II

(Acts adopted under the EC Treaty/Euratom Treaty whose publication is not obligatory)

DECISIONS

COMMISSION

COMMISSION DECISION

of 19 July 2006

on the measure No C 35/2005 (ex N 59/2005, which the Netherlands are planning to implement concerning a broadband infrastructure in Appingedam

(notified under document number C(2006) 3226)

(Text with EEA relevance)

(2007/175/EC)

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Community, and in particular the first subparagraph of Article 88(2) thereof,

Having regard to the Agreement on the European Economic Area, and in particular Article 62(1)(a) thereof,

Having called on interested parties to submit their comments pursuant to the provision(s) cited above [1] and having regard to their comments,

Whereas:

I. PROCEDURE

(1) By letter dated 2 November 2004 (and registered under CP 212/2004 on 18 November 2004), Essent Kabelcom (hereafter: Essent), a cable operator, filed an informal complaint with the Commission. The complaint concerns the public funding of a fibre access network ('Fibre To The Home' or 'FTTH') in Appingedam, a town in the north of the Netherlands. Essent later confirmed that the complaint should be qualified as a formal complaint.

(2) Essent, which is the second largest cable operator in the Netherlands and which also operates a cable network in Appingedam, had also lodged an appeal in a Dutch court in September 2004 [2]. The court ordered the municipality on the basis of Article 88(3) EC Treaty to notify the plans to build the network in Appingedam and to grant aid to the Commission and to suspend the further roll-out of the network.

(3) By letter registered on 3 February 2005, the Dutch authorities notified the measure to the Commission 'for reasons of legal certainty', asserting that the measure did not constitute aid. On 31 March 2005, the Commission requested further information from the Dutch authorities. The authorities, after an extension of the deadline, replied by letter of 4 August 2005, registered on 16 August 2005.

(4) By letter dated 20 October 2005, the Commission informed the Dutch authorities that it had decided to initiate the formal investigation procedure laid down in Article 88(2) of the EC Treaty with respect to the measure at hand ('decision to initiate the procedure'). The decision to initiate the procedure was published in the *Official Journal of the European Union* of 16 December 2005. [3] The Commission called on interested parties to submit their comments on the measure.

[1] OJ C 321, 16.12.2005, p. 7.

[2] Case referred to as LJ-N AQ8920 which can be found at www.rechtspraak.nl.

[3] See footnote 1.

(5) The Dutch authorities responded by letter of 3 January 2006 to the request for comments in the decision to initiate the procedure. The Commission further received comments from the following interested parties:

— Essent Kabelcom B.V., received by letter dated 13 January 2006;

— VECAI, received by letter dated 13 January 2006;

— An industry association which requested not to reveal its identity, received by letter dated 16 February 2006;

(6) The comments from the interested parties were sent to the Dutch authorities on 3 May 2006. The authorities informed the Commission on 7 June 2006 that they did not have any comments with regard to the observations received.

II. DESCRIPTION OF THE MEASURE

II.1. Background

(7) The municipality of Appingedam considers that public intervention is needed to address the non-pervasive supply of advanced broadband ([4]) services to companies and citizens by supporting the deployment of a glass fibre access network ('Fibre To The Home', 'FTTH') in Appingedam. According to the municipality, Essent and telecommunications operator KPN provide broadband access in Appingedam, but they do not provide 'advanced broadband services'. The municipality decided to participate financially in the project after private investors and operators had shown no interest to take part in the project on market terms.

II.2. The envisaged measure

(8) The *passive layer* of the planned glass fibre network (rights of way, ducts, fibres, etc.) would be owned by a public foundation ('Stichting Glasvezelnet Appingedam', hereafter: 'the foundation') set up and controlled by the municipality. The investment in the passive layer is estimated at € 4,9 million. The municipality of Appingedam will provide either a loan or a guarantee for a loan for that amount. Initially, it was not foreseen that the construction of the passive layer would be tendered out. However, the municipality decided, as stated in the letter of the Dutch authorities of 4 August 2005, that the construction of the passive layer would be subject to a public procurement procedure.

(9) On the basis of the passive layer, an *active network* would be operated which provides wholesale services to service providers who would offer broadband services to end users (households and businesses). The costs of the active layer (telecommunications equipment, network management, etc.) are estimated at € 1 to 1,3 million. The active components have, according to the Dutch authorities, an estimated lifecycle of 5 to 8 years.

(10) The authorities initially stated that the active layer would be owned and financed by an entity ('Stichting Damsternet') set up by private investors. Not all potential private investors were known at the initial stage of the project. According to the authorities, […], […] and […] had initially shown an interest.

