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Subject: State aid SA.38690 (2014/N) - Germany - NGA Bayern Modification

Sir,

I. SUMMARY

- (1) I am pleased to inform you that the European Commission has assessed the amendments to the measure "*Next generation network for commercial and accumulation areas in Bavaria*", as laid down in the new "*Richtlinie zur Förderung des Aufbaus von Hochgeschwindigkeitsnetzen im Freistaat Bayern*" (hereafter: "the amended measure") and decided not to raise objections as the State aid contained therein is compatible with Article 107(3)c of the TFEU.

II. PROCEDURE

- (2) By Decision of 20 November 2012¹, the Commission approved the measure "*Next generation network for commercial and accumulation areas in Bavaria*" as laid down in the "*Richtlinie zur Förderung des Aufbaus von Hochgeschwindigkeitsnetzen in Gewerbe- und Kumulationsgebieten in Bayern*". After pre-notification discussions, Germany

¹ See: http://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=3_SA_35000.

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notified modifications to this measure to the Commission on 2 May 2014 pursuant to Article 108 (3) of the TFEU. The German authorities replied to the Commission's informal (e-mail) requests for further clarifications of 12, 18, 19 and 20 June 2014 by letter registered on 20 June 2014.

III. CONTEXT

- (3) In line with the "Europe 2020" strategy for more growth, with the "Digital Agenda for Europe" and with the German federal broadband strategy (that calls for comprehensive broadband networks with download speed of at least 50 Mbit/s by the year 2018), the Region of Bavaria aims at gradually deploying NGA-networks in the region with download speed of at least 50 Mbit/s and with upload speed that is significantly higher than that of basic broadband networks.
- (4) At present, while around 98 percent of households and undertakings in the region of Bavaria have access to basic broadband (download speed of at least 2 Mbit/s), only around 51 percent of households and undertakings reach download speeds of 50 Mbit/s or more. This figure is moreover significantly lower in rural areas (around 15 percent).
- (5) Therefore, the measure was adopted in order to promote the development of NGA networks in the Free State of Bavaria.
- (6) Following approval of the measure by the Commission on 20 November 2012, it entered into force on 1 December 2012. After one year of experience in its implementation, the German authorities consider that it is necessary to modify the measure on certain points in order to increase its efficiency, while at the same time ensuring full compliance with the new EU Guidelines for the application of State aid rules in relation to rapid deployment of broadband networks² (the "Broadband Guidelines").

IV. DESCRIPTION OF THE AMENDED MEASURE

- (7) **Objective:** Purpose of the amended measure remains to promote the deployment of NGA broadband networks with download speed of at least 50 Mbit/s in areas of the Free State of Bavaria that are currently un- or underserved with such broadband infrastructure. Within the context of this primary aim, it is clarified that supported broadband networks should reach download speed of at least 30 Mbit/s³. The measure is, moreover, extended to all un- or underserved areas, and is no longer limited to un- or underserved "commercial and accumulation" areas. In line with the Broadband Guidelines, it is also clarified that download and upload speeds to be reached by the networks concerned should be significantly higher than those of basic broadband infrastructure (see also recital (12)). This should contribute to the objectives of the Digital Agenda and as such to the achievement of common interest objectives.

² OJ C 25, 26.1.2013, p.1.

³ The German authorities explain that the comprehensive coverage of the entire Region with download speeds of 50 Mbit/s or more is not realistic at this stage, because it would generally require the comprehensive deployment of FTTB/H (which is too expensive).

- (8) **Duration:** The duration of the amended measure is extended by one year: the amended measure will enter into force after approval by the Commission and remain in force until 31.12.2018.
- (9) **Legal basis:** the amended measure is based on the Bavarian Budget order ("*Bayerische Haushaltsordnung*") and the directive on the promotion of the development of high speed networks in the Free State of Bavaria ("*Richtlinie zur Förderung des Aufbaus von Hochgeschwindigkeitsnetzen im Freistaat Bayern*").
- (10) **Budget and financing instruments:** The overall estimated (maximum) budget of the amended measure is increased by 1 000 million EUR to 3 000 million EUR.
- (11) **Aid amount and intensity:** as under the original measure, municipalities or combinations/associations of municipalities (hereinafter referred to as "municipality"/"municipalities") can provide a grant for covering the "profitability gap" of a (selected) network operator in constructing and operating a broadband infrastructure. The respective proportions of the funding of the grant by, on the one hand, the Free State of Bavaria and, on the other hand, the municipality are modified⁴. The total aid under the amended measure remains, however, limited to (100%) of the profitability gap. As this only concerns internal financing rules (transfer of financial means within a Member State), this does not have any effect on the substance of the scheme or the state aid assessment in the decision of 20 November 2013.
- (12) **Target areas:** The amended measure clarifies that support will be granted in areas in the free state of Bavaria, where currently no NGA network is in place or planned to be deployed in the next three years. In such areas/spots, support can be granted only if it leads to a significant improvement of the actual broadband service availability or of the broadband service availability planned to be deployed (with private means) in the next three years, i.e. if significant investments are made (e.g. bringing optical cable elements closer to the customer), that lead to at least doubling the available upload and download speeds ("step change")⁵, while reaching at least a minimum download speed of 30 Mbit/s, as described in recital (7) above. Accordingly, as in the original measure, only so called "NGA white" spots/areas in the sense of paragraph 75 of the (new) Broadband Guidelines⁶ will be eligible and this only in areas in which – without State support – no adequate high speed broadband services would be available on commercial terms (see recitals (13) to (15)). "Grey/black" NGA areas/spots are not eligible.

