

## Legally Privileged and Confidential

### OXFORDSHIRE COUNTY COUNCIL: FULL FIBRE STATE AID ISSUES

#### Background and Request for Advice

1. Oxfordshire County Council (the Council) is considering bidding for Local Full Fibre Networks funding from the Department for Culture, Media and Sport (DCMS). The Council intends to use this funding to award contracts for the supply of connectivity services. This advice note addresses a number of detailed State aid questions.

#### The State Aid Regime

2. From the beginning of 2021 the EU State aid rules no longer apply in the UK. There is, instead, a new regime of “subsidy control”, by virtue of the EU/UK Trade and Cooperation Agreement.
3. However, the DCMS funding would be from an already existing scheme, to which the EU State aid rules do continue to apply. This advice note therefore considers the applicability of those rules to various potential recipients.
4. Article 107 of the Treaty on the Functioning of the European Union prohibits public bodies from granting aid that distorts competition and trade in the European Union. To constitute State aid, an arrangement must have all the following characteristics:
  - 4.1. Aid is granted through State resources;
  - 4.2. The aid favours a certain “undertaking” (such as a private firm), or undertakings, and confers an advantage;
  - 4.3. The aid distorts or threatens to distort competition, or strengthens the position of the recipient in relation to competitors; and
  - 4.4. The aid affects trade between Member States.

#### General Principles

5. The award of funding from Central Government (DCMS) to the Council, as a public body, does not itself raise State aid issues. Nor does the use of the funding to purchase commercial services for the Council’s own use, where such services are obtained through a public procurement process.
6. State aid issues could, however, arise where either the Council, although a public body, engages in economic activities (that is, any activity consisting in offering goods and services on a market<sup>1</sup>), and thus acts as an “undertaking”; or where independent commercial users of publicly funded connectivity services (i.e. other “undertakings”) might also receive benefits.
7. We have therefore considered, in the detailed advice below, the proposed site types for connectivity services by the Council against these principles. We have also considered whether the supplier of fibre connectivity services to the Council (or business or domestic

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<sup>1</sup> European Commission Notice on the notion of State aid as referred to in Article 107(1) of the Treaty on the Functioning of the European Union (OJEU C 262/1, 19.7.2016), at paragraph 12.

premises near to newly served public sector sites) could be in receipt of State aid because of the stimulus effect of connectivity on the local market. In addition, we have considered the potential for State aid to suppliers of connectivity services if “social value” is taken into account by the Council.

## Site Types

8. **Schools:** the European Commission has stated that it considers that public education, within a national education system funded and supervised by the State, does not constitute an economic activity (paragraph 28, the Notice on the notion of State aid, referred to in footnote 1). Schools, therefore, will not be “undertakings”, and assistance to them will not constitute State aid. (The only exceptions would be any schools that fund themselves predominantly from private fees.)
9. **Council Offices:** as noted above (at paragraph 5) the Council itself is a public body, and funding which benefits offices belonging to the Council, for its own public activities, would therefore not constitute State aid.
10. **Museums:** the Commission has listed museums (either generally open to the public free of charge; or where the charge is only a small fraction of the museum costs) as not engaging in an economic activity (paragraphs 33 and 34, the Notice on the notion of State aid). Funding benefiting them will therefore not constitute State aid.
11. **GP Surgeries:** the Commission has held that public support to hospitals and other health care facilities providing the usual range of medical services aimed at a local population and unlikely to attract customers or investment from other Member States is not liable to affect trade between Member States, and therefore does not constitute State aid (paragraph 197 (c), the Notice on the notion of State aid). Funds benefitting GP surgeries for the local population will therefore not constitute State aid.
12. **Libraries:** libraries are not considered to be engaged in an economic activity (paragraphs 33 and 34, the Notice on the notion of State aid), and so funding benefitting them will not constitute State aid.
13. **Fire Stations:** fire stations performing public service tasks, paid for by central or local government, are not carrying out an economic activity, and so funding benefitting them will not constitute State aid.
14. **Recycling Centres:** the Commission has stated that the funding of waste management infrastructure not meant to be commercially exploited is in principle excluded from the State aid rules<sup>2</sup>. Funding benefitting recycling centres which perform a public function would therefore not constitute State aid.
15. **Children’s Homes:** children’s homes run by local authorities as part of their public duties of providing social care services for children would not constitute an economic activity, and so funding benefitting them will not constitute State aid. (Privately run children’s homes, by contrast, are likely to constitute “undertakings” for State aid purposes.)
16. **Health Board Offices:** public health facilities would be considered either not to be carrying out an economic activity (paragraph 24, the Notice on the notion of State aid); or, as for GP