(11) However, in their letter of 4 August 2005, the authorities stated that the municipality would in fact tender out the concession for the active layer, including the operation of the network, to an operator (hereafter 'the operator'). According to the information available to the Commission, it is not envisaged that other providers of electronic communications services than the operator would have direct access to the passive layer.

(12) It is unclear under which financial terms the concession would be granted. The draft concession agreement submitted to the Commission lays down that the concession holder would pay a concession fee to the foundation on an annual basis. The foundation would claim 'a payment which equals a maximum of 80 % of the generated annual cash flow'. In case of a negative cash flow, the foundation would not claim the payment of the fee. In that case it would only claim a minimal payment as laid down in an annex to the concession agreement. The annex to the concession agreement submitted to the Commission does however not set out the amount or conditions of the foreseen payments.

II.3. Product or service markets concerned

(13) In case the FTTH network in Appingedam would be built, providers of electronic communications services would use the wholesale access provision to offer retail broadband services to end users. Therefore, both the wholesale as well as the retail markets in Appingedam are affected by the introduction of the planned FTTH network financed by the municipality.

(14) As regards the *retail market* for broadband services in Appingedam, both KPN and Essent offer broadband services to end users: Essent currently offers up to 5Mbit/s and KPN currently up to 6 Mbit/s. Both Essent and KPN offer 'triple play' services (telephony, internet, digital/analogue TV). Other Internet Service Providers are also in the position to offer broadband services based on the wholesale offers of KPN. According to information available

([4]) Broadband services defined as 'always-on' communications services allowing transmission of large volumes of data can be delivered using various combinations of communications network technologies ('platforms'). Technologies can feature either fixed or radio based transmission infrastructure, and they can substitute or complement each other according to the individual situation. Current mass-market broadband services have generally download speeds starting from 512Kbit/s/ - 1Mbit/s. For business users, much higher speeds are needed.

to the Commission, Essent will offer 8 Mbit/s and for its high end product even 15 Mbit/s in the course of 2006 ([5]). Moreover, both KPN and Essent have the technical possibilities to further increase, on the basis of their existing networks, the bandwidth capacity of their service offerings.

(15) As regards the wholesale markets, the intervention by the municipality of Appingedam is aimed at the provision, through the operator, of a wholesale glass fibre access network and wholesale high-bandwidth broadband services over fibre ([6]). As regards the wholesale markets identified in the Commission Recommendation on relevant markets ([7]), two specific markets seem to be — directly or indirectly — concerned by the proposed measure. These appear to be, the market for wholesale unbundled access to local loops (market 11 of the Recommendation) and the market for wholesale broadband access (market 12 of the Recommendation). In Appingedam, KPN offers wholesale access to infrastructure and services necessary for the provision of broadband services ([8]).

II.4. Reasons for initiating the formal investigation procedure

(16) In its opening decision, the Commission expressed reservations with regard to the compatibility of the measure with the Common market on the basis of Article 87(3)(c) of the EC Treaty. Relating to the necessity of the measure, the opening decision questioned whether the situation in Appingedam could actually be described as featuring elements of 'market failure'.

(17) It was stated in the opening decision that broadband access was in fact available in Appingedam, although the broadband services currently provided are not entirely comparable with the services which could be offered over the planned network. Consequently, it was considered that there is an important overlap of network coverage and services offered between existing networks and the envisaged measure.

(18) The Commission also stated that it was difficult to envisage applications or services for citizens and businesses which could not be deployed using broadband services delivered over the existing networks. It was considered that the degree of substitutability between retail and wholesale services delivered over the envisaged FTTH network on the one hand and services delivered over the existing networks on the other hand were high. Hence, the potential distortion of competition by the measure was expected to remain very high for the foreseeable future.

(19) The measure foreseen by the authorities would entail a serious risk that State intervention would crowd out existing and future investments by market players. Accordingly, it was expressed in the opening decision that it would under these circumstances also be questionable whether the foreseen measure and the use of the aid instrument as such were proportionate.

III. OBSERVATIONS RECEIVED BY THE COMMISSION

III.1. Observations by third parties

(20) The Commission has received comments from three interested parties: Essent, Vecai and one industry association requesting anonymity.

(21) Cable operator Essent states, referring to a report published by the CPB ([9]), that there is no market failure present in Appingedam. The CPB investigated the possible presence of market failure in the broadband market in the Netherlands ([10]) and found that there are no significant market failures present in the Dutch broadband market. Policy measures can, according to the report, hardly be based on the argument of market failure. According to Essent, the Minister of Economic Affairs supported the conclusion of the CPB in a letter to the Dutch parliament of 5 December 2005, which was submitted to the Commission.

