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Subject: **State aid SA.34708 (2012/N) - Poland**
 Broadband network project in Cieszyn region

Sir,

I. SUMMARY

- (1) I am pleased to be able to inform you that the European Commission has assessed the measure "*Broadband network project in Cieszyn region*" (hereafter: "the measure") and decided not to raise objections because the measure is compatible with the internal market, pursuant to Article 107(3)(c) of the Treaty on the Functioning of the European Union (TFEU)¹.

II. PROCEDURE

- (2) By a letter registered on 26/04/2012, pursuant to Article 108 (3) of the TFEU, the Polish authorities notified to the Commission a measure for supporting the

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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deployment of a broadband backhaul network in the region of Cieszyn. Following a request for information on the measure sent by the Commission on 26/06/2012, 12/02/2013 and 22/05/2013, the Polish authorities submitted their replies by letters registered on 01/08/2012, 11/03/2013, 04/07/2013 and 31/07 2013.

III. CONTEXT

III.1. The target region

- (3) The target area of the project covers the Cieszyn district located in the southern part of the Voivodship of Silesia. The district includes 12 communes² with a population of approx. 172 000 inhabitants.
- (4) With the notified measure, the Polish authorities aim to mitigate the extent of digital and social exclusion in those areas and create new professional opportunities for the skilled residents. The access to broadband services will allow people who used to leave their residence due to financial considerations to engage into distance working. Dissemination of broadband access to Internet will be a stimulus for development of modern electronic economy and e-government in the region, and as a consequence it shall favour development of areas of knowledge-based economy.

III.2. The rationale for public intervention

- (5) According to the Polish authorities, the development of broadband in the Silesia region faces two key problems: (1) the shortage of infrastructure to deliver the services required by the public authorities and by citizens; and (2) the lack of adequate competition reflected in high prices or inadequate services.

Shortage of infrastructure of commercial operators offering broadband services

- (6) As regards the first concern, similarly to other regions in the European Union, also in the case of target areas of the project, advanced broadband services and the infrastructure required to support them are available for citizens and businesses in more densely populated areas, whereas broadband infrastructure is inadequate or outright lacking in other areas which are not commercially attractive for electronic communication operators. This leaves citizens and businesses in such areas without the possibility of adequate broadband access and services.
- (7) According to the statistics provided by the Polish authorities, in 2011 the existing infrastructure at the access level was based in the vast majority on copper (82% of xDSL) and radio technologies and only in 2% on fibre optic (including cable and CDMA). The access to broadband services (i.e. equal or above 2 Mbit/s) in target areas reached the level of 50% and the penetration rate of NGA services was only 1%, which is still much below the EU average. In addition, there is no operator providing FTTx or GPON services and only 2% of the active connections allow transmission to the end-user with speed above 30Mbps.

² Brenna, Chybie, Cieszyn, Dębowiec, Goleszów, Hażlach, Istebna, Skoczów, Strumień, Ustroń, Wisła and Zebrzydowice.

- (8) In the Digital Agenda Scoreboard³, Poland is indicated as a country, which despite an acceleration in the years 2005-2009 still stays in the tail of the EU-27 with regard to the penetration of broadband Internet.

Lack of adequate competition reflected in high prices or inadequate services.

- (9) As regards the second concern, there is a lack of competition as regards wholesale and retail bandwidth services in many areas of Silesia. The Polish authorities indicated that the broadband access market share in Silesia held by the incumbent operator was approx. 66% (xDSL market share), without taking into account the indirect share attributable to it due to line rental to other operators – xDSL lines market.
- (10) The Polish authorities argue that the incumbent has the largest market share in terms of number of active subscriber lines. This shows a low degree of competition on the target market, where the existence of entry barriers and the dominant position of the incumbent do not give incentives to use the service of access to network infrastructure at a fixed location. According to the Polish authorities, the alternative operators, aware of the dominant position of the incumbent, its vertical integration are reluctant to invest in providing retail services via xDSL links based on the ULL service.

The rationale for rolling out a new network

- (11) According to the Polish authorities, the main reason for the low level of accessibility of the broadband services is the physical absence of sufficient fibre-optic broadband backhaul infrastructure and ‘last mile’ infrastructure. The existing infrastructure concentrates in the vicinity of the biggest city in the region. Consequently, the Polish authorities decided to roll out the new broadband backhaul network to bridge the infrastructural gap in the region.
- (12) The planned backhaul network will be open to private operators to obtain access for connecting ‘last mile’ infrastructure. Through the construction of a regional broadband backhaul network open for telecommunications operators, devoted to the provision of wholesale services, the Polish authorities aim to reach objectives of social cohesion and economic growth. The construction of a new broadband backhaul infrastructure will allow operators of access networks to enter the market, which will have a positive impact on the supply of retail services and competition in the areas covered by the notified project.
- (13) According to the Polish authorities the analyses conducted so far indicate the increasing significance of "digital exclusion" in the region, especially in rural areas and small towns. The limited supply has curtailed demand for broadband internet access, which is reflected in the lack of interest in the use of broadband internet access. The notified project is to solve the crucial problem of the low usage of broadband internet access, especially in rural areas.
- (14) According to the Polish authorities, the measure is necessary for the achievement of the objectives of the Digital Agenda for Europe⁴ in order to avert the widening

³ New 2012 Scoreboard: https://ec.europa.eu/digital-agenda/sites/digital-agenda/files/KKAH12001ENN-PDFWEB_1.pdf Commission Staff Working Document SWD(2012) 180 final of 18 June 2012 available under http://ec.europa.eu/information_society/digital-agenda/scoreboard/index_en.htm

⁴ Communication of the Commission of 26.8.2010 COM(2010) 245 final/2 A Digital Agenda for Europe.

of the digital divide and to provide the population of Poland with competitive internet access.

