



EUROPEAN COMMISSION

Brussels, 30.8.2012
C(2012) 6105 final

PUBLIC VERSION

WORKING LANGUAGE

**This document is made available for information
purposes only.**

Subject: **SA.34809 (2012/N) – Germany**
 NGA broadband Markt Reisbach

Sir,

I. SUMMARY

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

II. PROCEDURE

- (2) Germany notified on 14 May 2012 the above mentioned measure to the Commission, pursuant to Article 108 (3) of the TFEU and supplemented the notification with additional information on 12 June 2012 and on 13 June 2012. On 21 June 2012, 6 July 2012, 20 August 2012 and 23 August 2012, the Commission requested additional information which was supplied by letters of 2 July 2012, of 19 July 2012, of 23 August 2012 and of 24 August 2012, respectively.

Seiner Exzellenz Herrn Dr. Guido WESTERWELLE
Bundesminister des Auswärtigen
Werderscher Markt 1
D - 10117 Berlin

III. DESCRIPTION OF THE MEASURE

- (3) **Context:** Englmannsberg, Altersberg, Oberhausen, Obermünchsdorf and Niederhausen (hereafter: “the target areas”), parts of the municipality (*Ortsteile*) of Markt Reisbach, are currently insufficiently provided with broadband.
- (4) The notified measure concerns aid to the deployment of a network supplying households and undertakings with broadband services in the target areas. Under the programme "Model projects for broadband deployment", the measure was selected by the German authorities as one of the model projects for the realisation of innovative solutions and business models for the deployment of Next Generation Access (hereafter: "NGA") networks in rural areas.
- (5) As aid granted under the measure in the framework of the programme "Model projects for broadband deployment" for duct deployment falls under the federal scheme *Leerrohre*¹, the present decision relates only to the amount to be granted by Markt Reisbach to an operator selected following an open tender process, Telekom Deutschland GmbH (hereafter: "Deutsche Telekom"), corresponding to the profitability gap of EUR 137 600 for the operation of the planned NGA network.
- (6) **Objective:** The measure aims at closing the digital gap between rural and adequately supplied areas and enabling access to very high speed internet throughout the rural target areas. Objective is to increase social cohesion and to meet the challenges of economic growth, competitiveness and innovation.
- (7) Germany set out that it is not possible to achieve for the rural target areas the objective of the wide availability of high speed internet provision without State aid, as no infrastructure investment took or is going to take place within the near future.
- (8) **Legal basis:** The legal basis is the *Kommunale Haushaltsverordnung Bayern* and its side laws (*Nebenbestimmungen*).
- (9) **Target areas:** Support will be granted only in white NGA areas². The target areas are neither so-called NGA black areas³ nor NGA grey areas⁴.
- (10) The purpose of the investment is to build a backhaul network⁵ for 440 households. A backhaul optical fibre network is expected to have a long life-span (at least 20 years) and thus provides a reliable technology platform for the construction of NGA networks. Moreover, the optical infrastructure potentially supports unlimited capacity and, in this respect, will allow an open access at equitable market conditions to all fixed and mobile operators offering broadband services to end-users. All (wired and wireless) telecommunications operators will be able to connect to the network at equal and non-discriminatory conditions.

¹ Commission decisions in cases N53/2010 Federal framework programme on duct support and SA.32309 Amendment of the Federal framework programme on duct support .

² Areas where NGA networks do not at present exist and where they are not likely to be built and be fully operational in the coming three years by private investors.

³ Areas where more than one NGA network exists or will be deployed in the coming three years.

⁴ Areas where only one NGA network is in place and there are no plans by any operator to deploy a NGA network in the coming three years.

⁵ Backhaul (or middle mile) networks comprise the intermediate links between backbone (core) networks and access (or last mile) networks.

