
Changes to legislation: There are currently no known outstanding effects for the Commission Decision of 11 December 2007 on the State aid case C 53/06 (ex N 262/05, ex CP 127/04), investment by the city of Amsterdam in a fibre-to-the-home (FttH) network (notified under document number C(2007) 6072) (Only the Dutch version is authentic) (Text with EEA relevance) (2008/729/EC). (See end of Document for details)

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- Article 1 The investment by the municipality of Amsterdam in
Glasvezelnet Amsterdam...
- Article 2 This Decision is addressed to the Kingdom of the Netherlands....
Signature

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- (1) OJ C 134, 16.6.2007, p. 9: State aid C 53/06 (ex N 262/05) — *Citynet Amsterdam* — investment by the city of Amsterdam in a fibre-to-the-home (FttH) network — Invitation to submit comments pursuant to Article 88(2) of the EC Treaty.
- (2) VECAl supplied further information by e-mails registered on 27 December 2005, 11 January 2006 and 31 January 2006.
- (3) 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 several countries.
- (4) Information supplied by UPC on 12 May and registered on 15 May 2006.
- (5) The authorities sent information on 19 and 31 May, 1, 7 and 13 June 2006.
- (6) The authorities sent information on 18, 25 and 29 August 2006.
- (7) Cf. based on publicly available information, e.g. articles in newspapers *Parool* (7 October 2006) and *Trouw* (13 October 2006).
- (8) The last batch of information was submitted by letter registered on 22 September 2006.
- (9) Minutes of the Court of Appeal dated 21 November 2006, No 200601252.
- (10) *Gerechtshof*, judgement in case 1252/06 KG of 18 January 2007.
- (11) ‘Data rooms’ are typically used, for instance, during the due diligence phase of merger and acquisition transactions and provide access to confidential company data for the prospective bidders.
- (12) Cf. footnote 1.
- (13) By letter dated and registered on 17 July 2007.
- (14) By letter dated and registered on 16 July 2007.
- (15) By letter dated and registered on 17 July 2007.
- (16) By letter dated and registered on 17 July 2007.
- (17) By letter dated and registered on 17 July 2007, non-confidential version received on 27 July 2007.
- (18) The deployment of fibre access networks is considered to be the next big leap in the electronic communications sector. The new fibre networks when compared with existing copper based networks (such as ADSL or cable) will provide much higher speeds and symmetrical services and are expected to pave the way for numerous new, innovative services and applications based on IP technologies (IPTV, video on demand, telemedicine, etc.).
- (19) The successful bidder for the construction is Van den Berg Infrastructuuren (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 79-76325, is BBned.
- (20) ING RE is a subsidiary of ING, a financial services (banking and insurance) conglomerate.
- (21) Reggefiber is engaged in several fibre network projects in the Netherlands and linked to the building and construction group Volker Wessels.
- (22) 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*). By letter dated 20 December 2005 to Commissioner Neelie Kroes, Vecai requested the Commission to investigate the legal status of the housing corporations under the State aid rules. By letter of 3 February 2006, Commissioner Kroes replied, explaining that Competition DG is dealing with the issue within the framework of the before-mentioned ongoing procedure.
- (23) About one third of the houses (13 000) in this area are owned by the social housing corporations.
- (24) [...] The information in brackets is covered by the obligation of professional secrecy.
- (25) [...]