IV. DESCRIPTION OF THE MEASURE

- (15) **Objective:** The goal of the Polish authorities is to provide residential customers, business users, government and public administration bodies in the region of Cieszyn with the ability to access the electronic communication operator and technological platform of their choice and to have access to the services provided on NGA networks.
- (16) The project concerns the construction of a backhaul network in "white NGA areas" (i.e. areas where currently there is no coverage of NGA infrastructure and where private investors do not plan to build such infrastructure in the next three years). According to the Polish authorities, providing access to the subsidised backhaul infrastructure to telecommunications operators will create incentives for investment in NGA last mile segments. The other objective of the project is to allow the use of the new backhaul network to eliminate the "digital divide" in traditional basic broadband in areas where currently there is no adequate broadband infrastructure. The project will be implemented following the approval of the Commission.
- (17) The planned infrastructure will be available for use also to public administration. This will allow to implement and use commonly available e-services (including in particular e-government, e-education, e-health).
- (18) **Legal basis:** the Act of 6 December 2006 on the guidelines for the implementation of development policies (consolidated text: Journal of Laws of 2009, No. 84, item 712, as amended), the Act of 7 May 2010 on support for the development of telecommunications networks and services (Journal of Laws No. 106, item 675), the Act of 30 April 2004 on conduct in matters concerning State aid (consolidated text: Journal of Laws of 2007, No. 59, item 404, as amended), the Act of 16 July 2004, Telecommunications Law (Journal of Laws of 2004, No. 171, item 1800, as amended), the Act of 7 April 1989 - Associations Law (Journal of Laws of 2001, No. 79, item 855, as amended), the Act of 29 January 2004 on public procurement (Journal of Laws of 2010, No 113, item 759 as amended), the Act of 19 December 2008 on public-private partnership (Journal of Laws of 2009 No 19, item 100 as amended), the ordinance of the Minister of Regional Development of 18 December 2009 on expenditure and the procedures for the for payments under programmes financed with the participation of EU funding (Journal of Laws award/settlement of pre-payments and the scope and time frames for filing applications No. 223, item 1786) and the resolution of the Silesian Provincial Board No. 1708/91/III/2007 of 18 September on the adoption of the Regional Operational Programme for Silesia for the years 2007-2013.
- (19) **Design of the project:** The project will be implemented by the public authorities of the region. The local authorities will first launch public procurement procedures for the design and construction of broadband backhaul infrastructure in Cieszyn region and will subsequently, in a different procedure, select the infrastructure operator. The selected infrastructure operator will pay the municipalities a fee for the lease of the broadband infrastructure and will keep the right to retain revenues from the management and operation of the network. The authorities will remain the owner of the network throughout the life of the contract with the infrastructure operator. The infrastructure operator will not offer

any services to end-users, but only wholesale services to other telecommunications undertakings. The infrastructure operator will have the obligation to provide effective access to third parties for a period of at least 7 years.

- (20) The project envisages the deployment of backhaul infrastructure whereas the subsidy will cover mostly passive elements, which are indispensable for installation and running of broadband access to Internet (such as e.g., ducts, cables, optical fibres, manholes, telecommunications racks, or other locations of telecommunications nodes) as well as to the adaptation of the premises at node locations, if required for achieving the desired objective within the allowed budget.
- (21) The project also involves connecting the premises of local public administration to the planned backhaul network infrastructure for its own use and in order to be able provide the citizens with adequate e-administration services.
- (22) **Budget and funding instruments:** The total project budget amounts to PLN 19 790 240 (approx. EUR 4.8 million). Most of the funds (approx. 71%) will be provided by the ERDF, while the remaining part will come from the budget of the local authorities.
- (23) **Aid amount and intensity:** Aid intensity and aid amount to the chosen infrastructure operator will ultimately depend on the outcome of the tender procedure. Nevertheless, given the ownership of constructed broadband backhaul infrastructure (that will remain with the local authorities) as well as the contractual arrangements between the local authorities and the selected infrastructure operator, the actual aid amount will be lower than the amount mentioned in the paragraph above related to the project budget.
- (24) **Mapping and coverage analysis:** As confirmed by the Polish authorities, the analysis of the existing infrastructure and investment plans for the next three years was made on the basis of a detailed inventory carried out by the local authorities, which was later updated with the data available from the NRA and the incumbent.
- (25) The inventory covered both backhaul and access infrastructure (the inventory covered infrastructure that allows to provide basic broadband access to Internet with bandwidth of at least 2 Mbit/s). The inventory was carried out between January and May 2008, subsequently updated in July 2010, through a repeated poll amongst all telecommunications undertakings listed in the NRA's register, covering their infrastructure and investment plans. Moreover, several meetings with operators had been organised to discuss all issues associated with the implementation of the project, including the results of the inventory. The inventory was updated once again in April 2011 using data from the NRA and the incumbent as well as questionnaires sent to operators on the availability of broadband infrastructure.
- (26) **Public consultation:** Between 24 June and 31 July 2011 the Polish authorities undertook the public consultations in order to verify the results of its mapping, planned classification of areas eligible for intervention (with the projected location of the network nodes) and to obtain information from stakeholders on their plans on planned investments in broadband infrastructure as well as their views on the project. No comments challenging the proposed project were filed during the consultations.