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<sup>2</sup> Paragraph 11, Infrastructure Analytical Grid for Waste Management Infrastructure (2017).

surgeries, not to have a sufficient effect on trade because of their local nature (paragraph 197 (c)). Funding benefitting them would not constitute State aid.

17. **CCTV:** the use of CCTV systems owned by public bodies exercising public powers would not constitute an economic activity, and funding would therefore not constitute State aid.
18. **Village Halls As Remote Working Hubs:** the use of these by Council staff would not constitute an economic activity. If these are subsequently used by non-Council staff, then by analogy with Case SA.33149 (Germany, *Wirtschaftsbüro Gaarden – Kiel*), concerning an economic advisory bureau offering purely local services, and paragraph 197 (f) the Notice on the notion of State aid, there is no foreseeable impact of such small-scale local activity on cross-border services, investment or establishment, and therefore not a sufficient effect on trade to constitute State aid.

### **Effect on Nearby Business and Domestic Premises**

19. As noted above, at paragraph 5, a supplier of services to the Council would not be in receipt of State aid where those services are obtained through an open competitive process. The same principle applies to the supplier of fibre connectivity services.
20. Since the supplier is not in receipt of State aid, it is immaterial whether it also supplies private “undertakings” with similar services. Individual premises which happen to be located near to newly served public sector sites, and which are owned or occupied by “undertakings”, and which might benefit from the stimulus effect of enhanced connectivity, will be considered either insufficiently selective to have an advantage conferred on them constituting State aid<sup>3</sup>; or (like the customary amenities, such as shops etc., of publicly funded, non-economic, infrastructure) too local in nature to have a sufficient effect on trade to constitute State aid (paragraph 207, the Notice on the notion of State aid).

### **Social Value**

21. We have considered the State aid implications in a situation where, in receiving competing bids for supplying connectivity services to a public sector site, the Council wishes to take into account “social value” (meaning the number of additional premises in the locality which will also be served). The premises themselves would not be in receipt of State aid (for the reasons set out in paragraph 20, and because they would pay the applicable charges for installation and use to the connectivity supplier).
22. According to paragraphs 89 to 96 of the Notice on the notion of State aid, State aid can normally be excluded where a public body employs a competitive tender procedure to purchase goods or services, because this is evidence that a transaction is in line with market conditions and therefore no advantage is conferred on the “undertaking” supplying the goods or services. To ensure conformity with market conditions, the award criteria also need to be specified in advance of the tender process (paragraph 92). Therefore, provided the Council specifies in advance to bidders how “social value” will be taken into account as a criterion in assessing bids, State aid would be presumed not to benefit the winning supplier.

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<sup>3</sup> See, by analogy, Case N 192/2005, *Austrian Securitisation Scheme*, where bonds backed by state guarantees, and sold to end investors, lacked sufficient specificity to constitute State aid to the investors who bought them.

23. (To take a worked example, two suppliers may have similar costs of £80,000 to connect a public sector site, for which a typical charge may be £30,000. They each may bid £30,000, with one saying it will also connect 50 homes as additional premises, and the other 100 homes. Provided it is specified in advance that “social value” will be included as a criterion, and how it will be measured, choosing the second bidder would not constitute State aid to it. In both cases the suppliers would be aiming to recoup their costs by making connections to the additional premises, and earning revenue from them as well as from the public sector site, but each would decide separately how to do so, in line with its own commercial strategy, the charges it makes to connect the premises and the revenue it expects to obtain.)

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