

**POMOC PAŃSTWA — ZJEDNOCZONE KRÓLESTWO****Pomoc państwa nr C 4/2005 (ex NN 57/2004)****Podatek od Nieruchomości od Infrastruktury Telekomunikacyjnej****Zaproszenie do zgłaszania uwag zgodnie z art. 88 ust. 2 Traktatu WE**

(2005/C 62/08)

(Tekst mający znaczenie dla EOG)

Pismem z dnia 19 stycznia 2005 r., zamieszczonego w języku oryginału na stronach następujących po niniejszym streszczeniu, Komisja powiadomiła Zjednoczone Królestwo o swojej decyzji wszczęcia procedury określonej w art. 88 ust. 2 Traktatu WE dotyczącej części wyżej wspomnianej pomocy/środka.

Zainteresowane strony mogą zgłaszać uwagi na temat pomocy, względem której Komisja wszczyna procedurę, w ciągu jednego miesiąca od daty publikacji niniejszego streszczenia i następującego po nim pisma, kierując je na następujący adres lub numer faksu:

Komisja Europejska  
Dyrekcja Generalna ds. Konkurencji/Directorate-General for Competition,  
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Uwagi te zostaną przekazane Zjednoczonemu Królestwu. Zainteresowane strony przekazujące uwagi mogą wystąpić z odpowiednio umotywowanym pisemnym wnioskiem o poufne traktowanie ich tożsamości.

## TEKST STRESZCZENIA

**Procedura**

W lutym 2004 r. Vtesse Networks Ltd, operator telekomunikacyjny ze Zjednoczonego Królestwa, złożył skargę dotyczącą rzekomej pomocy państwa w formie preferencyjnego opodatkowania British Telecom Plc („BT”), głównego operatora telekomunikacyjnego. Na podstawie powyższej skargi Komisja zażądała dostarczenia informacji przez władze Zjednoczonego Królestwa i otrzymała odpowiedź w kwietniu 2004 r.

**Opis środka, w stosunku do którego Komisja wszczęła procedurę**

Środek dotyczy podatku od nieruchomości w Zjednoczonym Królestwie nakładanego na majątek zakładowy, w tym infrastrukturę telekomunikacyjną. Podstawowym rozporządzeniem regulującym ten system podatkowy w Anglii i Walii jest ustawa dotycząca finansów samorządów lokalnych (Local Government Finance Act) z 1988 r. Przewiduje ona wycenę wartości aktywów, która stanowi podstawę opodatkowania i w odniesieniu do której stosowana jest stawka podatkowa do wyliczenia zobowiązań podatkowych. Stawkę podatkową ustala się co roku i jest ona jednakowa dla wszystkich operatorów telekomunikacyjnych. Jakkolwiek podstawę opodatkowania dla każdego operatora określa Agencja Biura Wyceny (Valuation Office Agency/„VOA”), agencja wykonawcza rządu centralnego, stosując rozmaite metody wyceny, z możliwością odwołania się. VOA stosuje określoną metodę wyceny aktywów w stosunku do BT i Kingston Communication (główny operator w regionie Hall), a inną metodę w odniesieniu do wnoszącego skargę i innych konkurencyjnych dostawców. Wydaje się, że zastosowanie różnych metod prowadzi do dysproporcji w obciążeniu podatkowym między spółkami konkurującymi na rykach telekomunikacyjnych.

**Ocena pomocy**

Według ogłoszenia Komisji w sprawie zastosowania zasad pomocy państwa do środków odnoszących się do bezpośredniego opodatkowania przedsiębiorstw (Dz.U. C 384 z 10.12.1998, str. 3-9), korzyści podatkowe ograniczone do pewnych typów przedsiębiorstw lub produkcji określonych towarów, mogą stanowić pomoc państwa. Redukcja podstawy opodatkowania, a w konsekwencji poziomu opodatkowania, obowiązującego dla BT i Kingston, pociąga za sobą selektywne korzyści dla tych przedsiębiorstw, redukując koszty, które normalnie podczas działalności handlowej musiałyby one ponieść. Rynek telekomunikacyjny Zjednoczonego Królestwa został otwarty dla konkurencji, dlatego też korzyści przyznane BT i Kingston Communications mogłyby zakłócić konkurencję i wywrzeć wpływ na handel. Wydaje się, że spełnione są warunki zakwalifikowania powyższego środka jako pomocy państwa w świetle art. 87 ust. 1.

Dlatego też na obecnym etapie procedury, Komisja doszła do wniosku, że władze Zjednoczonego Królestwa mogły przyznać BT i Kingston Communications pomoc państwa w rozumieniu art. 87 ust. 1. Podczas gdy występowanie pomocy można wykluczyć tam, gdzie zróżnicowane traktowanie usprawiedliwić można charakterem i ogólną strukturą systemu, w niniejszym przypadku Komisja wątpi w możliwość takiego usprawiedliwienia, biorąc pod uwagę nieodłączne cechy i wewnętrzną logikę systemu podatkowego.

Nie wydaje się, żeby odstępstwa przewidziane w art. 87 ust. 2 i 3 Traktatu WE miały tu zastosowanie. Zważywszy na powyższe wątpliwości w odniesieniu do zgodności tej pomocy z Traktatem WE, Komisja postanowiła wszczęć formalną procedurę dochodzenia zgodnie z art. 88 ust. 2 Traktatu WE. Zgodnie z art. 14 rozporządzenia Rady (WE) nr 659/1999, wszelka bezprawnie przyznana pomoc może podlegać windykacji od jej beneficjenta.

