The Commission specifically requested a complete overview of these costs in its letter of 29 September 2006. Although in November 2006 the authorities submitted an overview of settlements between Amsterdam, GNA and its shareholders, this overview did not fully clarify all “pre-financing” activities by the municipality including the amounts actually spent by the municipality of Amsterdam as mentioned in previous documents.
- (57) The authorities state in their replies of 26 October and of 20 November that all costs will be invoiced to GNA and as such borne by the investors of GNA. The authorities have also informed the Commission that 'an interest charge' will be added. However, it is not stated which interest rate will be charged.
- (58) Based on these submissions by the Dutch authorities, the Commission is thus, at this stage, not in a position to calculate or verify the total amount of these "pre-investments" which appear (including the amounts agreed by some of the shareholders in LoIs) to be in the magnitude of €1.5 million. Besides, this amount does not seem a non-negligible percentage of the overall budget of the project. It is also not fully clear at this stage how these costs are shared between the shareholders and included in the business plan of GNA.
- (59) In general, it appears that the actions undertaken by Amsterdam before the signing of the letters of intent and before concluding the contracts have reduced the risks associated with the project for all investing parties. A part of the start-up risk of the business underlying the GNA business plan may have been absorbed or mitigated by the municipality of Amsterdam before the investments by ING and Reggefiber in GNA were made.
- (60) Therefore, the information submitted by the Dutch authorities has not alleviated preliminary²⁸ doubts of the Commission that the “pre-financing” by the municipality - partly without the explicit agreement of some of the other investors - could have reduced the investment risk of the other investors in GNA and had a positive impact on their willingness to invest in GNA.
- (61) Hence, in view of these doubts it is at this stage not clear whether all shareholders in GNA have invested under the same terms and conditions.

²⁷ The Letter of Intent between ING and Amsterdam was signed at 14.12.2005, the LoI between the housing corporations and Amsterdam was signed in April 2005 (exact date is not indicated on LoI) and the LoI between Reggefiber and Amsterdam has been signed probably on 15.03.2006, although the LoI is not clear about the date.

²⁸ Doubts existing at the time of sending the letter of 29 September 2006.

1.2.4. Other relationships

- (62) Addressing a specific concern expressed by the Commission, the authorities have provided a statement in which they declare that there are no other relations between the parties concerned, i.e. relations outside the notified agreements, which are relevant for the assessment whether the investment is in line with the Market Economy Investor Principle.

1.2.5. Assessment of the business plan

- (63) In order to verify the conditions for the investment in GNA, the Commission carried out a preliminary assessment of the business plan of GNA. Similar to the Commission's assessment in other cases²⁹, it will be analysed whether the injected capital can allow for a normal market return. If capital injections by a public investor disregard any prospect of profitability, even in the long term, such an injection constitutes State aid within the meaning of Article 87 EC³⁰.
- (64) A detailed analysis of the business plan seemed also necessary since the complainant UPC, based on the aforementioned report of RBB Economics, claims that the assumptions underlying the GNA business case are unrealistic and that the project is commercially not viable. According to UPC, neither the municipality nor the other shareholders are investing in accordance with the Market Economy Investor Principle³¹.

Financial indicators

- (65) GNA Amsterdam applied 3 main performance indicators to measure the success of the project being the cash-flow generation, the return on equity (RoE) and the internal rate of return (IRR).
- (66) A positive cash-flow generation is expected after [...] of operation. Based on its preliminary analysis, the Commission finds that there is a high risk that the target may not be achieved, mainly due to a long start-up period (construction of network, [...]) in which GNA will not generate any revenues.
- (67) The Commission finds that the RoE indicator provided by the authorities cannot be easily compared to other projects on the market with publicly available information and hence is of limited value for an assessment of the applicability of the Market Economy Investor Principle. [...]. The project has a much longer payback period [...] than other telecommunications projects: it needs more time to produce the expected return for investors - and the longer the timeframe, the higher the uncertainty and the risk involved for the investors.

