



Brussels, 28.06.2010
C(2010)4475

Subject: **N 559/2009 – United Kingdom**
 North Yorkshire – Next Generation Broadband

I. SUMMARY

- (1) I am pleased to be able to inform you that the European Commission has assessed the measure "*North Yorkshire Next Generation Broadband - Extension of NYNET in Rural Areas and Market Towns*" (hereafter: "the measure") and decided not to raise objections as the State aid contained therein is compatible with Article 107(3)(c) of the Treaty on the Functioning of the European Union (hereafter "TFEU")¹.

II. PROCEDURE

- (2) Following pre-notification discussions, by letter dated 14 October 2009, pursuant to Article 108 (3) of the TFEU, the authorities of United Kingdom (hereafter: "UK") notified the above mentioned measure to the Commission. On 30 October 2009 the Commission sent a request for information to the UK authorities. The UK authorities replied by letter dated 9 February 2010. The Commission requested clarification of certain aspects of the additional information from the UK authorities by submission dated 9 March 2010, for which they provided an answer on 23 April 2010.

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

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III. CONTEXT

- (3) On 21 February 2007, the Commission approved approximately GBP 7 million of State aid² for the construction and maintenance of an advanced broadband project in North Yorkshire which was to provide the public sector with a fibre backhaul network linking 12 points of presence ("PoPs")³ in rural North Yorkshire. For this purpose, a special public sector vehicle was set up, the NYNet, a limited company wholly owned by North Yorkshire County Council. NYnet currently provides services directly to most public sector bodies in North Yorkshire, including for example, the National Health Service. To date NYnet have used revenues from the original 12 PoPs to construct additional 29 PoPs which are currently used only for public sector connectivity. The present measure aims at connecting this backhaul network⁴ with business parks and small market towns in rural areas of North Yorkshire by means of fibre glass.
- (4) As the area of North Yorkshire described in the notification is in principle a white NGA area, broadband services are only available via first generation networks, such as ADSL. With the emergence of new downstream services, the inability of first generation networks to cope with applications requiring higher bandwidths is emerging. Most notably this can be seen with services such as BBC iPlayer, Channel 4 On Demand and even YouTube HD. The average optimal download speed in North Yorkshire is 3.2Mbps (which in reality falls at peak times of high contention), the BBC recommends at least 3.5Mbps downstream to receive iPlayer HD broadcast quality content. Similarly, the poor upload speeds associated with first generation broadband preclude effective two way videoconferencing or connection of rural home workers to corporate VPNs where upload speeds are as important as download ones. Both these situations are worsened by the issue of simultaneous users in one household, as at these low bandwidths, multiple service delivery of content, email, and video/VoIP at the same time is untenable. Typically this will require greater than 20Mbps downstream and 4Mbps upstream associated with NGA services.
- (5) The service providers of NYnet are working to offer a wide range of value added services that are increasingly dependent on high speed, low contended, symmetric, QoS enabled NGA. Typically a SME will soon have hosted applications (e.g. MS Office, on a streamed or thin client model), data backup, VOIP SIP handsets, Video/Web conferencing, virtualisation, internet access and a 99.6% or more SLA⁵ on availability. Depending on the degree of contention and number of employees, the typical requirement is for in excess of 10Mbps symmetric service. Current ADSL provision to SMEs has, as described above, an optimal average line speed of 3.2Mbps and an upload speed of less than 0.38Mbps. At times of high contention, this can drop significantly, but regardless, is incapable of supporting the NGA services described above that service providers wish to sell to SMEs in North Yorkshire.

² Commission Decision in case N746/2006 "North Yorkshire NYNET Project", United Kingdom. OJ C/152/2007.

³ A point of presence ("PoP") is an access point to the fibre backhaul network. It is a physical location that houses servers, routers, ATM switches and digital/analogue call aggregators.

⁴ In a hierarchical telecommunications network the backhaul portion of the network comprises the intermediate links between the core network, or backbone, of the network and the small subnetworks at the "edge" of the entire hierarchical network.