⁴ As described in the Decision of 20 November 2012 (recital 8), originally, depending on the financial capacity of the municipality and the special need for action, funds from the budget of the Free State of Bavaria could be provided to the municipality covering 40, 50, 60 or 80% of this profitability gap, whereby the maximum amount to be funded from the budget of the Free State of Bavaria was 500 000 EUR per municipality. The remainder of the profitability gap was to be financed by the budget of the municipality concerned, which was also entitled to finance the entire grant covering the profitability gap without support from the budget of the Free State of Bavaria. These percentages and maximum amount funded from the Free State of Bavaria are modified in the amended measure. As in the original measure, the aid under the amended measure remains, however, limited to covering (100% of) the profitability gap.

⁵ Under certain circumstances, for instance if the measure supports fibre-to-the-cabinet ("FTTC"), the intervention could also lead to an improvement for certain non-targeted connections. To ensure that this remains a mere side effect, any state-funded investment is ruled out for these non-targeted connections.

⁶ EU Guidelines for the application of State aid rules in relation to the rapid deployment of broadband networks, OJ C 25 of 26.1.2013, p. 1.

- (13) **Detailed mapping and coverage analysis, consultation with stakeholders:** the amended measure simplifies the mapping and consultation procedure, while continuing to ensure that only NGA white areas/spots can benefit from state funding: the municipality must first establish the currently available broadband services on the basis of publicly available sources (such as the federal broadband atlas - "Bundesbreitbandatlas") and summarize it in a map, which is published on the central online portal www.schnelles-internet.bayern.de (hereafter the "central online portal"). On the central online portal, parties must further be requested to comment on the completeness and accuracy of the description of the currently available broadband services as summarized in the map and to inform about any plans for broadband deployment in the next three years and download and upload speeds planned (market consultation). It must thereby be explicitly mentioned that these inquiries are made in the context of the market consultation provided for in the amended measure. The deadline to respond to this market inquiry should be at least one month. The municipality can request the submission of plans on the roll out of a planned network with binding milestones.
- (14) The results of this market consultation are to be submitted to the licencing authority and published on the central online portal.
- (15) During the market consultation, the municipality also explicitly mentions that any potential participant in a later tender procedure that owns passive infrastructure in the deployment area must confirm that it is in principle willing to grant access to this infrastructure to other tender participants and that it has provided all necessary information on this infrastructure to the Bundesnetzagentur in a timely manner for completion of the infrastructure atlas (Infrastrukturatlas⁷). In case the Bundesnetzagentur is not informed sufficiently in time to ensure timely insertion in the infrastructure atlas, the potential participant must directly inform the municipality of this infrastructure. The latter mentions this in the tender notice and provides information on this infrastructure to tender participants upon their request.
- (16) **Choice of the network operator and obligations imposed on it:** The amended measure does not significantly affect the selection procedure; the network operator must still be selected by way of a transparent and non-discriminatory selection procedure in conformity with European and German public procurement rules. A prior notice regarding the selection procedure must be published on the central online portal. In order to ensure that the results of the market consultation are up-to-date, the notice shall be published no more than one month after publication of the results of the market consultation.
- (17) The description of the work in the tendering procedure must be technology and provider neutral. As under the original measure, it must include the selection criteria and their respective weight in the evaluation and the description must be directed to the conclusion of a contract between the municipality and the operator that ensures that all objectives and conditions of the amended measure and all requirements imposed by the licensing

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The German authorities explain that the infrastructure atlas contains information on infrastructure in Germany that can in principle be used in the deployment of broadband networks. Operators must each year, before 1 July, provide information on their (new) infrastructure to the Bundesnetzagentur, which updates the infrastructure atlas accordingly. The infrastructure atlas can be consulted by any network operator participating in an open selection procedure under the amended measure.

authority are fulfilled. Prior to its conclusion, the contract must in principle⁸ be submitted to the Bundesnetzagentur for its opinion. Such opinion is binding on the municipality. The contract must include at least the following obligations on the network operator:

(i) obligation to establish and maintain the network operation for a period of at least seven years and to grant open access at wholesale level on equal and non-discriminatory terms for at least the same period, as described in recital (23). The contract must include a detailed description how this will be ensured. Furthermore, the draft contract between the (selected) network operator and any access seeker must be submitted to the Bundesnetzagentur for opinion. This opinion is binding upon the network operator.