²⁹ Commission decision on Alitalia's industrial restructuring plan of 7 June 2005, OJ L69/1; Commission decision concerning the grant of State aid by France to the Bull group, see footnote 22.

³⁰ Cf. paragraph 44, Opinion of Advocate-General Geelhoed, delivered on 27.09.2000 in Joined Cases C-382/99 and C-399/00, Italy v. Commission [2001] ECR I-4035

³¹ RBB Economics on Amsterdam's investment in the FTTH Citynet project and the Market Economy Investor Principle. See footnote 16.

- (68) The internal rate of return (IRR) is used to make decisions on long-term investments and compare different investment projects. The underlying IRR of GNA amounts to [...] %. Publicly available IRR benchmark figures about similar projects are limited³². The most relevant publicly available comparative data are cost of capital data such as the weighted average cost of capital³³ of other companies in the same industry. Based on Commission information, those figures fluctuate in the range between 8.1% and 10.6%³⁴, while a report by ING³⁵ concerning the GNA project assumed a cost of capital of [...] %.[...].
- (69) Overall, the three targeted indicators do not seem unrealistic, but are highly dependent on the achievement of key success factors. Forecasts are likely to be very uncertain due to the novelty of the project in terms of technology (fibre technology), business model (three-layer model), limited project size (hence only limited economies of scale) and expected consumers' demand for services requiring high bandwidth.
- (70) In addition, it has to be assessed whether the average cost of capital is the relevant benchmark for assessing the profitability of the investment in question. This would only be the case if the project has a degree of risk that is comparable to that of the average project in the business. In particular because of the reasons explained above, this does not seem to be the case. The Commission invites interested parties to comment on this aspect.
- (71) As stated above, a relevant part of the start-up risk of the business may have been absorbed or mitigated by the municipality of Amsterdam before the actual investment by ING and Reggefiber, as Amsterdam "pre-financed" the project between 2004 and 2006.

Investment costs per connection

- (72) The Commission also assessed the planned investment costs. [...]. This leads to an overall cost for the passive layer of €[...] per household. The benchmark figures, collected by the Commission, for the complete infrastructure (active and passive together) fluctuate between € 1,000 and € 2,000³⁶, while the ratio between the investments needs for passive and active connection is roughly about two to one.

³² The Dutch authorities have not submitted IRR benchmarks despite a request by the Commission.

³³ So-called WACC: weighted average cost of capital; expresses the relative cost of equity and debt capital of a business.

³⁴ UPC (Dutch cable operator) 10.6%, Fastweb (Italian broadband operator) 9%, Telenet (Flemish cable operator) 8.5%, KPN (Dutch incumbent) 8.1%

³⁵ ING analyst report "European Telecoms", 24 February 2006.

³⁶ For the whole infrastructure (active and passive) UPC/RBB estimates €1500 per home passed (€ 1000/ €500 respectively), KPN €1300, Hillegom (Dutch FTTH company) €1200, Corning (fibre optic manufacturer) €1200, ADL (consulting company) €1000 (€600/ €400 respectively), Fastweb (Italian broadband operator) €1200, ARCEP (French regulator) €2000 (data from 2005 and 2006).

- (73) The benchmark figures indicate that the capital expenditure per connection projected by GNA [...] in comparison with data available from market players and other sources.

Residual value of the passive fibre network

- (74) The estimated residual value of the passive network has a pivotal role in the GNA business plan to achieve the financial targets and to provide collateral for the investors. Since no relevant market data were available for this parameter (no publicly available merger or acquisition data for a FTTH company), the Commission analysed this residual value as if an integrated operator were to be sold in [...] and taking into account the investment costs of the passive network³⁷. These two values indicate a price range of €[...] for the network at a penetration rate of [...] % in [...] compared to GNA's own calculation which achieves €[...] million.
- (75) Nevertheless, in a worst-case scenario³⁸, GNA indicates that the passive infrastructure would be worth approx. € [...] million for a potential new investor. [...]. In short, the residual value calculations provided in the business plan leaves some room for doubts.