⁵ Service level agreement on the availability of the network

IV. DESCRIPTION OF THE MEASURE

- (6) *Objective:* The objective of the rollout of NGA infrastructure in North Yorkshire is to ensure economic and social development and well-being by promoting the knowledge economy, enabling residents to acquire basic technology skills and providing advanced accessible public services using 21st century information and communication technology. These public services include the development of technology-enabled services with significant benefit to rural areas, such as 'tele-medicine' and video-conferencing and white-boards for schools.
- (7) The notified measure has three strands:
- First, creating an additional number of PoPs and connecting them to the network through optical links from the 12 existing "core" PoPs using revenues from the 12 PoPs as set out in paragraph (3) above. By creating these new PoPs, elements of the backhaul can be partitioned to service providers at speeds of 10 Mbps, 100 Mbps and 1 Gbs. The new PoPs will be located either in current exchanges, in public sector buildings or in purpose built locations.
 - Second, connecting approximately 140 business parks and Multi Dwelling Business Units ("MDBUs")⁶ with (existing or newly created) PoPs. The aim is to provide "NGA connectivity" from the business parks to the nearest PoP on an open access basis to service providers.
 - Third, connecting market towns (on a case by case basis) with (existing or newly created) PoPs of the backhaul network where no operator is willing to provide a market town with NGA services in the medium term future of 3 years.
- (8) *Legal basis:* The measure will be co-financed from funds of the ERDF Sustainable Competitiveness Programme 2007-2013 and it is based on (1) Local Government Act 2000, (2) Regional Development Agencies Act 1998⁷, (3) Council Regulation (EC) No 1083/2006 – General regulation⁸, (4) Council Regulation (EC) No 1080/2006 - ERDF⁹, (5) Council Regulation (EC) No 1084/2006 - Cohesion Fund¹⁰, and (6) Commission Regulation (EC) No 1828/2006 - Implementing Regulation¹¹. Non State aid funding relates to revenues from selling connectivity to public sector entities and private sector service providers.
- (9) *Target areas:* The aid targets the entire territory of North Yorkshire with the exception of Harrogate and York. Harrogate and York are excluded from the measure because the

⁶ Business parks in North Yorkshire are either occupied by multiple businesses distributed over multiple buildings (as in the case of converted farms and stables), or multiple businesses occupying a single large building (as in the case of converted "stately" homes. The latter is defined as a multi dwelling business unit.

⁷ Available at: http://www.opsi.gov.uk/Acts/acts1998/ukpga_19980045_en_1

⁸ OJ L 210/25 of 31.7.2006.

⁹ OJ L210/1 of 31.07.2006.

¹⁰ OJ L210/79 of 31.07.2006.

¹¹ OJ L 45/3 of 15.02.2007.

main cable operator, Virgin and BT are already offering NGA services in these towns. In February and March 2009, the UK authorities conducted market research in North Yorkshire which showed that NGA services are currently only available for businesses in Harrogate and York where BT and Virgin are already present. The survey examined broadband availability at a post code level of detail. The information gathered was used to produce maps for the four main areas in the region showing available broadband speeds which vary from a high of download speeds of 8 Mbps to "no service" dependent on the length and nature of the copper wire from the local exchange to the customer.¹² The UK authorities refined this market research in November and December 2009 and drew up further maps which identify 'white', 'grey' and 'black NGA areas' within the meaning of the *Community Guidelines for the application of State aid rules in relation to rapid deployment of broadband networks*¹³ (hereinafter the "Broadband Guidelines") for the use of State aid to introduce. The maps show Harrogate and York as basic broadband 'black areas' that are likely to fall at least into the category of 'grey NGA areas' within the next three years, by virtue of availability of NGA services from BT and/or Virgin Media, therefore these areas will not be covered by the current measure.