(ii) obligation to inform third parties comprehensively and without discrimination, on demand, on all infrastructure (such as ducts, fibre, street cabinets, etc.) built in the context of this amended measure and to grant access as early as possible (and at the latest 6 months before launch of the services concerned⁹).

(iii) obligation to orient the wholesale price for network access at the regulated prices or the average published wholesale prices that prevail in more competitive regions for the same or comparable access services. The cost structures on site and the aid granted to the operator are taken into account in fixing the wholesale access price. If there are no regulated or published prices for certain wholesale access products, the price should be fixed in accordance with the principles of cost orientation and the methods defined in the relevant sectorial regulation.

In case the price is not yet regulated and there is a dispute on the wholesale access price or conditions between the network operator and access seekers that cannot be solved within a reasonable period, the municipality should set the price and conditions on the basis of an opinion of an independent expert to be appointed in consultation with the licensing authority. Before fixing the price and/or conditions the municipality must consult the Bundesnetzagentur.

(iv) obligation to inform the licensing authority of the wholesale access price, as soon as it is fixed, for publication of this price on the central online portal (see also recital (28)).

(v) obligation to describe the funded infrastructure on the basis of plans, including a description of the connections and download and upload speeds realized, and to provide this documented description to the municipality without delay. The operator must also provide information on the infrastructure to the Bundesnetzagentur, for insertion in the infrastructure atlas.

(vi) in cases where the grant to cover the profitability gap amounts to 4 million EUR or more, obligation to submit a calculation with a structure comparable to the one provided prior to the project and to provide, on demand of the municipality, any other document necessary to establish the existence or absence of overcompensation.

⁸ Only if the contract corresponds to a standard contract previously agreed upon with the Bundesnetzagentur and the municipality explicitly confirms this to the Bundesnetzagentur (for information) and to the licensing authority (for publication on the central online portal), the municipality is not obliged to submit it to the Bundesnetzagentur for opinion.

⁹ In the (unlikely) case that the network is built in a period shorter than 6 months, access is to be granted at the latest at the time of the completion of the network.

(vii) obligation to reimburse the grant in case the conditions of the amended measure have not been respected due to circumstances attributable to the operator or when ordered by the Commission. Upon request, the operator has to provide a bank guarantee to secure this reimbursement.

- (18) The contract must also provide that these contractual obligations must be passed on in case of changes in ownership, administration or operation of the network concerned.
- (19) As in the original measure, tenderers must submit a technical offer (including, inter alia, a description of the ways proposed to ensure effective wholesale access, data on download and upload speed, retail prices and degree of supply reached etc.) as well as a detailed and plausible account of the profitability gap.
- (20) The network operator claiming the lowest profitability gap (and thus the lowest funding) is in principle to be selected. If the municipality defines additional criteria for evaluation, it must specify in advance the weighting of the qualitative criteria, whereby the level of the profitability gap should be given the most important weight. In case there are less than 3 bidders, the Bavarian Broadband Center (see recital (29)) will verify the plausibility of the proposed profitability gap and mediate between the municipality and the bidder in negotiations concerning this profitability gap. The selection decision following the tender must be published on the central online portal.
- (21) **Aid intensity:** the aid intensity of a project will depend on the outcome of the local tendering procedure. As in the approved federal broadband regulations¹⁰ and the original measure, the maximum amount of the grant will not be the total cost of the project, but the profitability gap, which will be calculated for each project and submitted by the tenderers to the municipality concerned in the course of the selection procedure.
- (22) **Use of existing infrastructure:** Existing infrastructure of the incumbent can be used via detailed regulatory access rights.¹¹ To ensure the use of existing infrastructure to the maximum extent possible (and thus also to minimise the profitability gap), the amended measure requires that the municipality publishes in the tender notice any known infrastructure that can be used for the project and any work it may intend to perform itself in that respect or that it refers to public sources that provide this information. Sources are, in particular, the infrastructure atlas and the excavation atlas (Grabungsatlas).¹² The amended measure adds that any operator participating in the selection procedure that owns passive infrastructure in the area concerned must confirm that it has provided all information on this infrastructure to the Bundesnetzagentur in a timely manner for insertion of this information in the infrastructure atlas and that it accepts in principle to offer this infrastructure for use by other participants in the selection procedure. In case of recent infrastructure that is not yet mentioned in the infrastructure atlas, the operator is required to provide the relevant information to the municipality, who mentions this in the tender notice and provides information on the infrastructure concerned to tender

¹⁰ See, e.g., point 12 of Commission Decision N 238/2008. See also point 24 of Commission Decision N 368/2009.