Penetration rate

- (76) Another important factor for the business plan is the targeted penetration ratio. As revenues of GNA will depend to a large extent on the achieved penetration rate, i.e. connected households (and not on what price and service it is able to charge to customers), the feasibility of achieving the targeted penetration rate is of crucial importance for the success of GNA's business.
- (77) GNA is calculating to achieve a penetration rate of [...] % of all households within [...] months (and penetration levels are expected to be saturated approximately at this level). [...].
- (78) Based on the available data, achieving at least [...] % penetration for the “minimum scenario” seems optimistic. Moreover, the target of [...] % of all households after [...] months seems aggressive and will only be possible, if at all, through a [...] strategy shifting existing customers of, e.g. UPC and KPN to the operators using the GNA network.

Pricing

- (79) Due to its innovative and untested business model (separate passive, active and service layer) it is difficult to benchmark the prices charged by GNA with publicly available information.

³⁷ A recent merger transaction in the Dutch cable market (Casema/Multikabel) realized at the value €1700 per subscriber – which was considered by the analyst community as an upper limit. The assumed investment costs of GNA (€750 per subscriber) may provide a downward limit for the asset value.

³⁸ If the proposed business plan was not realized and no active operators (e.g. UPC and KPN) are willing to purchase the passive network. Only a new market entrant would be willing to take over and operate the network.

- (80) According to the business plan of GNA, [...]. [...].

Conclusions on the business plan

- (81) Consequently, following this preliminary analysis, not only the targeted performance indicators, but all assumptions underlying the business plan seem, when benchmarked against other projects, highly optimistic³⁹. Moreover, there is a high degree of sensitivity for the success of the project if even one of the targets (such as penetration grade) does not materialize.
- (82) ING and Reggefiber have both stated in the letters submitted to the Commission that they invest [...]. [...]. The project also qualifies as a pilot to test FTTH and it may be that both companies see this emerging network technology/delivery platform as a growth opportunity for their existing business. The fact that the project benefits from both the support of the municipality (funds, building permits) and the housing corporations (funds, owning buildings to be connected) makes this proposition even more attractive. Further questions remain whether all costs and all associated risks, in particular the initial investments by the city of Amsterdam, were incorporated in the business plan.
- (83) As stated in paragraph (41), it needs to be assessed to whom the advantage is being granted.

Beneficiaries of the advantage

- (84) If the investment by Amsterdam is not in line with the Market Economy Investor Principle, an economic advantage may be granted to GNA and consequently also to its shareholders. In addition, other undertakings on different levels of the business may also benefit from the advantage provided.
- (85) As regards the level of the wholesale operator, BBned obtained the right to exploit the network through a tender procedure which was advertised in the Official Journal of the European Communities⁴⁰. The principles of openness, transparency and equality of treatment were thus respected. It is generally accepted that such an open tender for the management of an infrastructure such as the FTTH network in Amsterdam tends to minimise any advantage to the winning bidder. However, although as a result of the tender, BBned would not obtain an excessive return from the project it would nevertheless be able to establish a business based on GNA network and enter the market for wholesale services on conditions not otherwise available on the market. The investment by the city of Amsterdam could therefore confer an economic advantage to BBned.
- (86) In addition, it cannot be excluded at this stage that retail operators using BBned's services to serve their clients over GNA's network may benefit from an indirect advantage. They get access to an advanced infrastructure which *prima facie* would not be available without the involvement of the municipality of Amsterdam and the housing corporations and hence do not have to bear the

³⁹ The Commission has also certain methodological concerns regarding the GNA business plan. [...].

⁴⁰ Reference 2004/S 138 – 118456, dated 17 July 2004.

same level of investment as other operators using their own or rented networks (cable and copper)⁴¹.

1.3. Distortion of competition

- (87) If the intervention by the municipality of Amsterdam does not meet the Market Economy Investor Principle, it will alter the existing market conditions by enabling subsidised entry by GNA and its shareholders and thereby the wholesale provider BBned into the market for advanced wholesale broadband services as well as allowing service providers to enter downstream retail markets. The fact that a new network becomes available, possibly at conditions below market prices, has the effect of distorting competition also in the downstream markets of retail broadband and other electronic communications services. During the introductory phase of wholesale and retail offerings based on the GNA network, price competition will be particularly harsh due to the [...] strategy supported by GNA, leading to a strong business impact on other providers not using the GNA network and BBned's services.