- (10) *Consultation with existing operators:* The UK authorities have twice undertaken a market consultation to ascertain that there are no plans for private investments in NGA within the areas outside York and Harrogate within the next three years. The documents submitted by the UK authorities show that BT has no intentions to provide fibre broadband outside Harrogate and York. BT has merely announced the construction of further four locations for NGA in Yorkshire, none of which are in North Yorkshire. The UK authorities also submitted correspondence with [...]*,¹⁴ alternative providers to BT, which demonstrate that no commercial plans exist to roll out the NGA network subject to the notified measure within the next three years.
- (11) *Budget and funding instrument:* The aid takes the form of a direct grant. As the precise scope of the measure will be decided on a case by case basis, the amount of necessary funding is not yet known at this stage. The amount of public funding available for the measure is estimated at GBP [...] to GBP [...], mainly from the Rural Development Programme for England (RDPE) and ERDF support.
- (12) *Aid intensity:* The aid intensity of the project will depend on the scope of the measure as well as on the outcome of a tender procedure. The precise aid intensity will depend on the open tender procedure. The UK authorities expect that the aid intensity will amount to approximately [...] %.
- (13) *Duration of the measure:* The scheme is to run for two years (2010-2012). This means that the capital expenditure on fibre and networking equipment needs to be spent within

¹² Due to technical reasons, the available bandwidth via copper network using ADSL technology significantly deteriorates as the distance between the exchange and the end users sites increases. Hence, although in some places copper line is available, it is not capable of sustaining broadband (ADSL) services.

¹³ OJ C 235 of 30.9.2009, p. 7.

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

¹⁴ [...] operate on a national basis. [...] have a more Yorkshire regional focus (North Yorkshire is a sub-region of the Yorkshire region).

the first two years after the signature of the contract. The network must then remain open for a period of at least 10 years with an option for renewal.

- (14) *Procurement and award criteria:* The aid will be allocated on the basis of an open tender in line with the applicable national and EU procurement principles. The UK authorities foresee two options:
- (15) *Option 1:* The measure is open to any electronic communication operator to submit a bid for building up the infrastructure specified in paragraph (7). Should any bidder make an offer that represents best value on the basis of securing revenues from service providers and minimising aid, such bids will be evaluated accordingly on the basis of best value and the network would be exploited by the prevailing bidder.
- (16) *Option 2:* In parallel, the UK authorities would explore the possibility of identifying a technology partner to build, manage and operate the wholesale, open access network. Under this option, NYnet, as the owner of the network, would enter into contracts with service providers, not the technology partner. In this way, revenues from service providers would flow to NYnet (a publicly-owned body) and not to an electronic communication operator. NYnet would control the sales and marketing of the networks to service providers. NYnet has committed that any profits from the measure would be reinvested into extending the reach of NGA in North Yorkshire, ensuring ex post that the aid intensity for the measure would not increase.
- (17) NYnet would pursue both options and ultimately select the one which delivers the most NGA coverage for the least State aid. The choice between option 1 and option 2 is driven by two key issues: (1) availability of ERDF funds and (2) success in achieving policy objectives. With respect to the availability of ERDF funds, it could be a challenge to provide matching funds of at least [...] % of the budget as is required by ERDF regulations. These matching funds could come from the public sector (whether NYnet, NYCC or other UK regional funds) or the private sector (i.e. mixed national funding is excluded in the design of the financing). If the requisite matching funds must come from the public sector (because the private sector does not provide those amounts), the UK authorities consider that control of all wholesale revenues should flow back to NYnet and that no profit from uptake of wholesale access should accrue to the technology partner. In doing so, NYnet would be able to ensure that any revenues or profits are reinvested into activities which would help to achieve the social and economic policy objectives enshrined in the Project under the governance of NYnet. However, if minimum requisite amount (or a greater amount) of matching funds could be provided by the private sector (which is currently the more likely scenario, according to the UK authorities), then the UK authorities would prefer option 1 as the technology partner would take part of the risk on the sale of wholesale services. If the level of private investment results in a much higher percentage of businesses and citizens having access to NGA, then, by definition, the project will realise the prime policy objectives of economic and social gain through the widespread availability of NGA in rural North Yorkshire.
- (18) The *award criterion* will be the most economically advantageous offer. The UK authorities will use carefully designed and publicised award criteria aimed at ensuring competitive proposals by market players. To determine the economically most advantageous bid, the award criteria will be weighted (technical criteria at [...] % and

