



EUROPEAN COMMISSION

Brussels, 16.12.2009

C(2009)10403

PUBLIC VERSION

WORKING LANGUAGE

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Subject: State aid N 388/2009 – Finland
High-speed broadband pilot projects in Finland

Sir,

I. SUMMARY

- (1) I am pleased to be able to inform you that the European Commission has assessed the measure "*High-speed broadband pilot projects in Finland*" (hereafter: "the measure") and decided not to raise objections as the State aid contained therein is compatible with Article 107(3)(c) Treaty on the Functioning of the European Union (TFEU)¹.

II. PROCEDURE

- (2) Following pre-notification discussions, by letter dated 26 June 2009, pursuant to Article 108 (3) TFEU, the authorities of Finland notified the above mentioned measure to the Commission. On 26 August 2009 the Commission requested additional information, which the Finnish authorities provided on 13 and 15 October 2009 following an extension of the deadline for submitting the information. Additional clarifications were provided by the Finnish authorities by an e-mail of 16 November 2009.

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

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III. CONTEXT

- (3) In the end of 2008, the Finnish Government approved a national "*Plan of Action*" for improving the infrastructure of the information society². The general objective of the plan is to ensure that citizens and businesses, regardless of place of residence or location, have access to information society services.
- (4) The Plan of Action has two distinct targets for years 2010 and 2015 in terms of broadband coverage. By the end of 2010, all Finnish citizens, businesses and public administration bodies shall have access to basic broadband services with a minimum average downstream rate of 1 Mbps. By the end of 2015, according to the Plan of Action, nearly all Finnish citizens, businesses and public administration bodies shall have access to very high speed, so called next generation access (hereafter: "NGA") services with a minimum downstream rate of 100 Mbps.
- (5) Legislation and licence policy will be the tools to achieve the objective of "*broadband for all*" by the end of 2010. In the area, in which an electronic communication operator is assigned with the universal service obligation, this operator shall provide the basic broadband services to end users at a reasonable price. The definition is technology-neutral, permitting the universal service to be implemented on any technology platforms. In principle, the Finnish authorities explained that no public funding will be used to achieve this target for 2010.
- (6) The objective for 2015 is that nearly all (more than 99 percent of the population) permanent residences, businesses and public administration bodies shall be no more than within two kilometres' reach to an optical fibre or cable network or other by capacity and other characteristics equivalent network. End users will choose the electronic communication operator and/or the broadband technology platform at their own expense to subscribe to access to NGA services and the short distance of two kilometres will allow the operators to provide a minimum of 100 Mbps connections for the end users. The aim is to grant public aid for the building of future-proof network and ensure that all citizens in the project areas will be able to use high-speed broadband services in the future. The Finnish authorities argue that the need for higher connection rates will increase in line with advances in the information society.
- (7) According to the Finnish authorities, the commercial operators will achieve an NGA coverage of around 95 percent of the population in Finland, primarily in built-up areas. However, extending the NGA coverage to 99 percent will require the subsidised high-speed broadband networks to be built for approximately 130 000 households in non-built-up areas, typically in rural and remote areas with low population densities. The public funding will be granted only to the non-built-up areas where it is not economically viable for commercial operators to build high-speed networks.

² "*Valtioneuvoston periaatepäätös kansallisesta toimintasuunnitelmasta tietoyhteiskunnan infrastruktuurin parantamiseksi*". Available at: http://www.lvm.fi/c/document_library/get_file?folderId=334377&name=DLFE-5612.pdf