- (11) The initial aim was to achieve a minimum of 50 MBit/s download speed. This, however, depends on the quality of the existing copper cable or other technology connecting the individual households (last mile)⁶. After having tested the existing infrastructure, according to the German authorities, the actual download speed of the majority of the households will be between 27.9 Mbit/s and 51.3 Mbit/s (387 households).
- (12) For all the target areas, the German authorities have submitted an overview of the needs of customers.
- (13) The municipality examined with a public consultation whether any operator, in particular the existing network operator Deutsche Telekom, envisages a NGA rollout in the next three years. This, as confirmed in writing, is not the case. There is no evidence, as testified by two interest calls that any other operator would engage in the construction of a NGA network within the next three years.
- (14) **Description of the envisaged support:** The measure aims at supporting investment in the operation of NGA infrastructure (ducts and optical fibre). The support will cover a service concession for the deployment and operation of the network (including its maintenance). The network will connect eight existing street cabinets (*Kabelverzweiger*) in the target areas.
- (15) The State support will be given in the form of a grant which is supposed to cover the so-called profitability gap (*Wirtschaftlichkeitslücke*).⁷
- (16) **Identification of the target areas (mapping) and consultation with operators:** In two rounds, a letter was sent to all known supply undertakings and an announcement in the website of the municipality was conducted to ascertain whether any operators intend to deploy broadband in the target areas within the near future.⁸ A map of the planned network is published in the same website. There was further an analysis which demonstrated that there was a strong demand of citizens and undertakings for higher broadband speeds.
- (17) **Duration of the measure:** The scheme will be put into effect as soon as possible after the Commission's decision to approve the aid scheme. The duration is until 31 July 2013. The implementation by the selected operator should take place within 12 to 18 months from the award of the contract.
- (18) **Cumulation of aid:** The support cannot be cumulated with any other State aid programmes, whether they are on the federal level or on the level of the Bundesland.

⁶ As this infrastructure is owned by the incumbent Deutsche Telekom, when applying for aid under the programme "Model projects for broadband deployment" the municipality was not (and could not be) aware of the quality of individual copper cable links.

⁷ The profitability gap is defined as the delta between the discounted investment costs and discounted revenues of the project.

⁸ <http://www.reisbach.de/aktuelles02.aspx?newsid=34>. Under the Broadband Guidelines, the perspective is normally 3 years, but the German authorities consulted with no specific time limit of deployment plans. Vodafone D2 GmbH indicated that already today a broadband network with LTE technology was operated in *Markt Reisbach* and that this should be extended. At the access level, the measure will enable the LTE technology to utilise the publicly funded infrastructure.

- (19) **Granting authority, budget and aid intensity:** The granting authority is the municipality *Markt Reisbach*. The total budget is EUR 137 600. The profitability gap will be covered with 100%.
- (20) **Tender process:** The German authorities have carried out an open tender process in line with paragraph 51 b) of Community Guidelines for the application of State aid rules in relation to rapid deployment of broadband networks⁹ (hereafter: “the Broadband Guidelines”). Following such process, the offer of Deutsche Telekom has been selected as the most economically advantageous.
- (21) **Award criteria:** The German authorities have informed the Commission about the award criteria and their respective weighting. These criteria include the profitability gap (30 %), the technical concept and quality of service (25 %), the scope of necessary optical fibre infrastructure (25 %), the end user price (10 %) as well as the deadline for the beginning of the broadband service (10 %). The tender documents including the award criteria and their weighting were published in the Official Journal of the EU, the broadband portal of the *Breitbandinitiative Bayern*¹⁰ and the website of the municipality¹¹.
- (22) **Technology:** The call for tenders explicitly noted that the State support is available for NGA network based on optical fibre as this is the most adequate technological means for backhaul networks. Alternative platforms will be able to utilise the new network as a backhaul connection to offer its own services to end users.
- (23) **Wholesale access:** The chosen bidder is obliged to grant access to the subsidised infrastructure in a non-discriminatory and transparent manner on all levels of the network. Such access will allow all types of technologies to connect to the backhaul network and serve the consumers with broadband internet services. The access will be granted for a period of seven years. The infrastructure chosen will support effective and full unbundling.
- (24) **Use of existing infrastructure:** The existing street cabinets (*Kabelverzweiger*) are included in the project. Potential competitors could base their bid on the existing infrastructure of the incumbent, as there exists detailed access regulation.
- (25) **Price benchmarking:** According to the German authorities, the Germany wide universal tariffs of Deutsche Telekom for end user prices are subject to a strict regulation. Germany has ascertained that through price benchmarking it will be safeguarded that no overpriced wholesale prices are applied. Germany confirmed that the wholesale prices will be set in a manner that they are based on prices set by the national regulator. The pricing conditions form part of the tenders.
- (26) **Beneficiaries:** The direct beneficiary of the aid, selected through an open tender process, will be Deutsche Telekom, the electronic communications operator rolling out the active broadband infrastructure and offering broadband services (see paragraph 21). Indirect beneficiaries will be electronic communication operators utilising the new network for offering retail services to end users, residential users and primarily SMEs in the areas concerned who will benefit from better broadband services. Whereas residential users are

⁹ Community Guidelines for the application of State aid rules in relation to rapid deployment of broadband networks, OJ C 235 of 30.9.2009, p.7.

¹⁰ www.breitband.bayern.de.