- (27) Subsequently, another round of public consultations with stakeholders was carried out in July 2012 to take into account most recent developments. These consultations have not produced any comments, which would entail the need to change the assumptions made in the project.
- (28) **Opinion of the National Regulatory Authority:** The project was also subject to consultations with the National Regulatory Authority (UKE). A positive opinion on the notified project was issued by UKE in the letter registered on 27/03/2013.
- (29) **Conditional access to planned infrastructure:** The Polish authorities designed a conditional system of access to the planned backhaul network in order on one hand to meet the objectives of the scheme and at the same time to minimise the potential distortion of competition on existing operators.
- (30) The primary objective of the Polish authorities is to give access to the subsidised infrastructure to the telecommunications operators in order to create incentives for them to invest in the NGA last mile⁵ segment. The second objective of the project is to allow the use of new backhaul network to eliminate the "digital divide" in traditional basic broadband access in areas where there is no adequate broadband infrastructure.
- (31) In order to minimise the potential distortion of competition and make sure that the notified measure brings a step change in terms of broadband deployment in all the target areas, it is foreseen that in areas where one or more backhaul broadband networks are already in place the Polish authorities will allow third party operators to connect to the planned backhaul network only if they deploy NGA capable 'last mile' infrastructure. Such limitations in the use of the backhaul network will reduce any potential distortion of competition as regards basic broadband services providers, but at the same time will incentivize NGA network roll-out by developing a capillar and open fibre backhaul network in the region.
- (32) On the basis of the above described mapping exercise, the list of targeted areas was finalised and the type of access to planned network per type of area was identified according to the following table⁶.

Table 1: Conditional access to nodes of the broadband network in Cieszyn region with the type of available basic broadband access services

	<u>Total number of localities in category/ number of localities with planned network nodes⁷</u>	<u>Backhaul infrastructure in place (including dark fibre)</u>	<u>Basic broadband retail offers⁸</u>	<u>NGA infrastructures or plans for the near future</u>	<u>Conditional access to the planned network</u>
1	7	None	No	No	All operators can connect to the planned backhaul network, because

⁵ According to paragraph 57 of the Broadband Guidelines, NGA networks are access networks which rely wholly or partly on optical elements and which are capable of delivering broadband access services with enhanced characteristics as compared to existing broadband networks

⁶ In line with the method already applied in decision N 407/2009 Optical fibre Catalonia (Xarxa Oberta) C(2010)5696 of 11.8.2010, decision SA.31687 (N436/2010) Broadband in Friuli Venezia Giulia (Project Hermes) C(2011)3498 of 23.5.2011 and decisions SA.33438 (2011/N), SA.33440 (2011/N), SA.33441 (2011/N), SA.33439 (2011/N), SA 30851 (2011/N) Broadband Network for Eastern Poland of 10.11.2011.

⁷ These figures represent the number of localities within each category that the Polish authorities have indicated as planned targeted areas.

⁸ In relation to data about the existing and planned wireless access infrastructure, only technologies ensuring at least 2 Mbps for the end user were considered.

					no infrastructure is available
2	28 /14	Only one ⁹	Only one	No	Only 'NGA last mile' infrastructures can connect to the planned backhaul network
3	0	Incumbent	Incumbent + ULL ¹⁰	No	Only 'NGA last mile' infrastructures can connect to the planned backhaul network
4	0	More than one	Only one	No	Only 'NGA last mile' infrastructures can connect to the planned backhaul network
5	0	More than one	Incumbent + ULL	No	Only 'NGA last mile' infrastructures can connect to the planned backhaul network
6	2	More than one	More than one	No	Only 'NGA last mile' infrastructures can connect to the planned backhaul network
7	17 / 10	One or more	One or more	Yes	Nodes located in such locality can be used as technical nodes only ¹¹ unless the following two conditions are met: a) the closest existing or planned (in next 3 years) optical distribution node available for use in a "last mile" NGA network is located not closer than approx. 4 km from the planned location of the node, and b) no NGA services are provided in the area (and no reliable plans in the next 3 years). In this case 'NGA last mile' infrastructures can connect to the planned backhaul network

- (33) **Open tender process:** As confirmed by the Polish authorities, the infrastructure operator will be selected in an open tender procedure in accordance with the fundamental principles of openness, competition and transparency laid down in national and EU procurement rules.
- (34) **Award criteria:** In the tender procedure leading to selection of the infrastructure operator, the prospective contract will be concluded with the applicant presenting the most economically advantageous offer. In this respect, as confirmed by the Polish authorities the main award criteria will include: the amount of public aid applied (weight at least 65 %), level of private partner's capital expenditures

⁹ This category includes areas where there is only one optical access node; however the backhaul network is not open for third party operators. Additionally, no high bandwidth services are provided in this area and no other access nodes are planned to be constructed in the area within the next 3 years.

¹⁰ ULL: Local loop unbundling allows telecommunications operators to use connections of other operators from the telephone exchange's central office to the customer's premises.

¹¹ Category 7 singles out white NGA areas from a larger locality where there is already (or is planned) one or more optical distribution nodes available for use in a "last mile" NGA network. Consequently, public intervention is only allowed in those parts of a given locality where NGA services are currently not provided and are not planned in the near future (next 3 years) and at the same time the closest existing or planned (in next 3 years) optical distribution node available for use in a "last mile" NGA network is located not closer than approx. 4 km from the planned location of the network node. Without the public intervention, these areas would not benefit from the access to the NGA services, despite being included in a larger locality with one or more optical distribution node available for use in a "last mile" NGA network.

(weight 0-15%) other economic and quality criteria¹² (weight 0-20%). The award criteria will be defined in detail before the final bids are requested, in conformity with the principles of the public procurement legislation.