(22) Essent also states that Appingedam cannot be considered a peripheral area with socio-economic arrears. The services the municipality wants to offer for education, healthcare and elderly care can in fact be offered through the existing networks. Essent states that it supports the Commission's conclusion that it is not clear what applications or services could be offered on the FTTH network that cannot be offered through the existing networks. Moreover, the prices of broadband access in Appingedam are, according to Essent, not higher than elsewhere in the Netherlands.

([5]) According to information from Essent received by the Commission.

([6]) At present, a market for wholesale access to ducts or dark (unlit) fibre is not listed in the Commission Recommendation on relevant markets for electronic communications services. There is therefore, at least currently, no explicit provision in the European regulatory framework for electronic communications to offer third party access to duct or fibre infrastructure, Commission Recommendation 2003/311/EC of 11 February 2003 on relevant product and service markets within the electronic communications sector susceptible to ex ante regulation in accordance with Directive 2002/21/EC., OJ L 114 of 8 May 2003, p. 45 ff..

([7]) See footnote 6.

([8]) KPN has significant market power in the markets for wholesale unbundled access and specific wholesale leased lines. Therefore, KPN is subject to access regulation concerning important inputs for the provision of broadband services, such as local loops or wholesale leased lines. Moreover, KPN provides voluntarily bitstream access, a wholesale access product.

([9]) Centraal Planbureau (Netherlands Bureau for Economic Policy Analysis) is a research institute which delivers independent economic analyses. The CPB is independent with respect to content, but at the same time is formally part of the central government.

([10]) *Do market failures hamper the perspectives of broadband?*, Centraal Planbureau, December 2005.

(23) VECAI, the trade association of cable companies in the Netherlands, considers the proposed state aid measure to be incompatible with Article 87(3)(c) of the EC Treaty. Government funding in this sector would, according to VECAI, directly distort competition in a highly competitive market.

(24) There is, according to VECAI, no market failure present in the market for broadband services in the Netherlands. To substantiate its statement, VECAI also refers to the report of the CPB and the letter of the Minister of Economic Affairs also mentioned by Essent. The currently available infrastructures are capable of supporting highly advanced broadband services. The proposed investments would, according to VECAI, duplicate rather than complement existing infrastructures.

(25) VECAI also states that Appingedam cannot be considered as a peripheral area. Moreover, according to VECAI, the fact that the municipality is active both as an infrastructure owner and a public authority (granting permits, rights of way, etc.), may, under some circumstances, lead to a conflict of interest.

(26) The industry association requesting confidentiality submitted that the Commission should encourage the deployment of open passive access infrastructures. The decoupling of services and infrastructure can, according to the association, lower barriers for entry and increase competition as well as stimulate innovation. The association is of the opinion that the aim of competition rules should be to enhance overall welfare and not to protect existing market players.

(27) The association states that there is no need for state intervention if the owners of the existing infrastructures agree to make their infrastructure available to all other providers of electronic communications services and provide access on a fair and cost-oriented basis. However, if this is not the case, there is in fact a market failure present and public authorities should be allowed to intervene.

III.2. **Observations by the Dutch authorities**

(28) In response to the request for comments in the decision to initiate the procedure, the authorities did not refute any of the arguments brought forward by the Commission in the opening of the procedure. The Dutch authorities submitted a number of documents (e.g. research reports) that would explain the reasoning behind the measure and the possible usage of the network.

(29) The emphasis in the reports is on the possible applications of the planned network. The Dutch authorities argue that the choice for a glass fibre network was made based on the fact that the infrastructure currently available does not support the desired bandwidth capacity and service quality. The planned infrastructure would enable fast internet connectivity, video-conferencing, video-on-demand, interactive gaming/TV and IP-VPN ([11]) services.

(30) The services and applications which can be offered over the envisaged FTTH network are considered to be important for the exercise of the tasks of the municipality itself (e.g. offering e-Government services), for the healthcare sector (e.g. telemedicine and co-operation between different institutions involved in healthcare), as well as education (e.g. telelearning applications). In this context, the Dutch authorities mention that Appingedam has a high rate of unemployed and elderly people which need access to advanced broadband services.

IV. **PRESENCE OF STATE AID**

(31) The Dutch authorities have brought forward several arguments implying that the measure does not entail State aid or that the project merely concerns the provision of a 'public infrastructure'.

IV.1. **General infrastructure?**

(32) According to the Dutch authorities, the measure at hand does not fall within the scope of Article 87(1) EC, but should rather be seen as a typical task of a public authority, providing general 'public' infrastructure open to all parties at similar conditions.