## TEKST PISMA

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

## 1. PROCEDURE

2. On 17 February 2004 (A/31115) the Commission registered a complaint from Vtesse Networks Ltd (»Vtesse«), a UK telecommunications operator, concerning alleged preferential tax treatment in favour of British Telecom plc (»BT«), the incumbent telecommunications operator. Additional information was received from the complainant on 23 March 2004, 29 March 2004, 30 March 2004, 30 June 2004, 1 July 2004, 27 July 2004 and 11 October 2004. A meeting with the complainant was held on 30 June 2004 to further clarify the technical details of the information submitted.
3. The Commission also received on 28 April 2004 (A/33044) a letter from the UK Competitive Telecommunications Association (»UKCTA«), a trade association representing the interests of fixed-line telecommunications companies competing with BT, substantiating some of the issues brought forward by the complainant.
4. On 16 March 2004 (D/51920) the Commission sent a request for information to the UK, which was answered on 23 April 2004 (A/32924). The UK authorities submitted additional information on 11 October 2004 (A/37753).
5. Finally, the Commission has received letters dated 19 November 2004 (A/38972) and 30 November 2004 (A/39285) from BT submitting their views on the issue.

## 2. BACKGROUND

## 2.1. Rating system

6. »Business rates« are a UK property tax levied on non-domestic property<sup>(1)</sup>. Its aim is to contribute towards the cost of services provided by Local Authorities<sup>(2)</sup>. The primary regulation on non-domestic rating in England and Wales is the Local Government Finance Act

(»LGFA«) 1988<sup>(3)</sup>. In addition, a number of statutory instruments govern the implementation of the system.

7. Most properties are entered on so-called »Local Rating Lists«, i.e. the rating lists of the authorities in whose territory the properties are located. However, since properties such as telecommunications infrastructure extend beyond the boundaries of a single local authority, their valuations are typically entered on the so-called »Central Rating List«, which exists for England and Wales<sup>(4)</sup>. The rate payments made are then redistributed to the local authorities in proportion to their populations.
8. The tax rate, the so called »multiplier«, which applies equally to all business properties, is determined annually by the Secretary of State<sup>(5)</sup> and applies equally to all operators. It was set at 44,4 % of the rateable hereditament<sup>(6)</sup> for the fiscal year 2003/4<sup>(7)</sup>.
9. The base of this tax, the so called »rateable values« in England and Wales, are determined by the Valuation Office Agency (»VOA«), an executive agency of the Inland Revenue, part of central government<sup>(8)</sup>. The VOA is responsible for valuing the assets and including them on the »Rating Lists«. Revaluations are held every five years, so the rateable values determined on 1 April 1998 (so called »antecedent valuation date«) apply to the current five year period of 2000-05. Valuations completed on 1 April 2003 will apply for the next period of 2005-10<sup>(9)</sup>.
10. The property unit as valued for rating purposes is called the »rateable hereditament« and includes land, buildings and rateable plant and machinery<sup>(10)</sup>. Liability for the rates falls on the person in occupation of the rateable hereditament, i.e. the person who is in »paramount control« of the assets. According to the VOA, there has to be an actual, exclusive and non transient occupation, which brings commercial benefits to the occupier<sup>(11)</sup>. According to the complainant, in relation to rateable occupation of buildings, which constitute the majority of UK rateable hereditaments, the test is »he who turns on the lights pays the rates«.

<sup>(2)</sup> Local government finance in the UK is a devolved matter. The UK Government is therefore only responsible for the rating system in England. Rates in Wales, Scotland and Northern Ireland are the responsibility of the Devolved Administrations. Pre-devolution legislation largely applies in England and Wales, where the system is very similar. Therefore the description primarily covers the situation that exists there. However, the situation in Scotland is broadly similar.

<sup>(4)</sup> For telecommunications properties that are entered on Local Rating Lists, this is done in the area where it is considered by the VOA that the greatest proportion of rateable value resides.

<sup>(5)</sup> Except in a revaluation year, the multiplier can not increase by more than the rate of increase of the Retail Price Index, South Oxford Council, [www.southoxon.gov.uk](http://www.southoxon.gov.uk)

<sup>(6)</sup> The multiplier in percent was 43,2 1995/6, 44,9 1996/97, 45,8 1997/98, 47,4 1998/99, 48,9 1999/00, 41,6 2000/1, 43,0 2001/02, 43,7 2002/03, 44,4 2003/04, 45,6 2004/5.

<sup>(7)</sup> UK fiscal year 2003/4 covers the period 1 April 2003 — 31 March 2004.

<sup>(8)</sup> [www.voa.gov.uk](http://www.voa.gov.uk)

<sup>(9)</sup> Economic circumstances are taken as at the »antecedent valuation date«, while physical factors are taken as at the date of completing the rating list.

<sup>(10)</sup> Schedule 6 of the Local Government Finance Act on valuation of non-domestic hereditament, [www.hms.gov.uk](http://www.hms.gov.uk)

<sup>(11)</sup> Four tests of occupancy as established in John Laing and Son, Ltd. V. Kingswood Assessment Committee and Others [1948] 2 KB 116.

<sup>(1)</sup> Property used for business as opposed to residential purposes.