- (35) **Use of existing infrastructure:** The Polish authorities encourage the use of the entire existing infrastructure (e.g. roads, ducts, etc.) in order to limit the aid necessary for the measure as well as to avoid duplication of infrastructures. The authorities envisage the possibility of separate open tenders for the acquisition of the existing telecommunications infrastructure in various forms (e.g. ownership, contractual obligations), or alternatively, during the procedure for design and construction of the backhaul network infrastructure, the prospective contractors will be allowed to procure existing infrastructure if it is economically reasonable. The Polish authorities also confirmed that they would ensure that any operator which owns or controls infrastructure (irrespective of whether it is actually used) in the target area and which wishes to participate in the selection to receive the aid, shall meet the following conditions: (i) inform the aid granting authority and the NRA about that infrastructure during the public consultation; (ii) provide all relevant information to other bidders at a point in time which would allow the latter to include such infrastructure in their bid. In addition, the authorities confirmed that there is a national database managed by the NRA on the availability of existing infrastructures that could be re-used for broadband roll-out.
- (36) **Technology:** The main goal of the project is to develop backhaul network that could support NGA networks. At the current stage of development of telecommunications technologies there is no transmission medium for backhaul networks that would allow to provide NGA services other than optical fibre links. Therefore, the project envisages construction of the backhaul network using fibre-optics links, whereas for every other equipment, choice of technology will be based pursuant to technical plans, and in public procurement procedures no technology will be excluded a priori. Consequently, the services provided on the wholesale market will be such as to enable the interconnection to the backhaul network of any possible technology, which operators wish to use for their access infrastructure.
- (37) **Wholesale access:** The objective of the project is to provide capacity to any third operator wishing to connect its last mile infrastructure according to the modalities highlighted above. Hence, the wholesale access will be provided on non-discriminatory and open access terms. Wholesale services will include the access to ducts as well dark fibre renting services. As mentioned above, the obligation to provide effective wholesale access to third parties will apply for at least 7 years.
- (38) The winning bidder for the operation of the infrastructure will not be allowed to provide retail services in order to avoid any concern of possible anticompetitive exploitation (i.e. by giving preferential treatment to its retail branch with regard to the use of the network) of the advantages created by the management of the network.
- (39) **Wholesale access pricing:** As confirmed by the Polish authorities, the wholesale access prices will be based on average (regulated) wholesale prices for

¹²

E.g., efficiency of the use of infrastructure, license duration period in excess of the 7 year minimum, quality level of offered services, fees and their accessibility, methodology for monitoring project performance, maintenance conditions.

comparable services in more competitive areas, or, in the absence of such published prices, on prices specified or approved by the National Regulatory Authority (NRA). These rules should lead to application of fees (e.g., for dark fibre lease), which would allow access network operators to make their retail offer comparable with a retail offer available for end-users in areas featuring effective infrastructure-based competition.

- (40) **Monitoring and claw-back mechanism:** The compliance of the selected bidder with the contract obligations will be monitored on a regular basis by the local authorities and by NRA. The monitoring will be performed during the lifetime of the contract with the infrastructure operator. The Polish authorities envisage also a claw back mechanism for the notified project in order to avoid any overcompensation to the beneficiary. The calculation of the amount to claw-back will be dependent on the EBITDA¹³ and will comprise the whole lifetime of the project. According to the Polish authorities, the methodology will allow to take into account not only the operator's revenues but also whether the costs really faced are lower than those estimated in the business plan¹⁴.
- (41) **Transparency:** The Polish authorities confirmed that they would publish on a central website at least the following information on the State aid measures: the full text of the approved aid scheme and its implementing provisions, name of the aid beneficiary, aid amount, aid intensity and used technology¹⁵. Furthermore, the aid beneficiary will be obliged to provide entitled third parties with comprehensive and non-discriminatory access to information on its infrastructure (including *inter alia* ducts, street cabinets and fibre) deployed under a State aid measure.
- (42) **Reporting:** The Polish authorities confirmed that starting from the date when the network is put into use, for the duration of the aid measure, the State aid granting authority would report every other year the key information on the aid projects to the European Commission.

V. ASSESSMENT OF THE MEASURE: PRESENCE OF AID

- (43) 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

¹³ Earnings before interest, tax, depreciation and amortization - a widely used financial indicator also in the telecommunication industry.

¹⁴ The Polish authorities envisaging the following mechanism: if at the end of the accounting year, the EBITDA of the infrastructure operator exceeds the reference EBITDA (based on average EBITDAs for the companies from the telecommunications listed on the Warsaw Stock Exchange), part of the EBITDA in excess of the threshold, difference must be clawed back - the surplus will be divided between the local authorities and infrastructure operator proportionately to the level of State aid.

¹⁵ Such information will be kept for at least 10 years and shall be available for the general public without restrictions.

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.

- (44) To the extent that the broadband backhaul infrastructure built under the project is used by the public administration for its own purpose, as the Commission has already accepted in the past, the fact that a public authority builds its own public-sector network to satisfy its needs for Internet connectivity (instead of procuring such services from private operators) does not entail an economic advantage for the beneficiaries since they do not exercise an economic activity¹⁶. The mere fact that the local administration decides to build its own public-sector network in order to satisfy their own needs for internet connectivity instead of procuring such services from private operators does not raise concerns under Article 107(1) TFEU, this being an autonomous organizational decision by a public authority.
- (45) Furthermore, the use of network by public authorities to provide services for their own purposes (freely accessible public authorities' websites not intended to offer commercial services, but administrative services from the field of e-government, e.g. paying taxes over the web) does not constitute State aid to the extent that it is not an economic activity conducted in competition with "private" undertakings.
- (46) Consequently, the Commission concludes that this part of the project does not involve State aid within the meaning of Article 107 (1) TFEU.
- (47) As regards the remaining 'commercial' part of the project the Commission carried out the following assessment of the existence of State aid:

State resources

- (48) As described in paragraph (22), the measure is financed by resources of the Polish authorities and EU funds, which are allocated under the control of the authorities to the beneficiaries with an element of discretion. Hence, State resources are involved.
- (49) In State aid broadband cases, aid amounts and aid intensities are usually known only *ex post*, i.e. after the tender process ("gap funding"): the Commission requests aid to be granted through an open tender procedure, which guarantees that it will be the minimum necessary. Hence also for this case it is not crucial to quantify the aid amount in advance.