- (8) The pilot measure subject to the current notification is part of the second phase of Plan of Action that aims to achieve higher level of NGA broadband coverage in Finland with public funds than would occur without the aid. This notification will cover only ten pilot projects (hereafter "pilot measure"). The pilot measure aims at subsidising the building of very high-speed, NGA networks in rural and remote areas. The Finnish authorities decided to launch only ten pilot projects first in order to gain experience on the implementation of publicly subsidised projects that could be utilized when designing the main phase of the Government Plan of Action. The main phase of the Plan of Action will be notified later pursuant to Article 108 (3) TFEU.
- (9) Furthermore, the pilot projects, which are located around Finland, are planned to start already in 2009. According to the Finnish authorities the construction of electronic communication networks has proved to be an effective tool for economic recovery: jobs are created during the construction phase and also after the network has been taken into use.
- (10) In 2009, a detailed market analysis has been prepared for each of the ten pilot projects by the National Regulatory Authority, the Finnish Communications Regulatory Authority (hereafter: "FICORA"). For all areas where the planned ten pilot investment projects are to take place, a consultation with the electronic communication operators concerning their future plans has been conducted. This has served as a basic tool in determining the areas that would be eligible for aid in accordance with the *Community Guidelines for the application of State aid rules in relation to rapid deployment of broadband networks*³ (hereafter: "Broadband Guidelines").

IV. DESCRIPTION OF THE MEASURE

- (11) **Objective:** The aim of the pilot projects is to develop an infrastructure of electronic communication network offering very high speed broadband services in sparsely populated areas of Finland which are currently not served and where there are no plans for such coverage in the near future. The final goal is to give end-users access to new, innovative services in order to allow all citizens to participate in the knowledge based society. The existing networks will most likely not be technically sufficient to offer all of these services and satisfy the more sophisticated needs of citizens and business users in pilot project areas, not even if the eventually planned upgrade of the networks is taken in account.
- (12) According to the Finnish authorities, the target of the Plan of Action is justified by the increasing need in future for symmetrical connections that also feature high upstream rates. This need will be fuelled by demand from new, innovative services (such as remote work, animal farming, tourism, remote healthcare, e-learning, e-government services)⁴. The Finnish authorities indicated that the growth of the connection rates has been linear during the last twenty years and if this trend continues 100 Mbps connection rates will be a

³ OJ C 235 of 30.9.2009, p. 7.

⁴ For instance, depending on the remote work, presently 2 Mbps connection may be enough for one person in the household but after some years the need is estimated to be 10 Mbps symmetrical connection.

norm by the year 2015⁵. The need for access to the aforementioned services is even higher in rural areas due to long distances and the remoteness of services. The Finnish authorities argue that adequate broadband network coverage in rural areas could bring proportionally higher benefits for citizens and undertakings living in those areas than there for urban areas. Also the use of the different services at the same time in the households and businesses increases the need for faster connection rates.

- (13) The notified project concerns only the backhaul⁶ high-speed network without covering the last mile connection⁷. When the high speed network is within two kilometres of a household, the end user may choose the technology of the subscriber connection. The Finnish authorities decided that every household shall be within a distance of 2 kilometers from the subsidized network, because due to the technology limitations of the NGA networks, only within this distance can NGA services be provided to the consumers.
- (14) **Legal basis:** The measure is based on the Act on Discretionary Government Transfers 688/2001, the Government Decree on Broadband Construction Aid 451/2009, the Act on Broadband Construction Aid in Sparsely Populated Areas, the Act on public Contracts 348/2007, the Act on Support for Rural Development, Government Decree on Support for Rural Projects 829/2007.
- (15) **Target areas and consultation with existing operators:** The target areas comprise the following ten pilot project areas: Jalasjärvi, Pertunmaa, Kinnula, Miehikkälä, Sastamala, Lieksa-Nurmes, Pudasjärvi, Kiuruvesi, Karvia, Länsi-Turunmaa. These were evaluated by the responsible Finnish ministry and FICORA following suggestions submitted by the Regional Council. The pilot projects are located in the very sparsely populated areas.
- (16) The market analysis carried out by FICORA has demonstrated that the project areas are predominantly areas where at present such networks do not exist. Based on detailed mapping, coverage analysis and a consultation with the existing operators⁸, the Finnish authorities confirmed that only “white NGA areas” within the meaning of the Broadband Guidelines⁹ are eligible for support. The Finnish authorities also confirmed that in case where, within a project area, there is at least one operator offering 100 Mbps broadband subscriptions – the areas within a two kilometer range from such access points will not be eligible for state support.
- (17) Although currently basic broadband services on some of the targeted areas are available (mostly mobile or wireless solutions), following the consultation of the electronic communication operators concerning their future plans as regards the pilot project areas FICORA found that on the basis of the consultation it was clear that the 10 pilot project areas do not interest the

⁵ Report on the telecommunications needs in rural areas of 15.9.2008

⁶ Backhaul networks comprise the intermediate links between backbone (core) networks and access (or last mile) networks

⁷ The “last mile” or access networks are the final part of the network delivering connectivity from an electronic communications provider to a customer.