<sup>(2)</sup> »Business Rates — An Introduction«, Valuation Office Agency.

## 2.2. Rating of telecommunications

11. Business rates are also levied on telecommunications infrastructure. The Plant and Machinery Regulation («Regulation») 2000<sup>(12)</sup> stipulates that plant and machinery that are rateable for telecommunications infrastructure are «cables, fibres, wires, conductors or any system of such items, or any part of such items or such system, used or intended to be used in connection with the transmission of communications signals, and which are considered in the equipment of and are situated within premises»<sup>(13)</sup>. Plants and machinery not specifically described in the Regulation, such as for example telecommunications switching and transmission equipment, are not rateable<sup>(14)</sup>.
12. Telecommunications property has been subject to business rates since 1855 when telegraph poles on railways were deemed to be liable for rates<sup>(15)</sup>, to be followed in 1969 by the telephones belonging to the Post Office («PO») (16). Following the split-up of the PO and the privatisation of BT in 1984, this tax was also levied on the latter's infrastructure, as well as on that of Mercury Communications<sup>(17)</sup>, BT's only competitor during the duopoly situation of the 1980s. Initially, the tax amount payable was determined by applying a prescribed «standard formula»<sup>(18)</sup>.
13. When the telecommunications industry was gradually opened up to competition starting in 1992, the tax was levied on *all* telecommunications infrastructure, including that belonging to cable television companies, public utilities and other competitive providers entering the telecom market. The LGFA 1988 laid down the legal basis of the system, which foresaw a valuation of rateable hereditament, with a possibility to appeal, to determine the base of the business rates tax<sup>(19)</sup>.
14. As new technological solutions appeared, those too were submitted to the business rates tax regime. For instance, fibre optic long distance and metropolitan area networks were added in the late 1990s<sup>(20)</sup>. Fibre optic services involve three different levels of assets: (i) the duct, (ii) the «dark» fibre and (iii) the «lit» fibre. It is the current

policy of the VOA to only rate fibres from when they are lit and carry traffic. Ducts are rateable items, but only when used or intended to be used in connection with fibres, wires and cables. Consequently, empty ducts and dark (unlit) fibres are not rated.

## 2.3. Valuation

15. The LGFA 1988 laid down the legal basis of the system to be applied in the new market environment. Schedule 6 of the Act foresees a *valuation* of rateable hereditament to determine the base of the business rates tax. The objective of the valuation is to make a proportionate assessment of the annual rental value for a property if it is available on the market<sup>(21)</sup>. If rental evidence is not available, the objective is to calculate the amount a hypothetical tenant would pay in rent to a hypothetical landlord for the actual hereditament.
16. Since a specific method for valuing telecommunications networks is not prescribed, the VOA has a choice of four methods for calculating the «rateable value» of assets. According to the VOA, there is an accepted hierarchy between the possible methods depending on the individual circumstances and the evidence available:
  - (a) First, if there is rental evidence of the property then the «Rental» method is to be used, i.e. the price at which the property is let.
  - (b) Second, if direct rental evidence is not available, a comparison with the rental evidence of other comparable properties can be made. This method is called «Tone of the List», basically referring to a benchmarking exercise.
  - (c) Third, a «Receipts and Expenditure» («R&E») method is to be applied for properties which are seldom let, typically utilities. It calculates the hypothetical annual rental value by examining the receipts and expenditures to arrive at a net profit, the so called «divisible balance». The rateable value is determined by deducting the return required by a tenant on his capital («tenant's share») from the divisible balance to arrive at the hypothetical rent («landlord's share») (22).
  - (d) Fourth, one can resort to the «Contractor's Basis» method. This method arrives at the rental value by estimating the decapitalised<sup>(23)</sup> costs of constructing a similar hereditament adjusted for age and obsolescence, by looking at the cost of the capital which would need to be raised to finance the build-out, i.e. the interest that one would need to pay for a loan or the foregone interest if one's own capital is used (24).

<sup>(12)</sup> Statutory Instrument 2000/540, Valuation for Rating (Plant and Machinery) (England) Regulations 2000 N.540, Class 3 (4), www.hmso.gov.uk

<sup>(13)</sup> The main provisions apply to cables, fibres and wires that are outside the building, with those inside excluded from rateability.

<sup>(14)</sup> Brief Overview of the Telecoms Rating System for the purposes of the Broadband Stakeholders Group, Alan Roy Bradford CEO/VOA, 9 June 2003

<sup>(15)</sup> Electric Telegraph Co v Salford Overseers, op. cit. footnote 14.

<sup>(16)</sup> Most of the independent telecom companies were acquired by the General Post Office around 1912, except what is now Kingston Communications, which remained in the control of the local government in Hull.

<sup>(17)</sup> Later renamed Cable & Wireless, which since has been divided into Cable & Wireless UK and ntl. See also supra paragraph 28.

<sup>(18)</sup> Telecommunications Cable Networks Rating Review, presentation by Alan Roy Bradford, Valuation Office Agency, 25 June 2004.

<sup>(19)</sup> The LGFA came into force in 1990, but assets were still valued using the prescribed formulae during 1990-95 since, allegedly, given the tight time frame the valuations could not be ready for this five year valuation period.

<sup>(20)</sup> Op. cit. footnote 14.

<sup>(21)</sup> Assuming the tenant undertook to pay the usual tenant's share and to bear the costs of the repairs and insurance and other expenses (if any) necessary to maintain the hereditament in a state to command rent.