financial criteria at [...]%).¹⁵ In line with footnote 55 of the Broadband Guidelines and EU public procurement regulations, the awarding authority will stipulate in advance the award criteria and their relative weighting. In line with paragraph 51 of the Broadband Guidelines, the NYnet confirmed that in order to reduce the amount of aid to be granted, at identical quality conditions, the bidder with the lowest amount of aid requested will score more points.¹⁶

- (19) *Beneficiaries*: The direct beneficiary of the aid will be a technology partner who is to build, manage and operate the extended wholesale open access network and possibly NYnet. Indirect beneficiaries are service providers, business users (in particular SMEs), residential users and in case of option 2 described in paragraph (15), also NYnet.
- (20) *Technology neutrality*: To ensure technological neutrality, the tender will define service requirement, not a technical solution. This means that the project will adopt a position of technological neutrality with respect to any equipment, protocols and networking architecture.
- (21) *Use of existing infrastructure*: There are three options with respect to reutilisation of existing infrastructure: 1) use of existing regulated infrastructure of the incumbent operator for fibre connectivity to new PoPs, business parks and MDBUs; 2) reutilisation of existing radio masts where appropriate; 3) use of water and sewerage. Bidders will be encouraged to use existing infrastructures to the extent possible to avoid duplication, waste of resources and to minimize the public funding necessary.
- (22) *Wholesale access*: Third party operators will have wholesale access to the subsidised broadband networks in an open, non-discriminatory way during a period of ten years from the completion of the project.
- (23) If the subject of the measure is an NGA network, third party access includes both passive and active infrastructure. This open access policy will support effective and full unbundling and satisfy all different types of network access that operators may seek (including but not limited to access to ducts, dark fibre and bitstream access). The supported NGA infrastructure will have to provide access for at least three operators at the infrastructural level and access for an unlimited number of operators at the highest levels at bitstream level.
- (24) The UK authorities confirmed that they consulted Ofcom, the UK National Regulatory Authority ("NRA") and will continue to consult it about this measure to ensure compliance with the regulatory framework of the UK. A meeting between the NRA, NYnet and the Department for Business Innovation and Skills took place on 13 October 2009. According to the UK authorities, the NRA provided positive feedback on the measure which they consider to be in line with UK regulatory requirements on both access and pricing.
- (25) *Pricing*: To minimise price distortions, wholesale access will be priced by benchmarking equivalent wholesale services in London and elsewhere in the EU.

¹⁵ The tender will essentially follow the example of the tender already used by the UK authorities for the preceding measure in North Yorkshire as assessed in Commission Decision N 746/2006 of 21.2.2007.

¹⁶ This decision does not prejudice any further analysis by the Commission as far as the respect of the public procurement rules is concerned.