1.4. Effect on trade

- (88) The project and the resulting market result is liable to affect telecom operators and service providers from other Member States. The telecommunications markets are open to competition between providers of electronic communications services and service providers, which generally engage in activities that are the subject of trade between Member States. Several telecommunication operators active in Amsterdam are part of international groups which operate on a pan-European basis and have investments in the Netherlands but also in other countries. An effect on trade can thus be assumed.

1.5. Conclusion

- (89) In view of the above, the Commission has at this stage doubts whether the notified measure is in line with the Market Economy Investor Principle. The Commission doubts whether all parties actually invest under the same terms and conditions and whether the municipality of Amsterdam does not accept to take on certain initial risks alone without appropriate compensation for these risks. In addition, there are also certain doubts as to whether all parties have invested de facto at the same time. In case the measure does not meet the Market Economy Investor Principle, an economic advantage may be granted through public funds to GNA and its shareholders, BBned and other wholesale and retail operators. The project has the potential to distort competition and may have an effect on trade between Member States. Therefore, at this stage and based on its preliminary assessment, the Commission cannot exclude that the notified measure includes elements of State aid within the meaning of Article 87(1) EC Treaty.
- (90) Under the conditions referred to above, it is thus necessary to consider whether the measure can be found to be compatible with the common market.

⁴¹ RBB Economics. Supplement to the RBB Report on Amsterdam's investment in the FTTH CityNet project.

VII. COMPATIBILITY ASSESSMENT

- (91) The Commission's assessment has – at this stage – focussed on the applicability of the Market Economy Investor Principle and the presence of aid. An in-depth compatibility assessment has not been carried out at this stage. The Dutch authorities have not put forward the argument that any aid present would be compatible with the Treaty. However, the authorities have submitted information on the alleged positive economic development aspects of the measure and the potential benefits of the measure for the citizens of Amsterdam.
- (92) Any compatibility assessment of the measure with the common market is likely to be based directly on Article 87(3)(c) of the EC Treaty⁴². Under Article 87(3)(c) an aid must pursue an objective of common interest in a necessary and proportionate way.
- (93) In that context, the Commission would have to assess whether there is a market failure in the broadband market in the Netherlands, and, more specifically, in Amsterdam, which could be remedied by State aid.
- (94) As the Commission indicated in its decision regarding the roll-out of a FTTH network in case C 35/2005 (hereinafter: "Appingedam")⁴³, recent data⁴⁴ confirm the high degree of competition and the multitude of broadband offers in the Dutch market. The Netherlands moreover has the highest broadband penetration rate in the EU and the Dutch broadband market is one of the most advanced in terms of service coverage, innovation and competition. In addition, providers of electronic communications services, cable operators and Internet Service Providers will introduce very-high capacity broadband services in the Dutch market in the near future⁴⁵.
- (95) In Appingedam, the Commission considered that the construction of an additional network with state aid was not necessary to remedy either a market failure or unaffordable prices for broadband services. The Commission found that the planned aid would distort competition and harm private investment to an extent which would outweigh the positive effects of the project. Hence, the Commission concluded that the measure did not fulfil the criteria under Article 87 (3) (c) and was found to be incompatible with the Treaty.
- (96) In that respect, the measure features certain similarities with the project in Appingedam, which sheds some doubts on the compatibility of any aid contained in the project under assessment. However, if the presence of aid is confirmed, the Commission will have to carry out an in-depth compatibility

⁴² This approach was also followed by the Commission in cases concerning state aid for broadband, see for instance: N 284/2005 *Regional Broadband Programme: Metropolitan Area Networks ("MANs")*, phases II and III – Commission decision of 08.03.2006; N 157/2006 *South Yorkshire Digital Region* – Commission decision of 22.11.2006.