<sup>(22)</sup> The Receipts and Expenditure Method of Valuation of Non-Domestic Properties, A Guidance Note, RICS Books.

<sup>(23)</sup> At the statutory rate of 5,5 % for the 2000 Rating List.

<sup>(24)</sup> The Contractor's Basis of Valuation for Rating Purposes, a Guidance Note, RICS Books.

### 3. DESCRIPTION OF THE MEASURE

#### 3.1. British Telecommunications

##### Valuations

17. 1995-2000 period: The VOA applied the »Receipts and Expenditure« method to BT. Accordingly, BT's tax liability for the period of 1995-2000 was determined by a valuation based on the »R&E« method undertaken by the VOA, as subsequently adjusted following a negotiated settlement with BT who appealed against the original valuation at the Central London Valuation Tribunal, which is a technical tribunal. The case was also due to be heard by the Lands Tribunal, a UK court, when BT and the VOA reached a settlement.
18. The detailed inputs into the economic model forming the basis of the original valuation by the VOA using the »R&E« method and the content of the subsequent adjustments made following the negotiations with BT (who have constructed their own model based on the »Contractor's basis« method) are at this stage not available to the Commission and their transmission necessitates, according to the UK authorities, BT's consent. The outcome was an agreement between the VOA and BT, which set the rateable value of BT's assets at GBP 470 million for the fiscal year 1995/96<sup>(25)</sup>. Applying the 1995/96 multiplier of 43,2 % to this rateable value, BT's tax liability is estimated to equal about GBP 203 million for this period, which represented approximately 2 % of BT's relevant annual revenues<sup>(26)</sup>.
19. 2000-2005 period: For the 2000 revaluation, applicable for the period of 2000-2005, the VOA settled BT's asset valuation at GBP 493 million<sup>(27)</sup>. The 2000 value was based on the principles and values agreed at the same time the 1995 list agreement was concluded<sup>(28)</sup>.

##### Revisions

20. In principle, a review of the system only takes place every five years. According to the UK authorities, when applying the »R&E« method to BT, economic modelling was used to estimate the prospects of changes to the level of receipts over a period of five years, and an »equated« level of receipts and expenditure was estimated as being representative of the five year period. This increased the level of certainty regarding BT's tax liabilities, as highlighted by the fact that the 1995 valuation also served as a basis for determining the 2000 values and as such conferred a de facto 10 year certainty upon BT.

<sup>(25)</sup> GBP 445 million for England and GBP 25 million for Wales.

<sup>(26)</sup> Based on Total Receipts of about GBP 10,199 million as stated in the 1995 Central Rating List Assessment for BT, CVO Analysis of Agreed Rateable Value, Equated Figures.

<sup>(27)</sup> GBP 467 million for England and GBP 26 million for Wales.

<sup>(28)</sup> Apparently BT's current list valuation, with effect from 1 April 2003, is about GBP 472 million (GBP 447,5 million for England and GBP 24,9 million for Wales) but appeals are outstanding. It is unclear to the Commission whether this is the case, and if it is the case, why there has been a new valuation in April 2003 resulting in lower rateable values than those determined in the 2000 valuation.

21. Moreover, subsequent downward revisions have been made to the 1995 valuation, to reflect the loss of market share of the company in the UK fixed telecommunications market resulting from the physical roll-out of competing telecommunications systems. In practice, these revisions meant for instance a decrease of an estimated 22 % in the value of the rateable hereditament in 1999/00 compared to 1995/96, resulting in a reduction in BT's tax liability over the same period. According to the authorities, such revisions are in line with the LGFA 1988 provisions which allow alterations to reflect changes in the physical state and enjoyment of the network<sup>(29)</sup>. To the Commission's knowledge, no similar upward adjustment has been made to reflect possible extensions or upgrades of the network.

#### 3.2. Kingston Communications

22. Kingston Communications (Hull) plc is the incumbent telecommunications operator in the region of Hull<sup>(30)</sup>. During the privatisation of the telecommunications networks in the UK in the late 1980s, the network in Hull remained State owned and the property of the municipality. Part of it was then sold to the public in 1999 with the Hull City Council remaining the only substantial single shareholder<sup>(31)</sup>.
23. The Commission has at this stage no information about the results of its valuation and hence the taxes it has been liable for. However, according to the UK authorities, the only other operator valued by the full »R&E« method since 1995 is Kingston Communications in Hull.

#### 3.3. Vtesse

##### Valuations

24. Vtesse is a »fibre to the business« service provider offering high-capacity retail leased lines, currently ranging from 25Mbits/s to 32Mbits/s, mainly supplied to large corporate users.
25. According to Vtesse, these products de facto compete with BT's 10Mbits/s and above leased line offers. In order to connect its customers, Vtesse leases »dark« fibre from other backbone operators and complements this with their own built infrastructure. The property rented, i.e. the dark fibre, which is then lit, is included in the »rateable hereditament« of Vtesse. The VOA has decided to rate Vtesse based on the »Tone of the List« method which establishes the »rateable value« of a kilometre of fibre route (consisting of a fibre pair), which is then applied each time new fibre is rented and lit. This is the method generally used for other competitive providers as well.

<sup>(29)</sup> Paragraph 2(7) of Schedule 6 to the Local Government Finance Act 1988 allows for alterations to be made to a Rateable List still in force in certain cases, for instance in the case of matters affecting »the physical state or physical enjoyment of the hereditament« or »the mode or category of occupation of the hereditament«.