- (26) *Minimum Service Requirements:* With respect to business parks, service requirements will stipulate a minimum bandwidth of 100Mbps access circuit with symmetric uncontended internet access over that access bearer. For market towns, the tender will set a requirement for a minimum 25Mbps to end users with the capability of supporting QoS¹⁷, symmetric services¹⁸ and varying contention. Services to businesses will be differentiated in terms of support for symmetric services, QoS and low contention ratios.
- (27) *Monitoring and clawback mechanism:* The granting authority will carry out appropriate audit activities, including technical review of the delivered solution. To ensure that no advantage accrues to the retail arm of any successful bidder, the tender will stipulate that there must be clear separation between wholesale and retail divisions of the successful bidder, to the extent that the price paid by the retail arm of the bidder must be identical to that paid by any other retail service provider. Wholesale tariffs will be published and compliance will be a component of an annual monitoring audit. The UK authorities believe that in this way, there will be a fair and competitive playing field for all retail service providers. A claw-back mechanism will also be part of the contract: the preferred bidder will pay back part of the State aid to the UK authorities if the demand for broadband in the target area grows beyond anticipated levels and this leads to a situation where the support granted is deemed to be higher than the average of the industry during the lifetime of the project. Any extra profit will be calculated annually and, at the end of the lifetime of the project, the cumulative calculation will determine the amount of the funding to be paid back. Repayment will be capped at the amount of the State aid involved in the measure.
- (28) The clawback mechanism is different in the model under option 2 described in paragraph (16). Here, the technology partner would only build, manage and operate the wholesale access network while NYnet would contract the service providers and hence receive all profits. Should NYnet yield profits from the NGA network which is to be created in such way, NYnet commits to re-investing such profits into the same type of measures as identified in paragraph (7), thereby ensuring aid intensity remains as low as possible. To ensure that all substantive conditions for re-investing State aid are fulfilled, NYnet will also (timely in advance of the tender) publish any plans on the NYnet website along with the maps indicating precisely the areas where the new measures will take place.¹⁹ NYnet will then invite third parties to submit within a reasonable period of time their observations on whether they are planning to roll out such measures on commercial terms without support from NYnet. In such hypothesis, NYnet will treat such areas as grey/black area and will only re-invest additional profits in NGA rolling out in NGA (updated) white areas.²⁰

¹⁷ Quality of Service is a strategy to manage heavy network loading based on traffic classifications. It aims at preventing a congestion of the broadband network (<https://www.nynet.co.uk/docs/site/NYnet%20QoS%20Report.pdf>)

¹⁸ A symmetric broadband service provides equal speeds for uploading and for downloading content via the internet.

¹⁹ In paragraph 9 it is mentioned that the whole of North Yorkshire (apart from black areas) is targeted.

²⁰ Reinvestment will be used to reach the more rural 'hard to reach' sparsely populated communities and business parks in North Yorkshire where even existing ADSL broadband provision is poor.

V. ASSESSMENT OF THE MEASURE: PRESENCE OF AID

- (29) According to Article 107 (1) of the TFEU, “*any aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods shall, in so far as it affects trade between Member States, be incompatible with the common market*”. It follows that in order for a measure to qualify as State aid, the following cumulative conditions have to be met: 1) the measure has to be granted out of State resources, 2) it has to confer an economic advantage to undertakings, 3) the advantage has to be selective and distort or threaten to distort competition, 4) the measure has to affect intra-Community trade.

State resources

- (30) The notified measure is attributable to the State and financed by resources of public authorities in the United Kingdom and EU funds (ERDF). Hence the measure is financed by State resources.

Economic advantage

- (31) *Selected operators*: In case of option 1, through the tender process, the selected operator will receive financial support which will enable it to enter the market and provide broadband wholesale services on conditions not otherwise available on the market. Although a competitive tender procedure tends to reduce the amount of financial support required, the aid will also allow the operator to offer services *prima facie* at lower prices than if it had had to bear all costs itself and thus attract more customers than under normal market conditions. The tender does not exclude that the selected technology partner acquires ownership of the (extended) wholesale access network as well as other tangible and intangible assets with State funds even after the lifetime of the projects. In view of the above, an economic advantage will be granted to the selected operator.
- (32) *NYnet*: Under option 2, NYnet will commercially exploit the extended backhaul network and retail all profits. Even though NYnet is obliged to re-invest all profits into the project, to carry out market research prior to re-investing such profits (§ 26) and to launch a procurement procedure to obtain the most economical bid (§ 15 to § 18), it would still indirectly benefit from the aid by obtaining the profits from an economic activity.
- (33) *Third party providers*: In the areas covered by the project, there is basic broadband connection but no NGA services. The measure to enhance and improve access points to the backhaul network will create demand for NGA services. Third party providers of broadband services will be able to use this wholesale access under non discriminatory terms and they will therefore also indirectly benefit from the aid.
- (34) *End users*: The measure aims at the provision of NGA broadband services to public authorities, business users and end users. Businesses (SMEs in particular) in the targeted geography will therefore indirectly benefit from the State aid.