⁸ See para (10)

⁹ See paragraph 68 of the Broadband Guidelines.

operators on a commercial basis as the population densities are low and often decreasing and that there are no plausible private investment plans to build commercially based high-speed networks (100 Mbps) in the project areas. Therefore, FICORA has effectively ensured that the areas eligible for support are limited to the areas where there is no high-speed access point (within a range of two kilometers) and where there is very little prospect of development of high-speed networks by the existing operators.

- (18) **Budget and funding instruments:** The aid takes the form of direct grants. The total budget for all ten pilot projects amounts to EUR 15.6 m. The selected operator may have government aid amounting to at most one third of the project budget. In addition, the selected operator may have aid from the local municipality and the European Regional Development Fund¹⁰ amounting at the most to one third of the project budget. At least one third of the project shall be financed by private parties.
- (19) **Aid intensity:** The aid intensity of the project will depend on the outcome of the tender procedure. The maximum aid intensity has been capped at 67%.
- (20) **Duration of the measure:** The pilot project measure is expected to run until 31.12.2015. In practice the time limit for project implementation will be stipulated in the invitations to tenders.
- (21) **Procurement and award criteria:** The aid will be allocated on the basis of an open tender carried out by the Regional Councils. The contract will be awarded to the bidder implementing the project in the best and most economical manner in accordance with the invitation to tender and the associated terms and conditions. The Regional Councils have drafted their tender documents based on the "model tender documents", which include the following criteria used for selecting the most economically advantageous bids with the respective weights: project price (amount of aid applied for the project) – 50%, subscription fees to be collected from users – 20%, other fees collected from users – 20%, commitment to provide services longer than the minimum term (10 years) – 10%.
- (22) **Technology:** The planned measure is technological neutral, by allowing different technology platforms to use the subsidized infrastructure. End-users will have the opportunity to choose the retail operator, the services and the last mile technology according to their needs¹¹. In the view of the Finnish authorities, the planned project will make it economically feasible for the commercial operators to invest in the last mile solutions and to provide retail services to the end users in rural areas. Furthermore, the procurement will be technology neutral allowing tenderers to propose any suitable technological solution.
- (23) **Wholesale offer:** The selected operator will have to offer wholesale services and access to the subsidised network to other operators for minimum 10 years.

¹⁰ The funding from the European Regional Development Fund is subject to a Commission Decision.

¹¹ If in a specific situation and depending on the network structure the subscriber lives far from the backhaul network, the subscriber line may be longer than two kilometres. In these cases the part of the subscriber connection extending further than 2 kilometres from the end-user may be subsidized.

The access obligation includes all possible forms of network access that access seekers might need, including dark fibre, ducts and equipment facilities. FICORA will supervise the compliance of the selected operator with the required access obligations.

- (24) **Beneficiaries:** The direct beneficiaries of the aid will be electronic communications operators offering broadband services. Indirect beneficiaries will be electronic communication operators utilising the new network for offering retail services to end users and local SMEs in the targeted areas.
- (25) **Pricing:** It is the duty of the national regulatory authority, FICORA to ensure that the wholesale access pricing in the subsidized network is reasonable. The operator has an obligation to prove that the price charged for a wholesale access or service is reasonable and non-discriminatory. In practice, the reasonable price of a wholesale access product or service should not exceed a cost-oriented price. In the future FICORA will collect information on wholesale NGA access prices and once there is enough information for benchmarking, FICORA will perform the relevant benchmarking of the prices.
- (26) **Service Requirements:** As described in paragraph (22), end-users will be free to choose any service provider and the last mile technology according to their needs to get access to the NGA network. However, to avoid the situation that the electronic communication operators might refuse to provide NGA services to the end-users, the selected operator will have the obligation to provide and construct subscriber connections to those end-users who want to have a subscriber connection to the subsidized network. The end-user will have to pay for the subscriber connection. The selected operator will have to provide services to end users through its own retail services or to enter into an agreement with another operator who will serve the end-users. In the application for public aid the operator will have to undertake to provide retail services to end users for 10 years.
- (27) **Monitoring and clawback mechanism:** FICORA will carry out appropriate monitoring. Should in a given pilot project the aid amount for the operator exceed EUR 1 m, the relevant contract with the operator will contain a clawback arrangement that will ensure that if the operator generates higher profit than foreseen, an amount proportional to the contribution of financing the project will be repaid.