<sup>(30)</sup> Since 1998 it also provides services to business customers in East Yorkshire where it is present on the market as an alternative provider.

<sup>(31)</sup> Espicom Business Intelligence: UK Telecommunications Market, 09/2003.

26. Based on benchmarks of actual rates paid, the VOA has set the tone rate for one kilometre route of fibre at GBP 1,200/km for the London metropolitan area and GBP 1,000/km in other parts of the country. In addition, in 2001 a so called »oversupply allowance« was granted by the VOA to fibre providers assessed by the »Tone of the list« method<sup>(32)</sup> equalling a 15 % discount on the rateable value effective as of 1 April 2001 and 25 % as of 1 April 2002<sup>(33)</sup>. According to the complainant, this was a one-off measure taking into account the chronic over-investment in fibre during the telecommunications boom and the subsequent drastic reduction in value of telecommunications networks. Accordingly, Vtesse's tax liability was around 7 % of its recurring revenues in 2003/04, and is expected to be about 10 % for 2004/05<sup>(34)</sup>. According to UKCTA, business rates paid by other competitive providers represent a similar percentage of their revenues to that of Vtesse.

#### Revisions

27. While the tone rate is set at the beginning of the five year period, the tone of a kilometre route of fibre is applied each time new fibre is rented and lit. Vtesse has the obligation to regularly inform the VOA of extension to its network so that the valuation of its hereditament can be adjusted. As a consequence, whenever it procures fibre to provide services to its customers, it is liable for rates that may equal up to 20-30 % of the recurring revenues of a new contract.

### 3.4. Other operators

28. Mercury Communications (later Cable and Wireless, »C&W«) was the first company to establish a nationwide telecommunications infrastructure to rival BT in the early 1980s, during the so called duopoly period. In May 2000, C&W was divided into two businesses: the residential telephony, cable and internet access part was sold to cable TV operator ntl, while C&W retained the UK corporate internet access business and was renamed C&W UK. With the full liberalisation of the market in the 1990s, C&W UK became an alternative telecoms provider competing with several other players in the market<sup>(35)</sup>. Originally C&W was valued just like BT by a prescribed formulae. However, it is unclear for the Commission which valuation method is currently used for C&W UK.

<sup>(32)</sup> BT and Kingston Communications in Hull do not benefit from this allowance, since it is only applied to those assessed by the »Tone of the List« method.

<sup>(33)</sup> Letter from VOA to Complainant, 11 March 2004.

<sup>(34)</sup> Recurring revenues include service revenues but exclude installation revenues. Given that Vtesse's operations only started in 2002, such distinction seems reasonable to allow for comparison with BT. Estimate for fiscal year 2004/05 is based on three quarter figures.

<sup>(35)</sup> Op. cit. footnote 31.

29. Regarding other operators active on the UK market, it is the Commission's understanding that they are valued based on the »Rental« or the »Tone of the List« method<sup>(36)</sup>. According to UKCTA, alternative telecoms operators typically pay two or three times the tax, expressed as a percentage of revenues, than BT. However, the Commission currently is not in possession of exact data concerning business rates tax liabilities and relevant revenues of alternative telecommunications operators.

## 4. COMPLAINT AND COMMENTS

30. The complainant has raised the following specific claims and concerns:

- (a) **Choice of methods:** If BT was valued using the »Rental« or »Tone of the List« methods as is used for Vtesse, it would end-up with a substantially higher and more proportionate tax liability. It questions why the »Rental« or »Tone of the List« methods are not used for BT.
- (b) **Adjustments:** In any case, the various methods should in principle yield similar results if appropriate adjustments were made. The complainant doubts whether such adjustments are made in the process of BT's valuations, given the different results.
- (c) **Downward revisions:** There is no downward revision in the valuation of competitors similar to that foreseen for BT to account for their eventual loss of market share or change in network topology.
- (d) **Upward revisions:** There does not seem to be a systematic upward revision of BT's valuation either, should the value of its assets increase. At the same time, Vtesse is charged incrementally, which causes an increase in the recurring price it can offer to its customers, whenever it leases new fibre, and lights this fibre to serve them. The complainant claims to have lost several contracts to BT by a small margin due to the incremental tax burden it is obliged to include in its price bid versus BT who has no such incremental burden.
- (e) **Discretionary powers:** The rating values and the valuation methods can be appealed, subject to time limits. Once an appeal has been made, typically negotiations are held to agree on an appropriate value. If no agreement is reached, it is referred to the relevant Valuation Tribunal, and at a second stage to the Lands Tribunal for determination. However, in most cases a negotiated settlement is reached. According to the complainant, the settlement signed with BT in 1995 gives the incumbent preferential treatment.

<sup>(36)</sup> Except the cable TV companies, which according to the knowledge of the Commission, are valued using a different method (based on »homes passed«) than the four described in this decision to open the formal investigative procedure.

31. It should be noted that UKCTA <sup>(37)</sup>, representing various competitive telecom operators, as well as other operators' groupings, <sup>(38)</sup> have also expressed criticism to the UK authorities concerning, among others:

- the *inappropriateness* of applying a rating system, which was originally designed to assess buildings, to telecommunications infrastructure, including its infrequent revisions;
- the *asymmetry* of the valuation, in which different methods are applied to operators involved in the same activity, i.e. delivering telecom services, with special regard to the distinct treatment of the incumbents;
- the *disproportionate* results yielded by the use of such differential methods, i.e. BT is estimated to pay about 2-4 % of revenues <sup>(39)</sup>, while its competitors typically pay several times this proportion.