Economic advantage

- (50) *Selected operator*: The municipalities of the target areas will conclude the contract with the selected operator for managing the planned backhaul network, whereas this operator will be also entitled provide the wholesale communications services on the private market. The funding the rollout of a broadband backhaul network in areas in which a private operator would not otherwise invest, implies that in both scenarios, the Polish authorities will have to cover the additional costs needed to invest in such non profitable areas.
- (51) Therefore, the selected operator will receive financial support which will enable it to provide broadband services at conditions not otherwise available on the market. The aid will allow the operator to offer end-to-end services *prima facie* at lower prices than if it had had to bear all costs itself and thus attract more customers

¹⁶ See Commission decision in case NN24/2007, Prague Municipal Wireless Network, OJ C/141/2007 and Commission decision in case N46/2007 Welsh public network scheme, OJ C/157/2007.

than under normal market conditions. In view of the above, an economic advantage will be granted to the selected operator.

- (52) *Third party providers*: The planned backhaul network will provide third party operators wholesale broadband services with access to a backhaul infrastructure. This way, third party operators will be granted an economic advantage since they will have access to wholesale capacity made available by State funding, as they will be customers of the selected electronic communication operators. By using such capacity, they can sell advanced broadband services to end customers.
- (53) The measure is also selective in that it is addressed to undertakings active only in a specific region and in certain markets for electronic communications services

Distortion of competition

- (54) The intervention of the State alters existing market conditions by allowing the provision of enhanced wholesale broadband services by the selected electronic communication operator and third party providers that would not be available under normal market conditions. The measure will alter the conditions of competition between wholesale operators who are likely to use the services offered by the planned backhaul network in the targeted areas and wholesale operators elsewhere in Poland and the EU.
- (55) Therefore, the fact that an improved broadband service and additional (wholesale) capacity becomes available has the effect of distorting competition.

Effect on trade

- (56) 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 business users located in Poland and those located elsewhere in the European Union.

Conclusion

- (57) The Commission therefore concludes that in so far as state funds are used to finance the deployment of the commercial part of the notified measure "*Broadband network in Cieszyn region*" constitutes State aid within the meaning of Article 107 (1) TFEU as moreover confirmed by the notifying Member State during the notification contacts.
- (58) Having established that the project involves aid within the meaning of Article 107(1) TFEU, it is necessary to consider whether the measure can be found to be compatible with the internal market.

VI. ASSESSMENT OF THE MEASURE: COMPATIBILITY

- (59) The Commission has assessed the compatibility of the scheme according to Article 107 (3) (c) TFEU and in the light of the *EU Guidelines for the application of State aid rules in relation to rapid deployment of broadband networks*¹⁷. The

¹⁷ OJ C25, 26.01.2013, p.1.

Broadband Guidelines contain a detailed interpretation of Article 107 (3) (c) TFEU in this area of State aid law.

- (60) As explained in paragraph 33 of the Broadband Guidelines, every aid measure has to comply with the below necessary prerequisites in order to be possibly declared as compatible with the internal market:

(1) Contribution to the achievement of objectives of common interest

- (61) The Commission defined in its Europe 2020 strategy of 3 March 2010¹⁸ the Flagship Initiative: "A Digital Agenda for Europe", 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, with broadband access for all by 2013, access for all to much higher internet speeds (30 Mbps or above) by 2020, and 50% or more of European households subscribing to internet connections above 100 Mbps."*
- (62) The project is focused on "white NGA areas" (i.e. areas where currently there is no coverage of NGA infrastructure and where private investors do not plan to build such infrastructure in the next three years). By providing access to the subsidised backhaul infrastructure to telecommunications operators the Polish authorities aim to create incentives for investment in NGA last mile segments. The other objective of the project is to allow the use of the new backhaul network to eliminate the "digital divide" in traditional basic broadband in areas where currently there is no adequate broadband infrastructure.
- (63) By extending broadband coverage to areas where private operators have no commercial interest to invest in the near future, the Polish authorities pursue genuine cohesion and economic development objectives which is in line with the Digital Agenda.

(2) Absence of market delivery due to market failures or important inequalities

- (64) As illustrated in section III.2 above, the availability of the broadband services in the project area is very low, whereby in some of target localities there is currently no broadband infrastructure at all and in the target areas where there is one infrastructure in place, it is not available for use by the third party operators. Furthermore, the public consultations revealed no investment plans in this area in the near future in view of their low commercial attractiveness for private operators. This demonstrates the absence of the market delivery due to market failures/important inequalities in the target areas.

(3) Appropriateness of State aid as a policy instrument

- (65) In the situation currently under assessment, due to the economics of broadband networks, the problem of the lack of supply of high speed broadband networks cannot be solved by measures involving demand stimulation or regulatory interventions.
- (66) Demand-side measures in favour of broadband (such as vouchers, tax breaks, awareness-raising measures or demand aggregation) could be an instrument of public intervention. However, these measures do not solve the illustrated problems on the supply side. As regards regulation, despite its crucial role in ensuring competition and supply in the market for electronic communications, evidence shows that in some areas of the Cieszyn region regulation has not fully

¹⁸ EUROPE 2020 - A strategy for smart, sustainable and inclusive growth, COM(2010) 2020, page 12.

been able to ensure effective competition in some of the markets for electronic communications and has not led to sufficient investments to bridge the digital divide affecting certain areas. Regulation is, indeed, a necessary, but not a sufficient instrument for the development of broadband services as alternative providers need to combine the use of wholesale products from the incumbent with own network investments which may not be profitable in areas where demand is low.