(33) The Commission considers that this would be the case if an infrastructure is needed to provide a service that is falling within the responsibility of the State towards the general public and is limited to meeting the requirements of that service. Moreover, it should be a facility that it is unlikely to be provided by the market because it is not economically viable and the way in which it is operated should not selectively favour any specific undertaking.

(34) Accordingly, the Commission is of the opinion that the project cannot be qualified as a general infrastructure which is outside the scope of State aid control. Contrary to, for example, certain infrastructures in the transport sector, which are open to all potential users on equal and non-discriminatory terms and which are not provided (constructed and/or managed) by the market on purely commercial terms, this type of infrastructure is actually deployed by private parties which are also delivering electronic communications services, although not necessarily on the conditions foreseen by the municipality of Appingedam for the measure at hand.

(35) As the presence of KPN and Essent in Appingedam shows, the provision of a local access network for electronic communications is not a typical task of a public authority, but such networks are normally deployed by providers of

([11]) Internet-protocol based Virtual Private Network services.

electronic communications services who deliver broadband services to households and businesses. The project thus duplicates to a certain extent market initiatives or makes possible the provision of services which are already available.

(36) Indeed, the absence of distortion of competition is not an inherent feature of this type of facilities, but rather has to be verified on a case by case basis. The market situation in Appingedam is such that the measure distorts or threatens to distort competition by competing with existing private networks and by discouraging future private investment in similar facilities.

(37) The Commission thus considers that the project in Appingedam falls within the scope of State aid control rather than considering it a general infrastructure which falls within the normal responsibilities of the State towards the public.

IV.2. The provision of a Service of General Economic Interest (SGEI)?

(38) Although the Dutch authorities have not explicitly invoked the existence of a Service of General Economic Interest, the argument that the provision of the FTTH network in Appingedam might represent a SGEI will be assessed.

(39) Member States have in general a large power of appreciation concerning the identification of a service as SGEI, while respecting the case-law of the EU courts which set out the general principles to be respected ([12]).

(40) In the measure at hand, the envisaged contractual relationship between the operator of the active layer and the municipality/the foundation reflects rather a classical private-public-partnership than the entrustment and implementation of a Service of General Economic Interest. This can also be deduced from the communication and documentation of the Dutch government regarding the measure which never mentions the term 'Service of General Interest' or similar notions. Unlike in cases in which the Commission decided that public financial support constitutes compensation for a SGEI — *cf.* decision on *Pyrénées-Atlantiques* ([13]) – neither the foundation nor the operator have a clear SGEI mandate to enable broadband access to the general public, citizens and businesses, in rural and remote areas where no other operator is providing ubiquitous and affordable broadband access.

([12]) As expressed by the Commission previously in the area of access to broadband services, for instance in paragraph 46 ff. of the decision concerning a broadband project in the French region of Pyrénées-Atlantiques, Commission decision of 16 November 2004 in case N381/04, 'Pyrénées-Atlantiques' (France), Official Journal C162/5 of 2 July 2005.

([13]) See footnote 11.

(41) In the case of *Pyrénées-Atlantiques*, the direct objective of the measure was to enable access to broadband services through a wholesale network to the general public in a region with limited broadband coverage. These conditions do not apply in Appingedam where broadband services are already provided over two networks.

(42) As the Commission finds that the measure does not represent a Service of General Economic Interest, it does not deem necessary to assess the measure in light of the other criteria laid down in the *Altmark jurisprudence* ([14]).

IV.3. The municipality of Appingedam does not act like a private investor

(43) The Dutch authorities claim that the investments by the municipality and the foundation are necessary precisely because market players are not willing to invest in the passive FTTH network in Appingedam as the expected return on investment is not sufficient to justify the investment on market terms.

(44) According to the Dutch authorities, the municipality had requested several banks to finance the investment in the passive network, but all banks except for the Bank Nederlandse Gemeenten (BNG) have refused to finance the project. BNG is willing to grant a loan to the municipality because, according to the municipality, BNG only assessed the creditworthiness of the beneficiary of the loan, i.e. the municipality, but not the setup of the FTTH network by the foundation or the overall project as such.

(45) Hence, the investment by the municipality in the foundation and the investment by the foundation in the passive network do not pass the 'market investor test' as a market operator would not have invested in the passive network, as experienced by the municipality when it contacted private investors.

IV.4. State aid assessment

(46) In their initial submissions before the Commission's decision to initiate the procedure, the Dutch authorities claim that there is no aid involved in this project, on any of the four levels which can be distinguished. There would be no advantage to the foundation and even if there were an advantage, it would have no effect on trade between Member States. The authorities are further of the opinion that there is neither aid granted to the operator of the active layer nor to the retail service providers. The operator will (have to) charge a wholesale price in line with market rates to service providers that deliver retail services which they already offered over existing infrastructures. If the Commission were to request the municipality to guarantee that the

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

operator charges these market prices, the municipality would lay this down in the agreement between the foundation and the operator.