32. In response to the concerns of the industry, the UK Department of Trade and Industry, in association with the Office of the Prime Minister, OFCOM (the sector regulator) and the VOA, has appointed a contractor to review the rating system as it applies to telecommunications companies, including possible effects on competition. The expert was due to report back during the summer of 2004. However, according to the UK authorities, due to last minute unforeseen circumstances, this report has not yet been completed and could not be published.

## 5. ASSESSMENT

### 5.1. Existence of aid

33. According to Article 87(1) of the EC Treaty any State aid granted by a Member State or through State resources in any form whatsoever which distorts competition 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. According to the Commission's notice on the application of the State aid rules to measures relating to direct business taxation, tax benefits restricted to certain types of undertakings, insofar as they favour certain undertakings or the production of certain goods, may constitute State aid <sup>(40)</sup>.

<sup>(37)</sup> UKCTA submission of 23 October 2003 to the Hearing on Broadband by the Trade and Industry Sub-Committee appointed by the House of Commons.

<sup>(38)</sup> Effect of Property Rating on Competition in the Market for Fixed Line Telecommunications Services in the UK: Proposed options for the future, paper drafted by alternative telecommunications providers, 12 July 2002.

<sup>(39)</sup> 4 % estimated for England based on 2001 revenues, op. cit. footnote 38.

<sup>(40)</sup> OJ C 384, 10.12.1998, p. 3-9.

### State resources

34. In applying Community rules, State resources can be in »any form whatsoever«, including tax measures such as a reduction in the tax base. If and when there is a reduction in a tax burden compared to the general system, State resources are at stake. The relative reduction of the business rates tax burden lowers the tax revenues of local authorities and hence is equivalent to the use of State resources in the form of fiscal expenditure.

### Selective advantage

35. A reduction in the tax base, and consequently the level of taxation, that a telecommunications operator is liable for, confers an advantage upon that undertaking in that it reduces the costs that that undertaking would normally bear in the course of its business. This seems to be the case for BT and Kingston Communications, which benefit from a reduced tax base compared to other operators.

36. The reasons behind this discriminatory taxation appear to be the application of a particular asset valuation method to BT and Kingston Communications, while applying a different method to other operators. Even if the method applied, including the corresponding revision mechanism, is foreseen in the relevant legislation as one of the possible approaches, the non-uniformity of the system and the discretionary powers given to the VOA to apply the general provisions to specific operators, while deciding to treat other operators differently, may lead to a selective advantage to a certain undertaking, while disadvantaging others who compete on the same market.

37. The justifications given by the UK authorities for applying the »Receipt and Expenditure« method to BT are:

(a) **Asset ownership:** BT owns 98 % of its infrastructure and does not pay rent for it which could serve as a basis for the »Rental« method.

(b) **Size and diversity of infrastructure:** There is no network as large, or nearly as large, and as diverse as BT's. There are no comparable operators whose rental values could serve as benchmarks.

(c) **The necessity to value »as a whole«:** BT's assessment is not made up of valuing many small parts and adding them together, but it has to be valued as a whole. Benchmarks on rental values of particular network elements are irrelevant.

(d) **Special obligations:** The full value of BT's network is »depressed« by its onerous licence conditions such as its universal service obligations (»USO«) and price cap regulations. Vtesse, on the other hand, does not have USO <sup>(41)</sup>.

<sup>(41)</sup> VOA's statement at the Berkshire Valuation Tribunal Hearing, 25 March 2004.