Distortion of competition

- (35) The intervention of the state alters the existing market conditions. It will provide a selective advantage to the bidder prevailing in the tender and will moreover benefit all third party providers who use the improved infrastructure to compete with other third party providers. Finally, it will alter the conditions of competition between end users in North Yorkshire who are likely to subscribe to the NGA services and end users elsewhere in the European Union. Therefore, the fact that State aid is used to extend the existing backhaul network in North Yorkshire will have the effect of distorting competition.

Effect on trade

- (36) Insofar as the intervention is liable to affect providers of electronic communications services 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. Moreover, the measure has the potential to distort competition between end users located in North Yorkshire and elsewhere in European Union.

Conclusion

- (37) Having established that the project involves aid within the meaning of Article 107(1) TFEU, it is necessary to consider whether the measure can be found to be compatible with the internal market.

VI. ASSESSMENT OF THE MEASURE: COMPATIBILITY

- (38) The Commission has assessed the compatibility of the scheme according to Article 107 (3) (c) TFEU and in the light of the Broadband Guidelines.
- (39) As described in points 34 and 45 of the Broadband Guidelines, in order to assess whether a measure is compatible under Article 107(3)(c) of the TFEU, the Commission balances positive and negative effects of the aid according to the criteria set out in the Guidelines.

The balancing test and its application to aid for the broadband network deployment

- (40) In applying the balancing test, the Commission assesses the following questions²¹:
- (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?

²¹ Broadband Guidelines, at paragraph 35.

- (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

Union policy

- (41) The Commission actively supports the widespread availability of broadband services²². There is clear evidence for the regional economic development benefits resulting from more widespread broadband deployment, including job creation and retention as well as improved health and education services. In order to achieve better broadband coverage and take-up, the Commission encourages Member States to put comprehensive national broadband strategies in place.²³ A well targeted state intervention in this field can contribute to reducing the '*digital divide*' that sets apart areas or regions within a country where affordable and competitive broadband services are on offer and areas where such services are not.
- (42) The measure at stake will help prevent the emergence of a digital NGA divide in the United Kingdom by extending the reach of backhaul wholesale access network services to rural areas and small market towns in North Yorkshire. It is therefore in line with the common interest.

Market failure and cohesion considerations

- (43) As set out in paragraphs 52 to 58 of the Broadband Guidelines, NGA networks, i.e.: networks which are mainly fibre based or use advanced upgraded cable networks, have the potential to facilitate the improvement of all aspects of broadband technology and broadband services.
- (44) By providing financial support for NGA services in rural areas of North Yorkshire where commercial providers are unlikely to provide NGA services in the medium term future (i.e.: in the next three years), the UK authorities pursue genuine cohesion and economic development objectives and thus, their intervention is likely to be in line with the common interest.

VI.2. Well-designed aid

(a) Aid is the appropriate instrument

- (45) In the situation currently under assessment, no private investments have taken place in the targeted areas as the operators would not be able to recoup their investments. The current legal and regulatory framework does not provide for any means to oblige operators to make this investment. According to the UK authorities, regulation is

²² For references, see section I "Introduction" of the Broadband Guidelines.

²³ Commission Communication COM(2004) 369 of 12.05.2004, "Connecting Europe at High Speed – National Broadband Strategies".

unlikely to lead to sufficient investments for the provision of broadband services in these un-served areas, where profitability of investments is low. Moreover, no such investment is planned (see § 10).