(47) Finally, the authorities claim that contrary to the ATLAS case ([15]) the network in Appingedam will be mainly used to provide services to households/citizens who do not perform economic activities. If there is aid to undertakings in Appingedam, this remains under the allowed aid intensity laid down in Regulation 69/2001 ('de minimis') ([16]).

(48) The Commission already noted in its opening decision ([17]) that the Dutch authorities had not provided information to substantiate these arguments. Following the decision to open the procedure, the authorities have not provided any further evidence supporting their reasoning concerning these points.

(49) According to the Treaty and consolidated case law there is State aid within the meaning of Article 87(1) if:

— there is an intervention by the State or through State resources;

— it confers an economic advantage on the recipient;

— it distorts or threatens to distort competition and

— the intervention is liable to affect trade between Member States.

State resources

(50) The municipality of Appingedam will provide either a loan or a guarantee for a loan. Therefore, at least part of the resources for financing the passive layer of this network would come from the municipality of Appingedam. These funds thus have to be considered as State resources ([18]).

Economic advantage

(51) The loan or guarantee to be provided by the municipality confer an advantage to several actors:

Advantage to the foundation

(52) The municipality has set up and controls the foundation which will own the passive layer of the network. In turn, the foundation makes the passive layer available to the operator. The construction and rental of the passive layer can be considered as an economic activity and the foundation can therefore be qualified as an undertaking within the meaning of Article 87(1) EC.

(53) Based on the information available to the Commission, the passive layer is financed by the municipality without any contribution from the foundation. The foundation does not seem to pay a remuneration for the use of the network either. As outlined above, the investment by the municipality of Appingedam in the passive network does not seem to be in line with the Market Economy Investor principle. Therefore, the state funding provided by the municipality represents an economic advantage to the foundation within the meaning of article 87(1) EC Treaty.

Advantage to the operator of the active network

(54) The authorities have confirmed that the concession for operating the passive infrastructure will be tendered out. If the concession is tendered out, in principle, the tender could minimize the economic advantage for the successful supplier within the meaning of Article 87(1) EC Treaty.

(55) However, although as a result of the tender, the operator would not obtain an excessive return from the project it would, nevertheless, have access to the passive network at conditions which will — for the reasons set out above — most likely not reflect the underlying costs incurred by the municipality and/or the foundation for building this network and which are not set to maximise the revenues from the project for the municipality. Although it is unclear under which financial terms the concession would be granted, as indicated above, it is likely that the pricing of this access may be below the underlying costs due to State intervention and will probably not be based on market rates for access to a comparable passive network.

(56) Therefore, the operator would be able to establish its business based on the government-funded network and enter the market for wholesale services on conditions not otherwise available on the market. The intervention of the State therefore confers an economic advantage to the operator.

Advantage to providers of electronic communications services

(57) Even if access to the optical network via the operator is provided to all interested providers of electronic communications services at transparent and equal conditions, it is likely that the pricing of this access may be below the

([15]) Cf. Commission decision of 9 September 2004 in case N 213/2003 — United Kingdom Project ATLAS; broadband infrastructure scheme for business parks (Corrigendum).

([16]) OJ L 10 from 13.01.2001, p. 30.

([17]) In paragraph 10.

([18]) As set out in point 2.1.2. of the Commission Notice on the application of Articles 87 and 88 of the EC Treaty to State aid in the form of guarantees, OJ C 71 of 11.3.2000, p. 14, there may be State aid under Article 87(1) of the EC Treaty even if no payments are made by the State under a guarantee. Moreover, even though there has not been a direct and clear transfer of State resources, State resources are involved, cf. case C-200/97, Ecotrade v. AFS [1998] ECR-I-7907, par. 43, Joined cases T-204/97 and T-270/97, EPAC [2000] ECR-II-2267, par. 80 and 81.

underlying costs due to State intervention and will probably not be based on market rates for comparable wholesale broadband services. Hence, the service providers will be granted an advantage since they have the possibility of entering the market for high speed retail broadband services, operating their business on conditions not otherwise available on the market.

Advantage to the end-users

(58) The above-mentioned elements suggest that the advantage granted to the operator, service providers and other telecommunication service providers may also translate into an advantage for the households and enterprises in Appingedam. Whereas residential users are not subject to State aid rules, businesses in the targeted geography may benefit from service coverage beyond and prices below what would be provided purely on a commercial basis like currently offered leased line offers or satellite connections. In addition, they may enjoy an advantage in comparison to businesses located in other regions of the Netherlands. The Dutch authorities have in addition brought forward that the end-users are all small to medium sized enterprises (SME) but they have not motivated why aid to this group would be justified. In addition, the aid measure is not only limited to the end-users.