V. ASSESSMENT OF THE MEASURE: PRESENCE OF AID

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

State resources

- (29) The notified measure is financed by resources of the government of Finland. Hence state resources are involved.

Economic advantage

- (30) *Selected operators*: Through the tender process, the selected operator will receive financial support which will enable it to enter the market and provide broadband services on conditions not otherwise available on the market. Although a competitive tender procedure tends to reduce the amount of financial support required, the aid will also allow the operator to offer end-to-end services *prima facie* at lower prices than if it had had to bear all costs themselves and thus attract more customers than under normal market conditions. The selected operator will also acquire ownership of the network as well as other tangible and intangible assets with State funds (e.g. equipment, customer relations) even after the lifetime of the projects. In view of the above, it is clear that an economic advantage will be granted to the selected operator.
- (31) *Third party providers*: In the areas covered by the project, there is basic broadband connection. The measure to enhance and improve access points within the existing network will increase demand for enhanced broadband services. Third party providers of broadband services will be able to use the enhanced access under non discriminatory terms due to the open access provisions and they will therefore also indirectly benefit from the state resources, as they will be customers of the selected electronic communication operators.
- (32) *End users*: The measure aims at improving the provision of existing broadband services to business users. Businesses in the targeted geography will therefore ultimately benefit from the improved service.

Distortion of competition

- (33) The intervention of the State alters the existing market conditions by allowing the provision of improved broadband services by the selected telecommunication operator and, potentially, third party providers. Furthermore, it will alter the conditions of competition between end users in Finland who are likely to subscribe to the enhanced services and end users elsewhere in the European Union. Therefore, the fact that an improved broadband service becomes available has the effect of distorting competition.

Effect on trade

- (34) Insofar as the intervention is liable to affect providers of electronic communications services from other Member States, the measure has an effect on trade. The markets for electronic communications services are open to competition between operators and service providers, which generally engage in activities that are subject to trade between Member States. Moreover, the measure has the potential to distort competition between end users located in Finland and elsewhere in the European Union.

Conclusion

- (35) Having established that the project involves aid within the meaning of Article 107(1) TFEU to the selected service provider, third party providers and businesses, it is necessary to consider whether the measure can be found to be compatible with the internal market.

VI. ASSESSMENT OF THE MEASURE: COMPATIBILITY

- (36) The Commission has assessed the compatibility of the scheme according to Article 107 (3) (c) TFEU and in the light of the *Community Guidelines for the application of State aid rules in relation to rapid deployment of broadband networks*¹². The Broadband Guidelines contain a detailed interpretation of Article 107 (3) (c) TFEU in this area of State aid law. As regards the applicable substantive provisions, the Commission has essentially analysed the measure in the light of the criteria developed in particular in paragraphs 31-79 of the Broadband Guidelines.

VI.1. The balancing test and its application to aid for the broadband network deployment

- (37) As described in points 34 and 35 of the Broadband Guidelines, in order to assess whether a measure is compatible under article 107 (3)(c), the Commission balances positive and negative effects of the aid according to the criteria set out in the Guidelines. In applying the balancing test, the Commission will assess the following questions¹³:
- (1) Is the aid measure aimed at a well-defined objective of common interest (i.e. does the proposed aid address a market failure or other objective)?
 - (2) Is the aid well designed to deliver the objective of common interest? In particular:
 - (a) Is the aid measure an appropriate instrument?
 - (b) Is there an incentive effect, i.e. does the aid change the behaviour of firms?
 - (c) Is the aid measure proportional, i.e. could the same change in behaviour be obtained with less aid?
 - (3) Are the distortions of competition and the effect on trade limited, so that the overall balance is positive?