- (67) In order to ensure the supply of broadband services to all its citizens, the Polish authorities intend to open the planned public network also for the commercial use by access operators.
- (68) Furthermore, the measure was consulted with the NRA, which issued a positive opinion on the design of the project. As mentioned in paragraph (39) above, the NRA will also be consulted with regard to determining the wholesale access prices and conditions.
- (69) Consequently, the Commission can agree that without further public intervention, avoiding the emergence of a new "*digital divide*" between different areas of the country seems not possible, which could lead to the economic exclusion of the local undertakings. Hence in the current situation, State aid is an appropriate instrument to achieve the set objectives.

(4) Existence of incentive effect

- (70) As set out in paragraph 45 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 without any State aid. According to the results of the public consultation and market research referred to above in paragraph (24) and following, in the targeted areas no backhaul broadband network investment would take place without public funding, hence the aid produces a change in the investment decisions of the operators. Moreover, by granting access to the public network to third party operators, the measure facilitates and encourages investments in last mile networks. Therefore, the aid shall provide a direct and appropriate investment incentive for the selected operator and for third party beneficiaries.

(5) Aid limited to the minimum necessary

- (71) In assessing the proportional character of the notified measures, the Commission has examined in paragraph (94) and following a number of necessary conditions to minimise the State aid involved and the potential distortions of competition.

(6) Limited negative effects

- (72) The significance of the distortion of competition has been assessed in terms of effects on competitors in paragraph (94) and following. Given the design of the project, it is unlikely to have a crowding out effect on potential future investments of private operators.

(7) Transparency

- (73) As further explained in paragraph (102) below, the aid will be awarded in a transparent manner and it will be ensured that the public authorities, economic operators, the interested public and the Commission have easy access to all relevant acts and pertinent information about the aid.

(8) The overall balancing exercise and the compatibility conditions

- (74) The Polish measure has been carefully designed to ensure that the overall balance of the effects of the measure is positive.
- (75) As explained by the Polish authorities, the availability of the existing backhaul infrastructure, which is owned mainly by the incumbent, is limited. In the parts of the target area where there is one infrastructure in place, it is not available for use by the third party operators. The potential use of other technologies, such as satellite is not optimal from the point of view of the cost of the service itself as this technology offers services for significantly higher prices and does not allow the provision of NGA services. Moreover, the Polish authorities stress that the prices are much higher in Cieszyn region than in other areas of the country¹⁹ and consider that this shows not only the disparity in terms of cost for broadband services but also indicates a significant backwardness of the region in terms of access to broadband services (in 2011 access to broadband services equal or above 2 Mbit/s in target areas reached the level of 50% and the penetration rate of NGA services was only 1%²⁰).
- (76) As mentioned above, the objective of the project is to bridge the digital divide and provide access to broadband services where they are currently unavailable or not sufficient. For this purpose, the project will promote the rollout of an open²¹ and modern²² backhaul infrastructure (built entirely in fibre technology)²³ which will allow the deployment of access networks in traditional white areas where no broadband networks exist or the deployment of an NGA network in NGA white areas²⁴. In this way, the notified project will bring significant new capabilities to the market, for which there is a potential unsatisfied demand. In particular, the penetration rate of the basic broadband as well as NGA services will increase by at least 25% according to the analysis carried out by the Polish authorities and the subsidised backhaul network will promote the development of 'last mile' NGA networks in areas where no such networks exist or are planned in the near future.
- (77) Consequently, such investment ensures a "step change" in terms of broadband availability for the target areas, in line with the requirements of paragraph 51 of the Broadband Guidelines.
- (78) Furthermore, the project aims at the funding of backhaul network open for access to all operators and technologies, which as confirmed in the paragraph 81 of the Broadband Guidelines, exhibit especially pro-competitive features.

Pro-competitive nature of the project

¹⁹ For example, for the same price in the target area is offered the service of 6Mb/s, whereas in other parts of the country the end-users can benefit from the service of 60 Mb/s.

²⁰ No operator provides NGA services which can deliver speeds of at least 30Mbps for the end user in the target localities except for a part of Cieszyn city whereby only narrow residential area in the city centre can benefit from such services.

²¹ Subject to the conditions specified in paragraph 30 and following

²² The ring of the backhaul network will be provided with equipment ensuring 10 Gb/s throughput; the branch-offs to the communes will have equipment supporting throughput up to 1Gb/s)

²³ Deployment of 118 km of fibre optic network and construction of network nodes in 37 localities

²⁴ In areas where a backhaul network already exists, only NGA capable networks can be connected to the subsidised backhaul network.

