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**Subject: State aid N391/2010 – Germany
Broadband development in Hessen**

Dear Sir,

1. PROCEDURE AND DESCRIPTION OF THE MEASURE

- (1) On 9 September 2010, the Federal Republic of Germany notified to the Commission the above-mentioned aid measure. The measure was notified under the Notice on simplified procedure, in particular point 5(b)(v) of the Notice.¹
- (2) A description of the relevant features of this measure can be found in the summary of the notification, as published on the website of the Commission http://ec.europa.eu/competition/state_aid/register/ii/doc/Not_N391_2010_A_L_DE.pdf and annexed to the present decision.

2. ASSESSMENT OF THE MEASURE

2.1. Existence of aid

- (3) Under the current scheme, the German authorities will provide direct grants for electronic communication operators to extend adequate broadband coverage in the region of Hessen. As shown by the features of the measure

¹ OJ C136, 16.06.2009, p. 3-12.

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described in the summary of the notification, the current measure will be financed by state resources. It will provide selective economic advantage to the electronic communication operators selected via the tender procedure and also for third party electronic communication operators that will be able to offer their services via wholesale access to the subsidized networks. There will be also an advantage for the business in the targeted areas.

- (4) The measure has the potential to distort competition. At the level of the network operators, support given to one operator may discourage other operators to deploy or expand their own networks in the targeted area on commercial terms. Public funding could also encourage local undertakings to subscribe to the services offered via the subsidized networks instead of more expensive market-based solutions. Insofar as the intervention is liable to affect providers of electronic communications services from other Member States and distorts competition between end users located in Germany and elsewhere in Europe, the measure has an effect on trade. The markets for electronic communication services are open to competition between operators and service providers, which generally engage in activities that are subject to trade between Member States.
- (5) The Commission therefore concludes that the notified aid measure constitutes State aid within the meaning of Article 107(1) TFEU² as moreover confirmed by the notifying Member State during the notification.

2.2. Compatibility of the aid

- (6) The Commission's compatibility assessment of the notified measure in this case did not imply any serious difficulties. The German authorities designed the current measure fully in accordance with two existing federal broadband support schemes in Germany, which were endorsed under the EU State aid rules by the Commission decisions of N238/2008³ and N368/2009⁴: the current measure only differs in the target areas from the above referred existing broadband schemes.
- (7) The Commission has assessed the compatibility of the notified measure with the internal market in the light of the Broadband Guidelines⁵, which contain a detailed interpretation of Article 107(3)(c) of the TFEU in this area of State aid law. As regards the applicable substantive provisions, the Commission has essentially analysed the measures in the light of the criteria developed in

² 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.

³ Commission decision in case N238/2008 "*Broadband infrastructure development in Germany*". JOCE C/154/2009.

⁴ Commission decision in case N368/2009 "*Bund: Änderung der Breitbandbeihilferegelung N115/2008 Breitbandversorgung ländlicher Räume in Deutschland*". JOCE C/93/2010.

⁵ *Community Guidelines for the application of State aid rules in relation to rapid deployment of broadband networks*, OJ C 235, 30.9.2009, p.7.

paragraphs 31 to 51 of the Broadband Guidelines. In order to be compatible under Article 107(3)(c) of the TFEU, the aid must pursue an objective of common interest in a necessary and proportionate way.

- (8) Since the objective of the measure is to extend basic broadband services to areas where no adequate broadband services with minimum 1 Mbps download speeds are available: the measure at stake pursues well defined EU policy objectives as laid down in paragraphs 37 to 40 of the Broadband Guidelines. The objective of the measure is also in line with the Digital Agenda⁶ which calls Member States to use public financing in line with EU competition and State aid rules in order to meet the coverage, speed and take-up targets defined in Europe 2020⁷.
- (9) The Commission's analysis confirms that the measure is well designed to deliver those common interest objectives.
- (10) First, it is an appropriate instrument because in the targeted areas of Hessen, Germany, the provision of adequate broadband services remains unprofitable for commercial operators in the near future of three years - that will be proved by a detailed mapping and coverage analysis and verified by an open, transparent public consultation for each aid project granted under the notified scheme. Hence the measure targets only "*white areas*" within the meaning of paragraphs 41 and 42 of the Broadband Guidelines and there are no valid alternatives to public funding to overcome those obstacles.
- (11) Second, since the measure only targets "*white areas*", the broadband network investment concerned would not take place in the near future of three years without any State aid. The maximum aid amount per single project will be EUR 500.000 that can be granted under the current scheme⁸. As confirmed by the German authorities, any project that might require public funding of more than EUR 500.000 would be subject to an individual State aid notification. The Commission considers that the aid should provide a direct and appropriate investment incentive for the selected operator due to the use of an open tender process to select the beneficiaries.
- (12) Third, the measure at stake is considered proportionate because, amongst other features, the following can be identified:
 - a) A detailed mapping and coverage analysis verified by an open, transparent public consultation will be conducted by the granting authorities in order to clearly indentify the targeted "*white areas*". In particular, the granting authorities will (1) undertake a detailed analysis of the existing infrastructures of the targeted areas; (2) in case the existing broadband

⁶ A Digital Agenda for Europe. COM/2010/0245 f/2.

⁷ The Europe 2020 Strategy has underlined the importance of broadband deployment to promote social inclusion and competitiveness in the EU. It restated the objective to bring basic broadband to all Europeans by 2013 and seeks to ensure that, by 2020, (i) all Europeans have access to much higher internet speeds of above 30 Mbps and (ii) 50% or more of European households subscribe to internet connections above 100 Mbps.