(59) The authorities have reiterated that if there is an aid to undertakings in Appingedam, the level of the aid remains under the allowed aid intensity laid down in Regulation 69/2001 ('*de minimis*'). The Commission acknowledges that the advantage for each of the business end users could be below *de minimis* aid thresholds. However, it cannot be excluded that the aid exceeds the limits set out in that Regulation or violates the non-cumulation requirements.

Distortion of competition

(60) The envisaged intervention by the State alters the existing market conditions in Appingedam by enabling subsidised entry into the wholesale market for fast broadband services (the operator) as well as allowing service providers to enter in the downstream markets of, *inter alia*, retail broadband and retail telecommunications services. In making their decisions regarding network investment and maintenance, the existing providers Essent and KPN have based their calculations on the assumption that other providers of electronic communications services would have had to bear the full costs of a new network or pay a market price for access to wholesale services, which appears to be no longer the case after the envisaged State intervention. The fact that a new network becomes available, *prima facie* at conditions below market prices, has the effect of distorting competition also in the downstream markets of retail broadband and other electronic communications services.

Effect on trade

(61) Insofar as the intervention is liable to affect telecom operators and service providers from other Member States, the measures have an effect on trade. The 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. For example, several cable operators and Internet service providers active in the Netherlands are part of international groups which operate on a pan-European basis and have investments in the Netherlands but also in other countries.

Conclusion

(62) In view of the above, the Commission considers that the project funded by State resources grants an economic advantage to the foundation, the operator and the service providers, which could at least partially translate into an economic advantage for businesses in Appingedam. The project furthermore distorts competition and has an effect on trade between Member States.

(63) Having considered that the project involves aid within the meaning of Article 87(1) of the EC Treaty, it is necessary to consider whether the measure can be found to be compatible with the common market.

V. COMPATIBILITY ASSESSMENT

(64) Article 87(1) of the EC Treaty provides for the general principle of prohibition of State aid within the Community. Article 87(2) and 87(3) of the EC Treaty provide exemptions to the general incompatibility principle as stated in Article 87(1).

(65) Article 87(2) stipulates automatic exemptions to the general prohibition of State Aid in Article 87(1). None of the exemptions foreseen in Article 87(2) can apply to the present case. With regard to Article 87(2) (a), the project can not be deemed to have a social character and the aid is not granted solely to individual consumers.

(66) The derogations provided for in Article 87(3)(b) and (d) EC are not applicable either. It needs to be mentioned though that Appingedam is located within an area eligible for regional aid ([19]), and is therefore in principle eligible for regional aid on the basis of Article 87(3)(c) EC. The Commission established guidelines for regional aid (hereinafter: Guidelines) ([20]) on the basis of Article 87(3)(c) EC. The measure can nevertheless not be justified under these Guidelines for the following reason:

([19]) National regional state aid map for the Netherlands 2000-2006 (State aid N 228/2000, ref. SG (2000) D/106075 of 8.8.2000).

([20]) Guidelines on national regional aid, OJ C 74, 10.03.1998.

(67) The measure is not based on a defined regional aid scheme and, in addition, favours only a certain sector in one town in that region. As stated in the Guidelines, '*an individual ad hoc aid confined to one area or activity may have a major impact on competition in the relevant market (in this case: impact on the third party operators) and its effects on regional development are likely to be too limited. The Commission considers therefore that such aid does not fulfil the requirements set out in the Guidelines* ([21]).'

(68) The Commission has further laid down other guidelines and frameworks defining rules for aid that may fall under the exemption foreseen in Article 87(3)(c). None of these guidelines applies to the present case. Since the intervention does not fall under any of the other existing frameworks or guidelines either, the Commission considers that the assessment of the compatibility of the measure with the common market needs to be based directly on Article 87(3)(c) of the EC Treaty ([22]) (hereinafter: Article 87(3)(c) EC) which states that:

(69) '*aid to facilitate the development of certain economic activities or of certain economic areas, where such aid does not adversely affect trading conditions to an extent contrary to the common interest*' may be considered to be compatible with the common market.

(70) In order to be compatible with Article 87(3)(c) an aid must pursue an objective of common interest in a necessary and proportionate way.

(71) Hence, the Commission will assess:

(a) Whether the proposed aid is aimed at a well-defined objective of common interest, i.e. whether it remedies a market failure or pursues another objective of common interest such as cohesion.