- (79) The wholesale provision of services is not aimed to develop an access network but only a transport "*backhaul*" network. Use of the transport network is a necessary input for retail telecommunication operators to provide (high speed and very high speed) access services to the end users. The operator of the new backhaul network will offer access to wholesale products (such as ducts, dark fibre) on a commercial basis. Construction of backhaul networks is generally a measure that fosters competition and investment and, for NGA networks, encourages third party operators to rollout last mile infrastructures capable of supplying advanced connectivity services to end-users. Backhaul networks have the potential to stimulate competition on all access technologies, while leaving the bulk of the investments to connect end-users to private operators.
- (80) However, backhaul networks are "hybrid networks" in the sense that they are able to sustain both basic and NGA types of networks: it is the (investment) choice of the telecommunication operators what type of 'last mile' infrastructure they wish to connect to the backhaul network. In particular, operators could decide to use ADSL or wireless solutions (i.e. basic broadband infrastructures), but they could also opt for rolling out, for example, an FTTH architecture (i.e. an NGA infrastructure).
- (81) Hence from a competition point of view, the possible distortion resulting from the deployment of subsidised backhaul networks shall be assessed on two levels: (1) the level of basic broadband networks and (2) the level of NGA networks, in line with the distinction made in the Broadband Guidelines.
- (82) With respect to (1), the measure could cause distortions of competition in those localities in which market forces seem to work adequately to provide basic broadband services to citizens. In these areas, public intervention would not be justified, since it would not address a market failure (as competitive broadband providers exist), it would not bring any significant benefits for the targeted areas (as citizens would receive the same level of services), state aid would not have any incentive effect and it could crowd out private investments. By contrast, in localities where a market failure exists with regards to basic broadband, the provision of subsidised backhaul services has a pro-competitive character.
- (83) As regards point (2), i.e. concerning NGA networks, according to the information submitted by the Polish authorities, the major part of the Cieszyn region (except larger cities and densely populated areas) has to be considered a "white NGA area": even where the incumbent's backhaul infrastructure is present, the access infrastructure is not yet upgraded nor will it be in the next three years (in the target areas no "credible investment plans" have been reported in the public consultation).

The system of conditional market access to the planned backhaul network

- (84) To alleviate these different concerns, the Polish authorities have proposed a system of conditional market access to the planned backhaul network infrastructure, depending on the existing market situation in the various municipalities, as explained above in Table 1.²⁵

²⁵

In line with Commission precedents in decision N 407/2009 Optical fibre Catalonia (Xarxa Oberta) C(2010)5696 of 11.8.2010, decision SA.31687 (N436/2010) Broadband in Friuli Venezia Giulia (Project Hermes) C(2011)3498 of 23.5.2011 and decisions SA.33438 (2011/N), SA.33440 (2011/N), SA.33441 (2011/N), SA.33439 (2011/N), SA 30851 (2011/N) Broadband Network for Eastern Poland of 10.11.2011.

1. "NGA white" and traditional "white areas"

- (85) As shown in Table 1 above, there are 7 localities in which there is no backhaul infrastructure at all (Category1). These areas are "white" also from the perspective of basic broadband, hence there is no need to impose restrictions on the type of last mile infrastructures allowed to use the planned backhaul network, provided that the conditions indicated in paragraph 78 of the Broadband Guidelines are respected (see below in paragraph (94) and following).

2. "NGA white" and traditional "grey areas"

- (86) Category 2 comprises 28 localities which are only served by the incumbent, not only in the backhaul but also in the access segment. These areas are "grey" from the perspective of basic broadband, but the Polish authorities demonstrated that the conditions laid down in paragraph 70 of the Broadband Guidelines are fulfilled.
- (87) In the target areas the provision of a broadband infrastructure is still a *de facto* monopoly only provided by the incumbent. The Polish authorities provided evidence that (i) no adequate services are offered to satisfy the needs of citizens or business users and that (ii) there are no less distortive measures available (including ex ante regulation) to reach the same goals.
- (88) For the purpose of establishing the above, the Polish authorities provided evidence that:
- (a) in areas included in this category the incumbent has significant market power and the backhaul network is not open for third party operators. Furthermore, no other access nodes are planned to be constructed in the area within the next 3 years.
 - (b) the overall market conditions are not adequate, by looking, *inter alia*, at the low accessibility of broadband services and the type of services offered to end-users as described in section III.2.
 - (c) the overall barriers preclude potential entry of other electronic communication operators.
 - (d) any measures taken or remedies imposed by the competent national regulatory or competition authority with regard to the existing network operator have not been able to overcome such problems. For instance, according to the Polish authorities, even if regulation may have been successful in establishing a competing offer of broadband services, the geographical remoteness and demand characteristics in the areas of Category 2 still prevent the achievement of supply conditions similar to those prevailing in urban areas.
- (89) Hence although a backhaul broadband infrastructure is present in the target areas, the evidence provided by the Polish authorities suggests that a market failure might exist. The State support for the deployment of broadband backhaul network in these areas is justified provided that other proportionality conditions indicated in the Broadband guidelines are respected (see below in paragraph (95) and following), in particular in order to allow the deployment of enhanced access networks. Accordingly, the Polish authorities will allow third party operators to connect to the subsidised backhaul network only if they commit to deploying access network capable of caring NGA services.

3. "NGA white" and traditional "black areas"

- (90) Category 6 comprises localities in which there are at least two backhaul infrastructures (besides "other" passive infrastructures) and a competitive retail market not only with the presence ULL operators accessing the network of the incumbent but with also an alternative cable infrastructure. These localities constitute black areas from the point of view of traditional broadband. As confirmed by the Polish authorities there are 2 localities identified in this category.
- (91) Category 7 features particular conditions, since it only includes white NGA "spots" constituting parts of larger areas marked as NGA grey or NGA black. In category 7 localities, the operators will not be allowed to obtain backhaul services from the planned backhaul network for their basic broadband infrastructures. However, in such "white spots", access to the planned backhaul network for use in a "last mile" NGA network will be possible if the following two conditions are met: a) in a given part of the locality the NGA services are currently not provided and they are not planned in the next 3 years b) at the same time the closest existing or planned (in the next 3 years) optical distribution node available for use in a "last mile" NGA network is located not closer than approx. 4 km from the planned location of the planned node. Without the public intervention, these areas, despite being included in a larger locality with one or more optical distribution node, would not benefit from the access to the NGA services in the near future. The Polish authorities confirmed that they are only planning nodes in 10 out of 17 localities classified in this category.
- (92) Although several broadband infrastructures exists in the municipalities belonging to categories 6 and 7, according to the evidence provided by the Polish authorities, no operator has plausible commercial plan to upgrade its infrastructure to NGA network in the near future of 3 years. Concerning basic broadband services, based on the data provided by the Polish authorities, it seems that these areas are served by at least 2 competing infrastructures or ULL operators, hence there is no evidence that these services are not offered at competitive conditions.
- (93) Accordingly, in the municipalities belonging to categories 6 and 7, the Polish authorities will allow third party operators to connect to the planned backhaul network only if they commit to deploying access networks capable of carrying NGA services.