¹¹ <http://www.reisbach.de/aktuelles02.aspx?newsid=27>.

not subject to State aid rules, businesses in the targeted areas will therefore ultimately benefit from the improved broadband services and coverage in comparison with what would be provided on a purely commercial basis.

- (27) **Claw back mechanism:** A clawback mechanism will not be established (see paragraph 38 (h)).

IV. PRESENCE OF AID

- (28) The support envisaged by Germany for the investment in broadband infrastructure constitutes aid in the sense of Article 107 (1) TFEU, according to which support by a Member State to undertakings qualifies as State aid if it meets the following cumulative conditions: 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 4) the measure has to be liable to distort competition and affect trade between Member States.
- (29) The current measure will be directly financed from the budget of the municipality and thus involves State resources. It will provide a selective economic advantage to the electronic communication operator selected via the tender process and also for third party electronic communication operators that will be able to offer their services via wholesale access to the subsidised network. It also enables undertakings to subscribe to the services offered via the subsidised network instead of more expensive market-based solutions. Thereby the support from the State strengthens the position of a selected number of beneficiaries of a specific sector in relation to their competitors and has the potential to distort competition. The principle beneficiaries are active in deploying and operating broadband networks, a market which is, at least potentially, subject to trade between Member States. Therefore this support is also likely to affect trade between Member States.
- (30) The measure caught by the present decision will, according to Germany, only take place after approval by the Commission. Therefore, the standstill obligation within the meaning of Article 108 (3) TFEU will be respected by Germany.

V. COMPATIBILITY ASSESSMENT

- (31) The Commission has assessed the compatibility of the scheme according to Article 107 (3) (c) TFEU and in the light of the Broadband Guidelines which guide the application of Article 107 (3) (c) TFEU by the Commission for aid with this objective.

The balancing test and its application to aid for broadband network deployment

- (32) As described in points 34 and 35 of the Broadband Guidelines, in assessing whether an aid measure can be deemed compatible with the internal market, the Commission balances the positive impact of the aid measure in reaching an objective of common interest against its potential negative side effects, such as distortions of trade and competition.
- (33) In applying this balancing test, the Commission will assess the following questions:
- a. 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)?

- b. Is the aid well designed to deliver the objective of common interest? In particular:
 - 1. Is the aid measure an appropriate instrument, i.e. are there other, better placed instruments?
 - 2. Is there an incentive effect, i.e. does the aid change the behaviour of firms?
 - 3. Is the aid measure proportional, i.e. could the same change in behaviour be obtained with less aid?
- c. Are the distortions of competition and the effect on trade limited, so that the overall balance is positive?

Objective of the measure

The aid is in line with EU policy

- (34) The scheme concerns the rollout of NGA infrastructure. This follows the Commission's Flagship Initiative: "A Digital Agenda for Europe" of the Europe 2020 strategy of 3 March 2010¹², which has the aim to deliver sustainable economic and social benefits from a Digital Single Market based on fast and ultra fast internet and interoperable applications. The Strategy explicitly invites Member States to draw up operational high speed internet strategies and target public funding on areas not fully served by private investments. Accordingly, Germany pursues with the notified measure an important objective of EU policy.

Aid is the appropriate instrument

- (35) No private investments have taken place in the targeted areas or will take place during the next three years. Without further public intervention, no progress could be expected in the reduction of the digital divide between rural and urban areas. As set out in the previous paragraph, Member States are invited to address public funding to non-served areas. Hence, State aid is an appropriate instrument to achieve the set objectives, pursuant to paragraphs 47 and 48 of the Broadband Guidelines.

The aid provides the right incentives to operators

- (36) 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 conducted by the German authorities in the target areas no investment would take place without public funding, hence the aid will trigger a change in the investment decisions of the operators. Therefore, the aid should provide a real investment incentive for operators.

¹² EUROPE 2020 - A strategy for smart, sustainable and inclusive growth, COM(2010) 2020, page 12.

Design of the measure and the need to limit distortions of competition

(37) As set out in paragraph 51 of the Broadband Guidelines, in assessing the proportional character of the notified measures in "white" or "grey" areas a number of conditions has to be met in order to minimise the State aid involved and the potential distortions of competition:

- (a) *Detailed mapping and coverage analysis, consultation with stakeholders:* Germany has undertaken an analysis of the existing broadband infrastructures in order to prove that State intervention is necessary in the target areas. By consulting potential operators in an open and transparent manner as well as by conducting a consumer survey, the scheme ensures that public funds are used only in an area where it is necessary and limits the possibility of crowding out private investments and distortion of competition to the minimum possible. No commercial NGA solution exists or will exist within the next three years in the target area.
- (b) *Open tender process:* Germany has selected the operator of the network in an open tender process ensuring transparency, and equal and non-discriminatory treatment, with the objective to minimise the aid necessary for the measure.
- (c) *Most economically advantageous offers:* Within the context of the open tender, Germany has selected the most economically advantageous offer. Germany has, in line with paragraph 51 c) of the Broadband Guidelines communicated the award criteria and the weighting parameters.
- (d) *Technology neutrality:* The NGA infrastructure at hand is fibre based, as this is the most adequate technological means for backhaul networks. At access level, the current measure will enable several alternative platforms (such as wireline, wireless, mobile solutions) to utilise the publicly funded backhaul infrastructure; it will be open to all technologies able to provide adequate broadband connectivity at the access segment. Therefore, the current measure 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 broadband services to end users.¹³
- (e) *Use of existing infrastructures:* Germany ensured during the tender process that existing civil infrastructures are considered by the bidders in the design of their offers (see paragraph 25).
- (f) *Open wholesale access:* The operator of the new network will be obliged to provide during 7 years following completion of the infrastructure open wholesale access to all interested parties in an open, transparent, non-discriminatory manner. Effective access to the network also covers the chosen operator's own infrastructure which he brings into the project as existing infrastructure.
- (g) *Price benchmarking for wholesale prices:* In order to ensure effective wholesale access and to minimise potential distortion of competition, wholesale prices on the subsidized network will be based on the average wholesale prevailing in more competitive areas of Germany and will be monitored by the national regulator.
- (h) *Claw-back mechanism to avoid over-compensation:* In accordance with footnote 59 of the Broadband Guidelines, in case of a project with very low aid amounts or small scale, "one-off" projects based on simple procurement principles, claw back mechanism may

¹³ See Commission decisions in cases SA.33807 National broadband plan Italy and SA.33151 Basic broadband deployment in white areas of Slovakia.

impose a disproportionate burden on the granting authorities and will not therefore be required by the Commission. The Commission agrees that the measure under assessment with an aid amount of less than EUR 1 million falls into this category; hence claw back mechanism would not be required.¹⁴

The conditions listed in paragraph 51 of the Broadband Guidelines are therefore fulfilled.

Special conditions for NGA infrastructure

White NGA / grey basis broadband areas

- (38) Regarding identified white NGA areas where already one basic broadband service provider is present (traditional grey area) and where operators do not have plans to invest in NGA networks during the coming three years, Germany intends to support the operation of new NGA infrastructure.
- (39) In line with paragraph 73 of the Broadband Guidelines, Germany firstly verified that such operation of new infrastructure is necessary to meet the needs of the areas not served by NGA networks.¹⁵ Secondly Germany had demonstrated that there are no other, possibly less distortive, means to reach this goal. Regulation is a necessary, but not always sufficient instrument for the use of broadband services and it cannot in this case solve the problem of lack of infrastructure.
- (40) Furthermore, pursuant to paragraph 79 of the Broadband Guidelines, Germany requires effective third party wholesale access for 7 years. Before the award of the service concession, Germany will also consult the national regulator, which is monitoring the competitive conditions on the broadband market and which may impose the necessary remedies provided by the applicable regulatory framework. Finally, the NGA architecture has to be designed in a way that it supports effective and full unbundling and satisfies all types of network access that operators may seek.

Conclusion

- (41) 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.

VI. DECISION

- (42) On the basis of the foregoing assessment, the Commission has accordingly decided to consider the aid measure "*NGA Breitband Markt Reisbach*" to be compatible with Article 107 (3) (c) TFEU and not to raise objections to it.
- (43) Germany is reminded that, pursuant to Article 108 (3) TFEU, it is obliged to inform the Commission of any plan to extend or amend the measure.
- (44) 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

¹⁴ See e.g. Commission decisions in cases N62/2010 High-speed Broadband Construction Aid in Sparsely Populated Areas of Finland and SA.33869 Breitband Markt Mömbris.

¹⁵ Germany conducted an analysis, which established the existing infrastructure as well as the number of potential business and private customers. It further established the need for very high speed internet by conducting a consumer survey, which showed that no users in the target area have speeds of more than 6 MBit/s and several users demanded significantly higher speeds.

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/competition/elojade/isef/index.cfm>.

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

European Commission
Directorate-General for Competition
State Aid Greffe
Rue Joseph II 70 / Jozef II straat 70
B-1049 Brussels
Fax No: +32 2 29 61242

Yours faithfully,

For the Commission

Joaquín ALMUNIA
Vice-President