In this case, it shall also be assessed whether

(b) the aid is well-designed to deliver the objective of common interest and in particular:

(i) Is the aid measure an appropriate instrument, i.e. is the aid capable of meeting the objective and are there other, clearly superior, instruments to achieve the same result?

(ii) Is there an incentive effect, i.e. does the aid change the behaviour of firms?

(iii) Is the aid measure proportional, i.e. could the same change in behaviour be obtained with less aid or with less distortive means?

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

Market failure

(72) The Commission needs to assess whether there is a market failure in the broadband market in the Netherlands, and, more specifically, in Appingedam, which could be remedied by State aid. Recent data ([23]) confirm the high degree of competition and the multitude of broadband offers in the Dutch market, which has the highest broadband penetration rate in the EU (about 30 % in mid-2006 and rapidly increasing further).

(73) The Dutch broadband market is a fast-moving environment and 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 future ([24]) and it is likely that 'next-generation networks' will be deployed over the next years without state support. ([25]) Moreover, third-generation mobile operators are currently rolling out mobile broadband services in the Netherlands, and around 70 % of the Dutch territory is, according to the information available to the Commission already covered by these services ([26]). These market-driven roll-out plans show that public intervention risks crowding-out private initiative.

([21]) Cf. Guidelines, Chapter 2, scope, p. 10.

([22]) This approach was also followed by the Commission in other cases, see for instance: State aid decisions for the UK: N126/04 'Broadband for SMEs in Lincolnshire' of 14.12.2004, N199/04 'Broadband business fund' of 16.11.2004, N307/04 'Broadband in Scotland — remote and rural areas' of 16.11.2004 (See: http://europa.eu.int/comm/secretariat_general/sgb/state_aids/).

([23]) European Commission (2006), European Electronic Communications Regulation and Markets 2005 (11th Report) COM (2006)68 of 20.02.2006.. According to the data of October 2005, the fixed incumbent's market share of fixed broadband retail lines is approx. 44 %, and its market share of DSL retail lines is approx. 72 %. Moreover, the incumbent's market share of DSL retail lines is decreasing further; The OECD broadband statistics of December 2005 also show that the Netherlands are one of the leading countries in broadband: www.oecd.org/sti/ict/broadband.

([24]) 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 in 2006 and KPN is rolling-out VDSL with a speed of >50 Mbit/s.

([25]) See for instance OPTA: *KPN's Next Generation Network: All-IP*, Issue Paper, 22 May 2006.

([26]) Cf. http://145.7.218.175/covcheck/main.asp and http://umtscoveragetool.vodafone.nl/UMTSdekking.html#. The website of KPN mentions that UMTS is available to 9 million people in 130 cities in the Netherlands: http://www.kpn.com/kpn/show/id=716554.

(74) Based on the factual information available to the Commission (CPB report, Commission report, OECD analysis, etc.), there are strong indications that market forces do deliver appropriate coverage and the desirable amount of services in the broadband market in the Netherlands ([27]). Furthermore, the proposed intervention in terms of public investment risks having a crowding out effect on private initiatives and fails to enhance the overall supply of broadband services.

(75) The CPB report states explicitly that there is generally no market failure in the broadband markets in the Netherlands, that firms have adequate incentives to invest in broadband and that the best government policy would be to rely on market forces. The report states that existing market failures are limited and mainly related to market power and minor production externalities. According to the report, regulation by Dutch regulator OPTA and specific subsidies for research and development seem to address both issues in an appropriate manner ([28]).

(76) Concerning more specifically Appingedam, as regards the *retail market*, as stated before, KPN and Essent both offer retail broadband services. Essent currently offers up to 5Mbit/s and KPN up to 6 Mbit/s. Both Essent and KPN offer 'triple play' services (telephony, internet, digital/analogue TV). Both KPN and Essent have the technical possibilities and will further increase, on the basis of their existing networks, the bandwidth capacity of their service offerings, should there be sufficient demand for such services. Other Internet Service Providers also have the possibility to offer broadband services, based on the wholesale offers of KPN.

(77) Concerning the wholesale markets, the Dutch regulator OPTA has imposed regulatory remedies for certain markets upon the operator with significant market power, KPN. KPN also offers wholesale access to its network and services necessary for the provision of broadband services ([29]). Certain cable operators, notably Essent, also offer a form of wholesale broadband access to third parties in the Dutch market ([30]).

([27]) There is still a small percentage of the Dutch population which does not have access to broadband, for instance because they live too far from a local exchange to be able to use Digital subscriber line (DSL) services and/or have no access to a cable TV network.

([28]) CPB report, p. 103.