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- (26) BBNed is a private broadband operator, a subsidiary of Telecom Italia. BBNed was selected through a tender procedure which was advertised in the *Official Journal of the European Communities* with reference to 2004/S 138-118456, dated 17 July 2004.
- (27) [...]
- (28) In telecommunications, ‘triple play’ is a term for offering high speed Internet access, television and telephone services over a single broadband connection.
- (29) The Judgement of the Court of First Instance in case T-73/98 *Société chimique Prayon-Rupel SA v Commission* [2001] ECR II-867, recital 93 says ‘the fact that the time spent considerably exceeds the time usually required for preliminary examinations under Article 93(3) of the Treaty may, with other factors, justify the conclusion that the Commission encountered serious difficulties off assessment necessitating initiation of the procedure under Article 93(2) of the Treaty’.
- (30) The municipality commissioned several studies in 2003 and 2004 to prepare the project and organised the tenders for the construction and the exploitation of the network. In addition, the city of Amsterdam financed certain digging activities and purchased software for the construction of the network. These ‘pre-investments’ of the municipality amount to [...].
- (31) See recital 30 and following of the opening decision.
- (32) As the Dutch authorities requested that GNA’s business plan was subject to the obligation of professional secrecy, RBB Economics did not have access to GNA’s actual business plan and based its study on publicly available information and on the public version of the Commission’s opening decision.
- (33) See recitals 30 and following of the opening decision.
- (34) The overall churn rates indicated all customers who left UPC to any other operator (for instance to KPN, GNA, moved to other districts, etc.). Therefore, UPC considers this figure as the maximum churn rate that the new GNA fibre network could have achieved at this stage.
- (35) GNA started to roll out the network in October 2006 and retail operators using the GNA network via BBNed started offering services in March 2007.
- (36) For instance, in certain parts of Nuenen and Hillegom, market penetration of services over the fibre network is higher than 80 % of all households after one year of service provision. The projects in Nuenen and Hillegom have a different setting than the Amsterdam project, for instance no public investor is present in Hillegom.
- (37) The Nuenen fibre network passes 7 400 homes, less than 25 % of the current size of the Amsterdam project.
- (38) See Commission Decision of 19 July 2006, C 35/05, *Broadband development Appingedam* (OJ L 86, 27.3.2007, p. 1), where the Commission considered aid for the development of a optic fibre access network to be incompatible with the common market as the Dutch municipality of Appingedam developed its network with State aid where private broadband network operators in the area already offered similar services. In the Appingedam case, there was no private involvement in the financing of the project and the MEIP was not invoked by the Dutch authorities.
- (39) Arcadis is an engineering company that provides project management, consultancy and engineering services for fibre network deployments.
- (40) The model is available at the following website: <http://ngn.arcadis.nl/>
- (41) See footnote 37.
- (42) The distinction between ‘white’, ‘grey’ and ‘black’ depends on the level of existing offers of broadband services. In general terms, ‘white areas’ are rural and scarcely populated zones with no broadband provision at all; ‘grey areas’ are zones where basic broadband services are already provided in some parts of the concerned territory; and ‘black areas’ are zones where different broadband services are offered over at least 2 competing infrastructures (such as telephone and cable TV networks).
- (43) Communication from the Commission to the Council and the European Parliament. *Common Actions for Growth and Employment: The Community Lisbon Programme*, COM(2005) 330 of 20 July 2005.
- (44) In the Stratix Consulting/Delft Technical University report prepared for the Dutch authorities on 8 March 2007 and submitted to the Commission on 16 March 2007, the consultant company lists

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approximately 50 ongoing fibre deployment projects in the Netherlands as of December 2006, with a similar amount of new projects announced and planned to be launched from 2007.