- (46) Without further public intervention, avoiding the emergence of a new "*digital divide*" between rural and urban areas does not seem possible, which could lead to the economic and social exclusion of the local citizens and undertakings. Based on the information provided by the UK authorities, it therefore appears that there is no alternative to granting public funding to overcome a lack of industry interest in providing NGA services. Public funding for the deployment of an NGA network is therefore an appropriate instrument in the present case.

(b) The aid provides the right incentives to operators

- (47) As set out in paragraph 50 of the Broadband Guidelines, regarding the incentive effect of the measure, it needs to be examined whether the broadband network investment concerned would not have been undertaken within the same timeframe without any State aid. According to the results of the public consultation and market research referred to above in paragraphs (9) and (10), in the targeted areas no investment would take place without public funding, hence the aid is expected to produce a change in the investment decisions of the operators. Moreover, as explained in paragraphs (14) to (15), the beneficiary will be selected by means of a public tender. Bidders must submit investment plans indicating the amount of aid that they consider necessary to carry out the investment given the anticipated investment and operating costs and revenues. Therefore, the aid should provide a direct and appropriate investment incentive for the selected operator.

(c) Design of the measure

- (48) In order to minimise the State aid involved and the potential distortions of competition, the notified measure has to meet a number of necessary conditions:
- (a) *Mapping exercise, coverage analysis and consultation with stakeholders:* The Commission is satisfied that the maps of the UK authorities, referred to in paragraph (9), are adequate to identify the white, grey and black NGA areas within the meaning of paragraphs 68 to 70 of the Broadband Guidelines. As set out in paragraph (10), the UK authorities executed a consultation exercise to find out whether industry would on its own expand the existing fibre based backhaul network to small market towns and business parks. This market research showed that no such plans exist to date.
- (b) *Open tender process:* The recipient of the aid will be selected by an open, competitive tender procedure (see paragraphs (14) to (15)), in full compliance with national and EU public procurement principles. This procedure has the effect of maximising the effect of the aid provided while minimizing any potential advantage granted for the selected operator.
- (c) *Most economically advantageous offer:* Within the context of an open tender, the UK authorities will select the most economically advantageous offers among those presented by the operators. The awarding authority will stipulate in advance the award criteria and their relative weighting. Under the terms of the open tender, the bidder with the lowest amount of aid requested receives more priority points within the overall assessment of the bid (see paragraph (15)).

- (d) *Technological neutrality*: The project does not favour any technology or network platform leaving it to commercial operators to come up with the most appropriate technological solutions to provide very high speed broadband services to end users. In particular, the prevailing bidder can use any technology to link the new PoPs to the backhaul network and to connect them to business parks and market towns (see § 19).
- (e) *Use of existing infrastructure*: Bidders have the possibility to contribute their infrastructure to the project, or acquire or rent infrastructure from another operator, which limits the economic impact of the project for operators that may already have basic electronic communications infrastructure in place. In order to try and limit the economic impact on existing network operators, bidders (or consortium of bidders) will be given the possibility to contribute their infrastructure to the notified project, which possibility included the use the products from Openreach and BT Wholesale that are available under the UK's regulatory framework. The use of existing infrastructure could allow bidders to reduce their investment costs, however in the current situation, for a bidder to be selected, it had to comply with a wide range of criteria that no single aspect of the solution (including the possible use of existing infrastructure) could overly influence the overall solution or distort the outcome of the evaluation.
- (f) *Wholesale access*: The selected operator (option 1) or NYnet (option 2) will have to provide access to the subsidised networks to other operators on open, transparent and non-discriminatory terms for ten years that will enable the latter to compete on the retail level.
- (g) *Price benchmarking*: In order to ensure effective wholesale access and to minimise potential distortion of competition, access wholesale prices will be based on the average published (regulated) wholesale prices that prevail in other comparable, more competitive areas of the country and the European Union. NYnet shall consult the NRA regarding benchmarking wholesale tariffs. Wholesale prices on the subsidized network shall be monitored and approved by the NRA with the objective to keep these at a reasonable and non-discriminatory level.
- (h) *Monitoring and clawback provision*: The project will be examined on a regular basis by North Yorkshire County Council and the monitoring mechanisms implemented will ensure that if the selected operator (option 1) or NYnet (option 2) fails to comply with the rules, the granting authorities will recover the aid granted. By ensuring that any extra profit generated through the operation of the networks will be clawed back (both option 1 and 2), the UK authorities ensure that the recipient of the aid will not benefit from overcompensation and will minimise *ex post* and retroactively the amount of aid deemed initially to have been necessary.
- (49) To the extent the measure aims to support the deployment of an NGA network in "white NGA areas", where one basic broadband network may already exist²⁴ (traditional grey area) further conditions shall be met as laid down in paragraph 73 of the Broadband Guidelines. In this respect, the UK authorities proved that:
- (i) The broadband services provided over the existing networks are not sufficient to satisfy the continuously growing needs of citizens and business users in the area in