The other proportionality conditions of the Broadband Guidelines

- (94) ***Detailed mapping and analysis of coverage, public consultation:*** As set out in detail in paragraph (24) and following, the Polish authorities have undertaken an analysis of the existing broadband infrastructure in order to identify the areas where State intervention is necessary. A public consultation has been conducted as described above in paragraph (26) and following. All the relevant stakeholders have had the opportunity to submit their views and the regulatory authority's opinion has been gathered. This way, the Polish authorities ensure that public funds are used only in areas where there are no plausible private investment plans to build commercially based broadband networks. As confirmed by the Polish authorities, no operator has objected to the project. Comments from two operators as regards the mapping and the areas eligible for intervention have been taken into account and no operator has put forward the existence of investment plans for

the near future. As such, the Polish authorities ensure that the aid is given only where it is necessary and limit the possibility of crowding out private investments and distortion of competition to the minimum possible.

- (95) ***Competitive selection procedure:*** To minimise the amount of aid involved, the Polish authorities run a selection procedure in line with the principles of openness, competition and transparency of the national and EU procurement rules, to select the undertaking for the construction and the management of the network. Details of the procedure and its outcome are described above in paragraph (33). This procedure has the effect of maximising the effect of the aid provided while minimising any potential advantage granted for the selected operator.
- (96) ***Most economically advantageous offer:*** The Polish authorities designed the selection procedure so as to choose the most economically advantageous offer among those presented by the operators, as detailed above in paragraph (34). The authorities specified in advance the relative weighting, which it will give to the key criteria chosen for the selection procedure. The system is designed in such a way as to ensure that the applicant with the lowest amount of aid requested receives more priority points within the overall assessment of the bid, in line with the provision of the Broadband Guidelines and in line with the principles of the public procurement legislation.
- (97) ***Technological neutrality:*** The Polish authorities confirmed the choice of technology for the relevant equipment will be based pursuant to technical plans and in public procurement procedures no technology will be excluded a priori. Consequently, the services provided on the wholesale market will be such as to enable the interconnection to the subsidised backhaul network of any possible technology²⁶, which operators wish to use for their access infrastructure.
- (98) ***Use of existing infrastructures:*** As confirmed by the Polish authorities, wherever possible, the new backhaul network will use existing infrastructure. This way, the Polish authorities avoid the unnecessary and wasteful duplication of existing networks and minimise the overall costs of the project. Furthermore, the Polish authorities also confirmed that they would ensure that any operator which owns or controls infrastructure (irrespective of whether it is actually used) in the target area and which wishes to participate in the selection to receive the aid, shall meet the following conditions: (i) to inform the aid granting authority and the NRA about that infrastructure during the public consultation; (ii) to provide all relevant information to other bidders at a point in time which would allow the latter to include such infrastructure in their bid. In addition, the authorities confirmed that there is a national database managed by the NRA on the availability of existing infrastructures that could be re-used for broadband roll-out.
- (99) ***Wholesale access:*** As described in paragraph (37), the selected operator will offer wholesale services and access to the subsidised backhaul network to other operators in an open, transparent and non-discriminatory manner for at least seven years. The access obligations will be supervised by the Polish NRA. Adequate safeguards will be put in place to prevent any undue discrimination towards access seekers or content providers and any other hidden indirect advantage.

²⁶

In line with the conditions detailed in paragraph 30 and following

- (100) **Wholesale access pricing:** In line with the provision of the Broadband Guidelines, the price for wholesale access will be based on average prices for comparable services in more competitive areas and whenever a reference offer is not available, wholesale prices and access conditions will be approved by the NRA, as detailed in paragraph (39).
- (101) **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 back as explained in paragraph (40), the Polish 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.
- (102) **Transparency:** As described in paragraph (41) above the Polish authorities confirmed that they would publish on a central website at least the following information on the State aid measures: the full text of the approved aid scheme and its implementing provisions, name of the aid beneficiary, aid amount, aid intensity and used technology²⁷. Furthermore, the aid beneficiary will be obliged to provide entitled third parties with comprehensive and non-discriminatory access to information on its infrastructure (including *inter alia* ducts, street cabinets and fibre) deployed under the State aid measure.
- (103) **Reporting:** The Polish authorities confirmed that starting from the date when the network is put into use, for the duration of the aid measure, the State aid granting authority would report every other year the key information on the aid projects to the European Commission.

Conclusion

- (104) The Commission concludes that the notified measure "*Broadband network in Cieszyn region*" meet the compatibility criteria set out in the Broadband Guidelines, 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 measure "*Broadband network in Cieszyn region*" is compatible with Article 107(3)(c) TFEU.

The Polish 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

²⁷ Such information will be kept for at least 10 years and shall be available for the general public without restrictions.

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>.

Your request should be sent by registered letter or fax to:

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Yours faithfully,
For the Commission

Joaquín ALMUNIA
Vice-President