- (45) Information submitted on 9 November 2007 and on 12 November 2007.
- (46) [...]
- (47) The weighted average cost of capital (WACC) expresses the relative cost of equity and debt capital of a business. WACC is a widely accepted financial indicator to measure for any particular business or project the rate of return required by the providers of capital (both debt and equity) having regard to the risk characteristics inherent in the project. Businesses or projects which are able to earn returns (measured e.g. using the internal rate of return) greater than the cost of capital add value for investors. Conversely, businesses or projects which, while they may still be profitable, produce returns less than the cost of capital ‘destroy’ investor value.
- (48) In the Commission’s benchmarking analysis, the assumptions of GNA’s business plan were compared with the available information of its considered peer companies, mainly European telecom operators.
- (49) The internal rate of return is used to make decisions on long-term investments and compare different investment projects.
- (50) Such as peer-to-peer applications, file downloading, HDTV services, etc.
- (51) See footnote 44.
- (52) The Dutch authorities are referring in particular to the CFI judgement of 12 December 2000, *Alitalia v Commission*, T-296/97, recitals 80-81, Court Judgement of 21 March 1991, *Italy v Commission*, C-303/88, ECR I-1433, recital 20; and CFI judgement of 12 December 1996, *Air France v Commission*, T-358/94, ECR II-2109, recital 70.
- (53) The Dutch authorities are referring to Commission Decisions 95/404/EC on a procedure relating to the application of Council Regulation (EEC) No 2407/92 (‘Swissair/Sabena’) of 19 July 1995, and N 172/00 *Seed and Venture Capital Scheme*, Ireland of 17 October 2000 (OJ C 37, 3.2.2001, p. 48).
- (54) Council Regulation (EC) No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article 93 of the EC Treaty (OJ L 83, 27.3.1999, p. 1).
- (55) France Telecom has recently sold its subsidiaries, Orange Netherlands and Nederland Breedband to Deutsche Telekom. The transaction was approved by the Commission on 20 August 2007.
- (56) The last data for the churn figures submitted by UPC relate to the situation as of 1 June 2007.
- (57) See also footnote 41.
- (58) See for instance Commission Decision of 19 July 2006, C 35/05, *Broadband development Appingedam* (OJ L 86, 27.3.2007, p. 1), also footnote 37.
- (59) C-345/02, *Pearle and others* [2004] I-7139, recital 35 with reference to Case C-303/88 *Italy v Commission* [1991] ECR I-1433, recital 11 and C-482/99, *France v. Commission, Stardust Marine* [2002] ECR I-4379, recital 24.
- (60) Legally, the municipality does not invest itself in GNA but through a special purpose vehicle that has been set up for this project [...] and which is owned by the municipality of Amsterdam via the Development Corporation Amsterdam (OGA, an undertaking owned by the municipality of Amsterdam). The investment therefore stems from State resources which are imputable to the State (the subsidiary is owned by the municipality and the decision to invest itself has been taken by the municipality and is channelled through its subsidiary upon initiative by the municipality). Therefore, the conditions outlined in case C-482/99, recital 37 *Stardust Marine* (see footnote 58) have been met.
- (61) See for instance Judgment of the Court of 8 May 2003 In Joined Cases C-328/99 and C-399/00: *Italian Republic and SIM 2 Multimedia SpA v Commission* [2003] ECR I-4035, recitals 37-38, ‘Seleco judgement’; Joined Cases 296 and 318/82, *Netherlands and Leeuwarder Papierwarenfabriek BV v Commission* [1985] ECR 809, recital 17; Application of Articles 92 and 93 of the EC Treaty and Article 61 of the EEA Agreement to State aid in the aviation sector, op. cit. recitals 25 and 26; Commission Decision of 2 August 2004 (2006/621/EC) on the State Aid implemented by France for France Télécom (OJ L 257, 20.9.2006, p. 11); Communication of the Commission to the Member States 93/C 307/03 on the application of Articles 92 and 93 of the

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- EEC Treaty and of Article 5 of Commission Directive 80/723/EEC to public undertakings in the manufacturing sector ([OJ C 307](#), 13.11.1993, p. 3), recital 2.
- (62) See for instance Judgment of the Court in case C-303/88 *Italy v Commission* [1991] ECR I-1433, recital 20, ‘ENI-Lanerossi judgement’; Case T-358/94 *Air France v Commission* [1996] ECR II-2109, recital 70.
- (63) Case T-296/97, *Alitalia* [2000] ECR II-3871, recital 81; case T-385/94, *Air France*, [1996] ECR II-2109, recitals 148-149. Cf. equally the Commission’s Position, The Application of Articles 92 and 93 of the EEC Treaty to public authorities’ holdings, Bulletin EC-9/1984, para. 3.2(i) and (iii).
- (64) 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.
- (65) Footnote 48 of the opening decision.
- (66) ING’s shares are 100 % floated on the stock exchange without any shareholder owning more than 5 % of its shares. Reggefiber is a subsidiary of Reggeborgh which is an investment vehicle of the family Wessels. See also footnotes 20 and 21.
- (67) The significance of private participation also has to be seen in the context that broadband investment in black areas are primarily driven by private operators. See also recital 84.
- (68) Paragraphs 49 ff. of the opening decision.
- (69) See also recitals 54-55.
- (70) Recitals 52 ff. of the opening decision.
- (71) For instance in its letter to the Dutch authorities of 29 September 2006.
- (72) See also recital 59. The Dutch authorities informed the Commission that the interest charge amounted to [...] and was paid on [...] by GNA.
- (73) See for instance Commission Decision of 7 June 2005 on Alitalia’s restructuring plan ([OJ L 69](#), 8.3.2006, p. 1), recital 194: ‘In order to present its offer, Deutsche Bank carried out an assessment of the company’s strategy and profitability prospects. In addition, before concluding the final contract, it proposes to carry out a due diligence operation which any investor should carry out before initiating the operation’.
- (74) Recital 62 of the opening decision.
- (75) In the following assessment, reference will be made mostly to UPC, as their submissions are the most detailed. However, the assessment also covers the more general remarks submitted by other interested parties.
- (76) Recitals 63 ff. of the opening decision.
- (77) Performed on 2 May 2006 on behalf of the Dutch authorities, submitted to the Commission on 11 May 2006.
- (78) Submitted on 16 March 2007, see also recital 75.
- (79) UPC (Dutch cable operator) 10,6 %, Fastweb (Italian broadband operator) 9 %, Telenet (Flemish cable operator) 8,5 %, KPN (Dutch incumbent) 8,1 %.
- (80) It should be noted that in its submissions UPC also did not use these indicators for its observations on GNA’s business plan.
- (81) [...]
- (82) UPC/RBB conducted their analyses on publicly available information, above all on an ING analyst report prepared on the feasibility of a fibre-to-the-home project in Amsterdam: ING analyst report ‘European Telecoms’, 24 February 2006.
- (83) Namely Chello Extreme, currently offering 20 Mbps download and 2 Mbps upload speed.
- (84) Where fibre penetration has reached more than 80 %.
- (85) See for instance JPMorgan (2006) study: The fibre battle — Changing Dynamics in European Wirelines, 4 October 2006. JPMorgan also calculates that the payback time of a fibre to the home infrastructure — providing open access in an average metropolitan market — starts looking attractive from a market share of 25 %.