²⁴ See paragraph 3.

question as explained in paragraphs (4) and (5) and commercial operators do not have sufficient commercial incentives to upgrade the existing networks as described in detail in paragraph (10).

- (j) There are no less distortive means (including ex ante regulation) to reach the stated goals as described in paragraph (45).
- (50) Concerning the conditions laid down in paragraph 79 of the Broadband Guidelines, the UK authorities proved that the following conditions are met:
- (k) Effective wholesale access: the access obligations imposed on the chosen operator include access to both passive and active infrastructure for 10 years without prejudice to any similar regulatory obligations that may be imposed by the NRA.
 - (l) As explained in paragraph (24), the NRA has been consulted in setting the conditions for wholesale network access. The NRA is expected in the future to continue either to regulate ex ante or to monitor very closely the competitive conditions of the overall broadband market and impose where appropriate the necessary remedies provided by the applicable regulatory framework. The UK authorities will ensure that, if not uniform, at least very similar access conditions will apply throughout all broadband markets identified by the NRA.
 - (m) Effective and full unbundling: as explained in paragraphs (22) and (23), the NGA network architecture that will benefit from State aid will support effective and full unbundling and satisfy all different types of network access that operators may seek, including but not limited to access to ducts, fibre and bitstream.

VI.3. The distortions of competition and the effect on trade are limited, so that the overall impact of the measure is positive

- (51) The Commission concludes that the notified measure will offset a geographical and commercial handicap and is objectively justified to address the lack of availability of enhanced broadband services due to the commercial unattractiveness of upgrading existing broadband services.
- (52) In view of the characteristics of the project and of the safeguards applied by the UK authorities, the overall impact on competition is deemed to be positive.
- (53) On balance, the Commission concludes that the overall effect of the measure is deemed to be positive. The measure is clearly in line with the objectives of Article 107(3)(c) of the TFEU as it facilitates the development of certain economic activities (broadband services) in certain remote and rural areas. The intervention is designed in a way that does not distort competition or adversely affect trading conditions to an extent contrary to the common interest.

VI.4. Conclusion

- (54) 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 107(3)(c) of the TFEU. In view of the duration of the scheme, the Commission would like to draw the UK

authorities' attention to future revisions of the Broadband Guidelines, which might make appropriate measures to the scheme necessary.

VII. DECISION

On the basis of the foregoing assessment, the Commission has accordingly decided that the aid measure "*North Yorkshire Next Generation Broadband - Extension of NYNET in Rural Areas and Market Towns*" is compatible with Article 107(3)(c) of the TFEU.

The UK authorities are reminded that, pursuant to Article 108(3) of the TFEU, they are obliged to inform the Commission of any plan to extend or amend the measure.

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:

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Your request should be sent by encrypted e-mail to stateaidgreffe@ec.europa.eu or, alternatively, by registered letter or fax to:

European Commission
Directorate-General for Competition
State Aid Greffe
Rue Joseph II 70
B-1049 Brussels
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Yours faithfully,

For the Commission

Joaquín ALMUNIA
Vice-President of the Commission