38. As stated in the Commission's abovementioned notice on direct business taxation, the presence of aid may be ruled out where the different nature of the measure is justified by the nature and general scheme of the system. In line with the case-law of the Court of Justice<sup>(42)</sup>, the Commission has continued to take the view that this justification must be based on the intrinsic features and inherent logic of the tax system. In the case at hand, however, the Commission has doubts about the validity of such arguments, and in particular:
39. **Asset ownership:** The UK authorities stated that the »Rental« method can only apply to lessees (and not lessors). However, the rent received by BT when renting out its own infrastructure could serve as guidance for the value of the network. Moreover, BT's retail business units themselves effectively rent infrastructure and buy network services from BT Wholesale, the business unit that manages BT's infrastructure. The internal transfer prices between BT's retail businesses and BT Wholesale could provide a basis, or at least a benchmark, for estimating the rental value, with appropriate adjustments for network services (provided, of course, that those prices are set at arms length).
40. **Size and diversity of infrastructure:** Such argumentation tends to suggest that bigger companies deserve reduced or digressive rates of taxation. This statement appears to be incompatible with the Commission's position in previous fiscal aid cases stipulating that nothing justified preferential treatment in favour of large companies<sup>(43)</sup>. Moreover, if the logic of the business rates property tax system is to assess the *value* of infrastructure, the *size* of the company should not be taken into consideration during the valuation process. In any case, the cable TV companies in the UK are also active in the telecommunications market, especially residential and, similarly to BT, have both an access and a backbone network. Their taxation level could also serve as a benchmark<sup>(44)</sup>.
41. **The necessity to value »as a whole«:** The UK was a forerunner in telecoms liberalisation, account separation and tariff regulation based on the cost-orientation of BT's tariffs. For these purposes, OFCOM, the UK regulatory authority, and its predecessor OFTEL, have been systematically collecting cost accounting data from BT since the 1980s. BT itself and OFCOM are in possession of detailed cost accounting data for BT's network. This data could be used to determine the taxable value of BT's network, at least to verify the assessment of the tax authorities. Moreover, liberalisation and network element unbundling have resulted in a variety of wholesale products which could serve as benchmarks for valuing the rental value of various infrastructure elements.
42. **Special obligations:** The Commission is not aware of BT or Kingston Communications being compensated for the provision of universal service under the Universal Service Directive<sup>(45)</sup>. Nor is the Commission aware of any compensation for universal service, or for any other obligation, which could be regarded as a service of general economic interest, specifically being granted through reduced property taxation. As regards to price regulation, while it may limit the returns of the incumbent and as such, the taxation level calculated based on the »R&E« method, this should not lead to inconsistency between the results of valuations by different methodologies. Finally, being an incumbent in a market tends to bring advantages in terms of asset value, while the arguments brought forward by the VOA tend to focus on disadvantages.
43. **Adjustments:** The Commission notes that even if the use of different methods could be justified by the logic of the system, these should deliver comparable results. The Commission's initial assessment of the use of various methods in this particular case is that they seem to lead to significantly different results based on similar facts. In particular, the »R&E« method estimates the rent value of the assets on the basis of revenues from the use of those assets, while the »Rental« and »Tone of the List« methods pick up the market values for the rent. Hence, it seems that the »R&E« method implicitly assumes that assets are used at capacity and profitably, which however may not always be the case. To avoid penalising operators whose assets are valued using a different method, appropriate adjustments would need to be made. The Commission does not question the validity of the methods themselves, but rather has doubts about the way they are applied to different operators.
44. **Revisions:** There does not seem to be any review mechanism in the system to ensure an equitable and proportionate tax burden among operators when applying the different methods. Scope for revisions within the five year cycle is very limited. While BT does enjoy a downwards revision mechanism, there does not seem to be a similar systematic review of the market conditions faced by competitors. The effect of such adjustment appears to move the tax payable by the incumbent closer to one based on operational performance and revenues, while for other operators it remains a tax based on rent of assets irrespective of performance. In addition, the failure to take into account the increase in the value of BT's infrastructure between two five-year review periods, while charging competitors incrementally as the value of their network increases, seems to further distort competition.
45. **Discretionary powers:** The valuation process gives discretionary powers to the VOA and seems to leave considerable scope for negotiation. According to the UK authorities, while there is an established practice, approved by the case law of the Courts of England, of applying a certain hierarchy of methods, there is no requirement in the LGFA 1988 to use any particular method in order to arrive at the rateable value and all methods can be considered<sup>(46)</sup>. In many cases, negotiated settlements are reached. At this point, the Commission is unable to determine whether the reasoning behind adopting a certain rateable value for BT is well reasoned, justified, and documented and does not unduly disadvantage other

<sup>(42)</sup> Judgement of the Court of Justice in Case C-308/01 of 29 April 2004 concerning Gil Insurance Ltd and Joint cases T-346/99, T-347/99, T-348/99 point 58 onwards.

<sup>(43)</sup> Commission Decision of 17 February 2003 No C15/2002 on Belgian Coordination Centres (OJ L 282, 30.10.2003) and No C51/2001 on Dutch international financing activities (OJ L 180, 18.7.2003).

<sup>(44)</sup> See footnote 36.

<sup>(45)</sup> Directive 2002/22/EC on Universal Service and Users' Rights relating to electronic communications networks and services.

<sup>(46)</sup> Op. cit. footnote 14.

operators<sup>(47)</sup>. In any case, such a settlement should respect the principle of non-discrimination among operators and the parameters on which the agreement has been reached should be objective and opened for all operators.

46. **Resulting taxation:** The doubts about the justification of applying different valuation methods are further reinforced by the differences in the resulting taxation. Even if the use of different methods and revision mechanisms would be based on an objective set of criteria, the Commission would expect these different methods to ensure equal treatment by yielding comparable results. In this context, it would be useful to compare the tax levels to an objective measure of the economic use of the assets taxed, such as, for instance, revenues. The tax payable by BT seems to be in the range of 2-4 % of relevant revenues while that payable by Vtesse and other new entrant competitors is said to be two or three times as much, and to reach 20-30 % on an incremental basis. Moreover, the application of different methods seems to structurally produce different results when it comes to the frequency of revisions and adjustments. While some minor discrepancy might be justified in the context of a property tax, it needs to be ensured that such differences are not disproportionate and discriminatory.

#### *Distortion of competition*

47. The UK telecommunications market has been opened to competition since 1992 and today is a highly competitive market with numerous operators. BT and Kingston Communications directly compete against Vtesse and other alternative providers active in the telecommunications services market. Hence on the assumption that the difference in business rates taxation among these operators involved State aid and conferred a selective advantage upon certain players, it would alter their competitive position on the market and hence distort competition.

#### *Effect on trade*

48. The mere fact that some firms' position is strengthened by the resulting lower rate of taxation compared to that of other firms which are competitors in intra-Community trade demonstrates that Community trade is affected. BT is a company active on a global scale, competing on several community markets in electronic communications services. Hence any advantage conferred upon it affects trade between Member States. This criterion also appears to be fulfilled to the extent that the telecoms companies affected by the measure at stake are able, actually or potentially, to trade with companies located in other Member States.