VI.2. Objective of the measure

The aid is in line with the policy of the Union

¹² For reference, see footnote 3.

¹³ See paragraph 35 of the Broadband Guidelines.

- (38) The current measure targets "*white NGA areas*"¹⁴, where no NGA broadband coverage is currently available and where there are no plans by private investors to roll out such infrastructure in the near future. Hence the objective of the measure is in line with Section 3.1 of the Broadband Guidelines: by extending NGA broadband coverage to areas where private operators have no commercial interest to invest, the Finnish authorities pursue genuine cohesion and economic development objectives.

Aid is the appropriate instrument

- (39) As set out in paragraphs 47 and 48 of the Broadband Guidelines, in the situation currently under assessment, the efforts from alternative instruments initiated by the Finnish authorities such as ex ante regulation, the universal service obligation¹⁵, or the broadband support measures related to demand (such as tax relief to households for IT investments) do not solve the problems related to the lack of supply of high speed broadband. In order to ensure the supply of high-speed broadband services to all citizens, the Finnish Government sees no alternative but to grant public aid to the construction of NGA networks in the very sparsely populated areas of the country, such as the ten pilot projects.
- (40) The Commission can agree that without further public intervention, avoiding the emergence of a new "*digital divide*" between rural and urban areas seems not possible, which could lead to the economic and social exclusion of the local citizens and undertakings. Hence in the current situation, State aid is an appropriate instrument to achieve the set objectives.

The aid provides the right incentives to operators

- (41) As set out in paragraph 50 of the Broadband Guidelines, regarding the incentive effect of the measure, it needs to be examined whether the broadband network investment concerned would not have been undertaken within the same timeframe without any State aid. According to the results of the public consultation and market research referred to above in paragraph (10) in the targeted areas no NGA network investment would take place without public funding, hence the aid produces a change in the investment decisions of the operators. Moreover, as explained in paragraph (21), the recipients of the aid will be selected by public tender. Tenderers will submit investment plans indicating the amount of aid that they consider to be necessary to carry out the investment given the anticipated investment and operating costs and revenues. Therefore, the aid should provide a direct and appropriate investment incentive for the selected operators.

VI.3. Design of the measure and the need to limit distortions of competition

- (42) The Finnish authorities have designed the measure in such a way as to minimise the State aid involved and potential distortions of competition arising

¹⁴ See section 3.3 of the Broadband Guidelines.

¹⁵ See paragraph 5.

from the measure. As set out in paragraphs 51, 71 and 79 of the Broadband Guidelines, in assessing the proportional character of the notified measures in "white NGA areas" a number of necessary conditions has to be met in order to minimise the State aid involved and the potential distortions of competition:

- (a) *Market research and consultation:* As set out in detail in paragraph (10), the Finnish authorities have undertaken an analysis of the existing broadband infrastructure in order to clearly identify the areas where state intervention is necessary. By consulting existing operators and updating the target areas accordingly and by consulting with the relevant stakeholders such as FICORA (National Regulatory Authority) ensures that public funds are used only in areas where there are no plausible private investment plans to build commercially based high-speed networks.
- (b) *Open tender process:* The Finnish authorities will select the undertakings for the construction and the management of the network in an open, competitive tender. This procedure had the effect of maximising the effect of the aid provided while minimizing any potential advantage granted for the selected operator.
- (c) *Most economically advantageous offer:* Within the context of an open tender, the Finnish authorities will select the most economically advantageous offers among those presented by the operators. Under the terms of the open tender, the bidder with the lowest amount of aid requested receives more priority points within the overall assessment of the bid as explained in paragraph (21)
- (d) *Technological neutrality:* The current measure will enable several alternative platforms (such as wireline, wireless, mobile solutions) to utilise the publicly funded infrastructure. Therefore, it does not favour any particular technology or network platform leaving it to commercial operators to come up with the most appropriate technological solutions to provide retail broadband services to end users.
- (e) *Use of existing infrastructures:* To avoid unnecessary and wasteful duplication of resources, the selected operator shall include in the aid application information on how the subsidised network is meant to be interconnected to other communication networks. In this way the bidders are encouraged to have recourse to any available existing infrastructure in the area, which limits the economic impact of the project for operators that may already have electronic communications infrastructure in place.
- (f) *Wholesale access:* The selected operator will have to offer wholesale services and access to the subsidised network to other operators for 10 years. The selected operator will have to offer other operators access to a network element or to the capacity of the network in an open, transparent and non-discriminatory manner. The access obligation includes dark fibre, ducts and equipment facilities. These access obligations will be supervised by FICORA.
- (g) *Price benchmarking:* In order to ensure effective wholesale access and to minimise potential distortion of competition, wholesale prices on the subsidized network will be monitored by FICORA with the objective to keep

these at a reasonable and non-discriminatory level. In the future FICORA will collect information on wholesale NGA access prices and once there is enough information for benchmarking, FICORA will perform the relevant benchmarking of the prices.

- (h) *Monitoring and claw-back mechanism to avoid over-compensation:* the project will be examined on a regular basis and the monitoring mechanisms implemented will ensure that if the beneficiary fails to comply with the rules, the granting authorities will be in the position to recover the aid granted. By ensuring that any extra profit generated through the operation of the networks will be clawed back¹⁶, the Finnish authorities ensure that the recipient of the aid will not benefit from overcompensation and will minimise *ex post* and retroactively the amount of aid deemed initially to have been necessary.
- (43) Since the measure aims to support the deployment of an NGA network in "white NGA areas", where one basic broadband network may already exist¹⁷ (traditional grey area) further conditions shall be met as laid down in paragraph 73 of the Broadband Guidelines. In this respect, the Finnish authorities proved that
- (i) the broadband services provided over the existing networks are not sufficient to satisfy the continuously growing needs of citizens and business users in the area in question and commercial operators do not have sufficient commercial incentives to upgrade the existing networks as described in detail in paragraphs (10) and (12);
 - (j) there are no less distortive means (including *ex ante* regulation) to reach the stated goals as described in paragraph (39).
- (44) Concerning the conditions laid down in paragraph (79) of the Broadband Guidelines, the Finnish authorities proved that the following conditions are met:
- (k) Effective wholesale access - under the current scheme the access obligations imposed on the chosen operator include access to both passive and active infrastructure for at least 10 years without prejudice to any similar regulatory obligations that may be imposed by the NRA.
 - (l) In the case at hand FICORA (the NRA) has been consulted in setting the conditions for wholesale network access and will actually be supervising the compliance of the selected operator with the wholesale access obligations.
 - (m) Effective and full unbundling – as explained above in paragraph (42) the NGA network architecture that will benefit from State aid will support effective and full unbundling and satisfy all different types of network access that operators may seek.

¹⁶ Small scale projects, where the aid amount does not exceed EUR 1 m are exempt from the application of the claw-back mechanism.

¹⁷ See para (11)

VI.4. Conclusion

- (45) The Commission concludes that the compatibility criteria set out in the Broadband Guidelines are met, hence the aid involved in the notified measure is compatible with Article 107(3)(c) TFEU.

VII. DECISION

On the basis of the foregoing assessment, the Commission has accordingly decided that the aid measure "*High-speed broadband pilot projects in Finland*" is compatible with Article 107(3)(c) TFEU..

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

If this letter contains confidential information which should not be disclosed to third parties, please inform the Commission within fifteen working days of the date of receipt. If the Commission does not receive a reasoned request by that deadline, you will be deemed to agree to the disclosure to third parties and to the publication of the full text of the letter in the authentic language on the internet site:

http://ec.europa.eu/community_law/state_aids/state_aids_texts_fi.htm.

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

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Yours faithfully,

For the Commission

Neelie KROES
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