⁸ Support under this scheme cannot be cumulated with any other German State aid broadband measures.

services deemed not adequate and there is a well-defined need of consumers for better broadband services, the granting authorities will be allowed to use State aid to remedy the market situation⁹. (3) If an operator raises concern on the plans of the granting authorities (because for instance, it considers that it already provides adequate broadband services or has plausible investments plans in the near future of three years), such concerns will be assessed by the German authorities in accordance with paragraph 42 of the Broadband Guidelines. All information related to the aid projects (including the mapping and the call for tenders) will be published on the dedicated broadband portal of Hessen: www.breitband-in-hessen.de.

- b) Open tender process: the aid will be awarded on the basis of an open tender in accordance with the principles of the EU and national procurement rules. The call for tenders will be published on the dedicated webpage of Hessen: www.breitband-in-hessen.de.
- c) Selection of the most economically advantageous offer: within the context of an open tender, the granting authorities will select the most economically advantageous offers among those presented by the operators. In line with paragraph 51 c) of the Broadband Guidelines, for the purpose of determining the most economically advantageous offer, the awarding authority will specify in advance the relative weighting, which it will grant to each of the qualitative criteria chosen (see fn. 55 of the Broadband Guidelines). In case of identical technical specifications, the lowest bid will be awarded the contract.
- d) The measure is technological neutral: bidders are entitled to propose the provision of broadband services using whatever technology they deem most suitable.
- e) The measure ensures the use of existing infrastructure to the extent possible: bidders are given the possibility to identify the most appropriate infrastructure and to contribute their infrastructure to the notified measure. Furthermore, the municipalities and broadband providers will be requested to provide information on their existing infrastructure (both passive and active) in the Hessian Broadband Information System¹⁰. Hessen will also publish information on ducts installation programs in the region as a result of, for instance, road constructions. In this way, the aim of the German authorities is to facilitate the use of existing infrastructures, to avoid duplications and to reduce the aid amounts necessary for the broadband projects.
- f) There will be a requirement to provide a wholesale access on the subsidized broadband network that will enable third party operators to compete with the

⁹ In case it is confirmed that there is no other means than State aid to provide broadband services on their territory – including the use of available existing infrastructure that could be used by electronic communication operators.

¹⁰ The Hessian Information System will provide information to all bidders on the existing infrastructures that could be potentially used in their bids (eg. free ducts, spare fibre capacity). Furthermore, third party operators can rely, via regulation on the DT Telekom infrastructure to make their bid.

selected service provider thereby strengthening choice and competition in the areas concerned by the measure. In line with the provisions of the Broadband Guidelines, the German authorities will require that wholesale access will be in place for a minimum period of seven years without prejudice to any further regulatory obligations of the selected operators. The German authorities point out that German regulatory law allows for the need driven creation of open wholesale access, if competitors demand this, also for operators without significant market power. These operators are first given the chance to reach an agreement with their competitors. For the situation that the parties fail to reach an agreement within a reasonable time period, the German authorities confirm that wholesale access prices will be fixed (by the municipality) according to the prices fixed by the regulator for comparable situations. The national regulator (*Bundesnetzagentur*) will take into account the cost structure of the participating operators in the framework of an efficient offer of services (*Kostenstruktur im Rahmen der effizienten Leistungsbereitstellung*). The criteria for the wholesale pricing will be stipulated in the tender documents, see 51 g) of the Broadband Guidelines.

- g) Benchmarking pricing exercise: The German authorities confirmed that retail prices of the broadband services of the supplier will be established in the course of the selection procedure. The German authorities are aiming to provide retail broadband services in the target areas at prices similar to not supported areas.
 - h) Monitoring and claw-back mechanism to avoid over-compensation: The project will be examined on a regular basis by the granting authority for a period of seven years 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. Regarding the requirement of a claw-back mechanism contained in paragraph 51 h) of the Broadband Guidelines, the Commission notes that the notified scheme provides for only very small aid amounts (i.e. maximum 500.000 euros per project) and intends to support one off projects based on simple procurement principles for which a clawback mechanism would present disproportionate administrative burden. For that reason the Commission accepts that no such claw-back mechanism is required for the current scheme. Furthermore, the German authorities confirmed that it will be not allowed to artificially divide projects only to achieve that the aid amounts would fall below 500.000 euros.
- (13) On balance, the Commission concludes that the overall effect of the measure is deemed to be positive. The measure is in line with the objectives of Article 107(3)(c) TFEU as it facilitates the development of certain economic activities (broadband services) in certain remote and rural areas. The intervention is designed in a way that does not distort competition or adversely affect trading conditions to an extent contrary to the common interest.

2.3. Conclusion

- (14) The Commission did not receive any substantiated comments of third parties upon publication of a summary of the notification on its website.
- (15) On the basis of the foregoing assessment, the Commission's analysis confirms 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) of the TFEU.

3. DECISION

- (16) In the view of the above, the Commission finds that the aid granted on the basis of the measure in question is compatible with the common market in accordance with Article 107(3) (c) TFEU and has accordingly decided not to raise objections to the notified measure.
- (17) The Commission reminds the Federal Republic of Germany to submit annual reports on the application of the aid measure and to inform the Commission pursuant to Article 108(3) TFEU on all plans to approve a new or to modify this aid measure. In view of the duration of the scheme, the Commission would like to draw the German authorities' attention to future revisions of the Broadband Guidelines, which might make appropriate measures to the scheme necessary.
- (18) The Member State has indicated in the context of the notification process that the summary nature of this decision implies that it does not contain any confidential information.

Yours faithfully,
For the Commission

Joaquín ALMUNIA
Vice-President of the Commission

Annex: Summary of the notification based on the information provided by the Member State according to the standard form provided in Annex to the Notice on simplified procedure.