⁴³ C 35/2005, *Broadband development Appingedam*, Commission decision of 19.07.2006.

⁴⁴ European Commission (2006), *European Electronic Communications Regulation and Markets 2005* (11th Report) COM (2006)68 of 20.02.2006.

⁴⁵ According to information in the possession of the Commission, Essent is testing a symmetrical Ethernet-to-the-Home solution providing 100Mbit/s, UPC plans to introduce a 50 Mbit/s product in the Netherlands and KPN is rolling-out VDSL with a speed of >50 Mbit/s.

assessment of the measure at hand, weighing all positive and negative aspects of the measure. The Commission notes some positive aspects of the project setup from a competition point of view, such as the openness of the FTTH network which will provide non-discriminatory access to operators, thereby fostering competition and consumer choice. However, the Commission also notes, again, if aid is present, that the project might have a strong distorting impact on the business and investments of existing operators.

VIII. CONCLUSION

- (97) Based on the information submitted by the Dutch authorities and interested parties, the Commission has, after a preliminary assessment, doubts that the investment by the city of Amsterdam in GNA - within the overall context of the project as outlined above - is in line with the Market Economy Investor Principle.
- (98) The Commission acknowledges that there are two private investors involved who make significant investments, and the Commission takes note of the statement provided by the Dutch authorities that there are no other relevant relationships between the parties. At this stage however, the Commission is not convinced that the investment has been concomitant with the investments by ING and Reggefiber. Moreover, the Commission is not convinced that the terms and conditions of the investment by the municipality of Amsterdam are equal to the terms and conditions under which the other parties have invested. In addition, the Commission has certain doubts with regard to the feasibility of the business plan.
- (99) Hence, it is at this stage not possible to exclude the presence of State aid in favour of GNA, its share holders, BBned and the operators using BBned's services. Although the Commission requested additional information from the Dutch authorities on several occasions, the doubts related to the project persist.
- (100) Given these doubts and taking into account the difficulties⁴⁶ encountered by the Commission and the impact of potential state aid on the investments of private operators it appears necessary that the Commission opens the formal investigation procedure.
- (101) In addition, the Commission finds it also necessary to open the formal investigation procedure given that the preliminary phase has been unduly protracted. During the course of the 19 months between notification and this decision, the Commission sent a series of separate official requests for information to the Dutch Government. It was not until 18 months after notification of the aid plan that the Dutch Government sent the Commission an overview of the investments which the municipality financed before the establishment of GNA was established.

⁴⁶ Case T-73/98 *Société chimique Prayon-Rupel SA v Commission of the European Communities* [2001] ECR II-867.

- (102) Finally, the opening of the procedure enables interested third parties to comment on the questions raised by this project.
- (103) In the light of the foregoing considerations, the Commission, acting under the procedure laid down in Article 88(2) of the EC Treaty, requests the Netherlands to submit its comments and to provide all such information which may help to assess the aid/measure, within one month of the date of receipt of this letter. It requests your authorities to forward a copy of this letter to the potential recipients of the aid immediately.
- (104) The Commission invites the Netherlands and all interested parties to comment on the issues raised in this letter. In particular, the Commission invites the Dutch authorities and interested parties to comment on the compatibility of any potential aid involved in the measure. Any compatible aid needs to be necessary and well justified, either in terms of pursuing an accepted objective of social or economic cohesion or as a remedy for a market failure. Moreover, State intervention must be proportionate to the objective pursued and must have a positive overall effect on welfare and competition.
- (105) The Commission informs the Netherlands that it will inform interested parties by publishing this letter and a meaningful summary of it in the *Official Journal of the European Union*. It will also inform interested parties in the EFTA countries which are signatories to the EEA Agreement, by publication of a notice in the EEA Supplement to the *Official Journal of the European Union* and will inform the EFTA Surveillance Authority by sending a copy of this letter. All such interested parties will be invited to submit their comments within one month of the date of such publication.

Yours faithfully,
For the Commission

Neelie KROES
Member of the Commission