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- (86) As for instance evidenced by the investments of Reggefiber, Casanet in the Netherlands, Iliad, Free or France Telecom in France and examples from other European countries. See also: The Netherlands: FTTH deployment overview, 4Q2006 prepared by Stratix, January 2007.
- (87) Source: Supplement to the RBB report on Amsterdam's investment in the FttH Citynet project, 7 November 2006.
- (88) Undertakings such as Pilmo, Unet or InterNLnet are already offering services on the GNA network with a limited geographical scope.
- (89) For a description of the three layer model see recital 23 ff.
- (90) For the assessment of the wholesale prices see from recital 146 ff.
- (91) For the whole infrastructure (active and passive) UPC/RBB estimates EUR 1 500 per home passed (EUR 1 000/EUR 500 respectively), KPN EUR 1 300, Hillegom (Dutch FttH project) EUR 1 200, Corning (fibre optic manufacturer) EUR 1 200, Arthur D. Little (consulting company) EUR 1 000 (EUR 600/EUR 400 respectively), Fastweb (Italian broadband operator) EUR 1 200, ARCEP (French regulator) EUR 2 000 (data from 2005 and 2006), JPMorgan (consulting company) EUR 1 000-EUR 2 000.
- (92) See also footnote 19.
- (93) Footnote 37 of the opening decision.
- (94) The cash flow based assessment (in line with the comments of UPC) resulted in a value range of EUR [...].
- (95) See for instance FttH Council documents available at <http://www.ftthcouncil.org/> or Gartner research of 14 February 2006: Governments Can Bring Moore's Law to Broadband Access.
- (96) The Dutch authorities have also submitted several sensitivity analyses and different business scenarios as part of the GNA business plan. The Dutch authorities argue that even in the 'worst-case scenario' the value of the asset will be sufficient [...].
- (97) Performed on 2 May 2006 on behalf of GNA, submitted to the Commission on 11 May 2006. See also recital 125.
- (98) In case of a business plan, sensitivity analysis enables for decision makers to assess the dependency of the financial outcomes of the business plan to the changes in the underlying assumptions. Similarly, different business scenarios also highlight different outcomes of the project in light of different market assumptions.
- (99) The ING report came to the conclusion that a fibre-to-the-home network in Amsterdam is financially feasible and viable (ING analyst report 'European Telecoms', 24 February 2006). However, the business plan used in the analyst report is significantly different compared to that of GNA (e.g. methodology, projected timeframe, financial targets, etc.).
- (100) GNA applies a different business plan methodology compared to the one applied in the ING report mentioned in footnote 98. In GNA's methodology, a cost of capital indicator was not required. However, in its analysis, the Commission also used the cost of capital figures to benchmark the IRR rate of GNA's business plan. See also recital 134 and following.
- (101) See recital 41.
- (102) The authorities provided the Commission with loan agreements on [...] and it is stated that the interest charged is equal to [...] %.
- (103) [...]
- (104) Namely the 'three-layer model', where the passive and the active layers are operated and managed separately, with an open and non-discriminatory access offered to all retail operators, see also Figure 1.
- (105) Small risky investments can also be explained by real option theory, according to which risky investments can entail a two-stage process. In the first stage, only a small investment is made (i.e. the company is purchasing an option). Some time later, when more information is known, the company can make a larger investment (i.e. exercising this option) or abandon its plans, thereby limiting its losses to the initial small-scale investment (i.e. to the costs of the option). By shouldering higher risk and uncertainty in the first stage (with small commitment), companies can reduce the risks of subsequent (larger) investments.

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