#### *Conclusion*

49. In conclusion, it would appear that the measure under consideration involves State aid within the meaning of

<sup>(47)</sup> According to the UK authorities, the VOA needs to obtain BT's consent to release to the Commission the relevant documentation which served for BT's valuation. In addition, it is said that BT itself arrived at its own valuation by the »Contractor's Basis« method but the VOA is not in possession of this valuation.

Article 87(1) EC. The Commission would like to emphasize, however, that this conclusion should not be seen as an attempt on its part to impose on the UK authorities the use of a particular valuation method. It is, in fact, for the UK authorities to choose the method they consider most appropriate to value the »rateable hereditament«, provided that any differences between individual undertakings or economic sectors are justified by the intrinsic features and inherent logic of the tax system and that, eventually, all taxable persons are subject to the same objective and non-discriminatory treatment, leading to comparable levels of taxation.

### 5.2. Nature and amount of the possible aid

50. On the basis of the information provided so far, the Commission tends to believe that the measures constitute new aid and not existing aid. Despite the fact that communications systems have been rated since the middle of the 19th century, it is the Local Government Finance Act (LGFA) 1988 which largely governs the current non-domestic rates system in England and Wales. Prior to the 1988 Act, BT (and most other utilities) were rated by a mandated statutory formula. The LGFA put utilities on the same commercial basis as other enterprises by introducing an independent valuation by various methods and allowing for appeal. The provisions of the Act were implemented at the 1995 valuation when the »Receipt and Expenditure« method was first applied to BT and Kingston Communications.
51. Assuming that the measure qualifies as aid, within the meaning of Article 87(1) EC, the aid amount must, according to § 35 of the Commission's abovementioned notice on direct business taxation, be calculated on the basis of a comparison between the tax actually paid and the amount which should have been paid if the generally applicable rule had been applied. However, since, at this point in time the Commission cannot pronounce itself on which method, if any, and, which level of taxation, if any, is deemed to be the standard one in the present case, the amount of aid cannot be determined at this stage, either.

### 5.3. Compatibility

52. At this stage and in view of the above, the Commission cannot exclude that BT, to whom the »Receipt and Expenditure« method is applied, may benefit from a specific and more favourable tax treatment amounting to State aid as defined under Article 87(1) EC. In addition, the Commission notes that Kingston Communication is likely to benefit from a similar tax treatment than BT.
53. It is therefore necessary to determine if such an aid could be considered compatible with the common market under Article 87(2) or (3) of the EC Treaty. It appears that none of the exceptions under Article 87(2) EC Treaty apply in this case, as the measure is not aimed at the objectives listed in these provisions.

54. Under Article 87(3)(a), an aid measure is considered compatible with the common market when it is designed to promote the economic development of areas where the standard of living is abnormally low or where there is serious underemployment. Such areas are defined by the United Kingdom's regional aid map. Since the measures are not limited to such areas, this provision does not apply.
55. As regards the exceptions laid down in Article 87(3)(b) and (d), the aid in question is not intended to promote the execution of an important project of common European interest or to remedy a serious disturbance in the economy of the United Kingdom, nor is it intended to promote culture or heritage conservation.
56. Finally, it is necessary to examine if the aid can qualify for the exception laid down in Article 87(3)(c) which states that an aid may be considered compatible with the common market where it facilitates the development of certain economic activities or of certain economic areas and does not adversely affect trading conditions to an extent contrary to the common interest.
57. The preferential tax treatment does not seem to be related to investment or to job creation and constitutes a permanent relief from charges that should be normally met by these companies in the course of their business. The measure could, at this stage, be considered as an operating aid scheme, the benefits of which will cease as soon as it is withdrawn. According to the constant practice of the Commission, such aid cannot be considered to facilitate the development of certain economic activities or of certain economic areas.
58. Since, assuming that the measure qualifies as State aid, it would not seem to qualify for any of the exceptions provided for in the Treaty, the Commission doubts that it

could be considered compatible with the common market.

## 6. CONCLUSION

59. In the light of the foregoing considerations, the Commission, acting under the procedure laid down in Article 88(2) of the EC Treaty, requests that the United Kingdom submit its comments and provide all such information as may help to assess the aid/measures to BT and Kingston Communications, within one month of the date of receipt of this letter.
60. The Commission is in particular interested to receive the conclusions of the review of the system undertaken by the Department of Trade and Industry or details of the ongoing discussions and any working papers on this matter. In addition, it would like to receive the details of the agreement between the VOA and BT, the VOA and Kingston, concluded in 1995, applicable for the 1995-2000 period and especially the economic modelling behind the valuation and the justifications (including data on relevant revenues etc.) for any subsequent concessions made during the settlement. Similarly, the Commission would like to receive the details of BT's and Kingston's 2000 valuation, applicable for the 2000-05 period. Furthermore, the Commission is interested in tax levels and relevant revenue data for Vtesse and other alternative operators, including Cable and Wireless. It also requests that your authorities forward a copy of this letter to the potential recipients of the aid.
61. The Commission wishes to remind the United Kingdom that Article 88(3) of the EC Treaty has a suspensory effect, and, that Article 14 of Council Regulation (EC) No 659/1999 provides that all unlawful aid may be recovered from the recipient."