([29]) KPN has significant market power in the markets for wholesale unbundled access and specific wholesale leased lines. Therefore, KPN is subject to access regulation concerning important inputs for the provision of broadband services, such as local loops or wholesale leased lines. Moreover, KPN provides voluntarily access to certain wholesale broadband services.

([30]) For example, Essent is providing WBA to the ISP Introweb (although limited to business customers), the cable operators Stichting CAI Harderwijk and Kabel Noord are providing WBA to the ISP Chello and the cable operator Cogas is providing WBA to the ISP @Home; cf. case NL/2005/0281 Wholesale Broadband Access in the Netherlands — Comments pursuant to Article 7(3) of Directive 2002/21/EC of 2 December 2005.

(78) In other cases of state support for broadband assessed by the Commission so far, the Commission indeed considered that State aid for wholesale networks could be an appropriate and proportionate instrument for tackling elements of market failure and/or equity problems. However, in those cases, concerning generally 'white' or 'grey' areas ([31]), the market did not support a competitive supply of broadband services or there were structural impediments to the roll-out of broadband ([32]).

(79) The Dutch authorities present the argument that 'future content services and applications' need networks with a capacity which is higher than the speed offered over by existing copper or hybrid copper-fibre cable networks. However, according to research reports, it is difficult to envisage mass-market applications in the near to mid-term future which cannot be delivered over the existing networks ([33]). This means that the degree of substitutability between services delivered over 'next generation networks' vis-à-vis existing networks is high and therefore the potential distortion of competition by the measure will remain high for the foreseeable future.

(80) In summary, it can be concluded that there is no market failure present in the broadband markets in Appingedam which would require financial state support.

Cohesion policy considerations

(81) Although Appingedam is located in a peripheral region of the Netherlands, the intervention is taking place in a town where retail and wholesale broadband services are already available via various providers of electronic communications services and networks at service conditions and prices comparable to other regions.

([31]) 'White areas' have no broadband provision at all, 'grey areas' are similar to a natural monopoly where the network is controlled by a single operator not granting access to its basic infrastructure. Appingedam, however, can be considered a 'black area' in which the market situation is characterized by the availability of different broadband services over at least 2 competing infrastructures (such as telephone and cable TV networks). For projects covering 'black areas' only, there is a high risk that state intervention crowds out existing and future private investments.

([32]) In the recent Irish case N284/05 *'Regional Broadband Programme — Metropolitan Area Networks (MANs), phases 2 and 3'*, Commission decision of 8 March 2006, the Commission accepted State support for the roll-out of open wholesale infrastructure, including geographic areas where the historic operator already provided basic broadband services, in view of the serious 'broadband gap' and the peculiarities of the Irish market (lack of alternative infrastructures, population distribution patterns, very late introduction of broadband by the incumbent, etc.).

([33]) See, for instance, UK Broadband Stakeholder Group, *Predicting UK Future Residential Bandwidth Requirements*, May 2006; IDATE, *Etude sur le développement du très haut débit en France*, March 2006.

(82) The CPB report, referred to above states that there is no evidence '*for a substantial geographical or social digital divide in the Netherlands. Broadband is available in almost all regions. Most consumers can choose between roughly 80 Internet subscriptions in densely populated areas and between approximately 30 in remote areas*'. The report mentions that there is perhaps a social divide (elderly persons are underrepresented in broadband usage), but the government may stimulate Internet usage by these persons via demand-side measures, for instance awareness-raising measures ([34]).

(83) Consequently, the measure concerned does neither address a market failure nor a cohesion objective. The aid is not necessary to promote the supply of broadband services in Appingedam and distorts competition in a disproportionate way. Therefore, in view of the absence of an objective of Common interest, the measure does not fulfil the criteria for compatibility under Article 87(3)(c).

VI. **CONCLUSION**

(84) For the reasons set out above, the Commission concludes that the measure entails State aid to the foundation, the operator of the fibre access network and to providers of retail broadband services. Since the aid does not facilitate the development of certain economic activities or of certain economic areas without adversely affect trading conditions to an extent contrary to the common interest, the aid cannot be justified under Article 87(3)(c) EC Treaty and is therefore not compatible with the Common market.

HAS ADOPTED THIS DECISION:

Article 1

The State aid which the Netherlands are planning to implement for the development of a broadband network in Appingedam is incompatible with the Common market.

The measure may accordingly not be implemented.

Article 2

The Netherlands shall inform the Commission, within two months of the notification of this Decision, of the measures taken to comply with it.

Article 3

This Decision is addressed to the Kingdom of the Netherlands.

Done at Brussels, 19 July 2006.

For the Commission

Neelie KROES

Member of the Commission

([34]) Page 14 of mentioned CPB report.