¹¹ See e.g. Commission Decision N53/2010 – Germany – Federal framework program on duct support, point 35.

¹² Regarding the infrastructure atlas, see footnote 7. The German authorities explain that the excavation atlas contains information on planned civil engineering, giving a clear overview of existing ducts.

participants upon request. In the tender, bidders are moreover explicitly requested to use as much as possible existing infrastructure as described in the tender notice. This should allow these other participants to take this infrastructure into account in their offer (see also recital (15)).

- (23) **Wholesale access:** The wholesale access conditions remain unchanged: the network owner must provide effective wholesale access to the subsidized network (including its existing infrastructure used for the project) for a period of at least 7 years. The NGA network architecture that will benefit from the support must thus support effective and full unbundling and satisfy all different types of network access that operators may seek (explicit reference being is also made to Annex 2 of the Broadband Guidelines). If at the end of the 7 year-period, the network operator is designated by the Bundesnetzagentur as having significant market power, the access obligations may be extended as appropriate. Furthermore, full access, without limitation in time, is to be guaranteed to any new passive infrastructure elements. In its offer the network owner must provide details on how it will ensure this effective wholesale access and unbundling.
- (24) In case of conflicts regarding the wholesale access price or conditions, these prices and conditions are fixed by the municipality on the basis of the opinion of an expert, appointed in consultation with the licencing authority. In this case, the Bundesnetzagentur must also be consulted before the wholesale price and conditions are fixed. Moreover, the Bundesnetzagentur must be consulted on the draft contract to be concluded between the municipality and the operator (except if it corresponds to a standard contract, see footnote 8) and on the draft contract to be concluded between the selected operator and the access seeker, thus including on the proposed concrete (price and) conditions for wholesale network access. The opinion of the Bundesnetzagentur is binding (see recital (17) and (17)(i)).
- (25) **Pricing:** Also the pricing conditions remain largely unchanged: The network operator is in principle obliged to base the wholesale price for network access on the regulated price or the average published wholesale price that prevails in more competitive regions for the same or comparable access services. It is clarified that the wholesale access price should also be set taking into account the aid received by the network operator (see recital (17)(iii)).
- (26) Moreover, the Bundesnetzagentur is involved in case of conflicts regarding the wholesale access price (or conditions) and on any draft contract between the operator and any access seeker (see recital (24)).
- (27) **Beneficiaries:** The recipient of the aid will be the selected operator of the network, through the municipality. Indirect beneficiaries will be electronic communication operators utilising the new network for offering retail services to end users, and business end users.
- (28) **Transparency, Monitoring, Control and Claw-back mechanism:** As under the original scheme, for all projects benefiting from state funding under the measure, utmost transparency continues to be ensured by publishing each milestone of the procedure on the central online portal. Also, for every project benefiting of aid under the measure, the following information is published on the central online portal: the aid beneficiary, the aid amount, the aid intensity, the area concerned, the technology used, the wholesale access

products and prices for these products. This information, as well as the full text of the approved aid scheme and its implementing provisions, shall be kept available without restrictions for the general public on the central online portal for at least 10 years.

- (29) The German authorities explain that a broadband "competence centre" (Bayerisches Breitbandzentrum) is set up to provide information, advice, coordination, project development and controlling. It serves all stakeholders regarding broadband expansion in Bavaria as a central contact point, informing them by way of neutral, initial advice. It is responsible for the central online portal on which it publishes relevant information as well as model documents to assist municipalities.
- (30) As under the original measure, the municipality must submit documents¹³ to the licencing authority establishing that the conditions for the grant are fulfilled before aid can be paid out. The licensing authority can moreover require any other documents regarding the planned project. The licensing authority only pays out (its part of) the grant to the municipality upon submission of documentary evidence (report and numerical evidence) of use of the funds in compliance with the measure. It is clarified that partial payments, based on evidence showing corresponding progress in construction, are allowed.
- (31) The control rights of the licensing authority (the Free State of Bavaria), the Bavarian Supreme Court of Auditors ("Bayerische Oberste Rechnungshof") and the Landratsamt (district office) as described in recitals 31 to 33 of the decision of 20 November 2012 remain unchanged. Also the claw-back mechanism remains unchanged, but is extended to all projects with a profitability gap of 4 million EUR and more. Similarly, the right of the licencing authority and the Bavarian Supreme Court of Auditors to directly request or inspect documents of the network operator is also extended to all projects with a profitability gap of 4 million EUR and more¹⁴.
- (32) **Public consultation:** the German authorities coordinated the amended measure with relevant stakeholders as well as the Bundesnetzagentur. Moreover, as the amended measure continues to be a framework programme, a consultation will take place in each geographic area for which the public support is envisaged under the framework in order to establish investment plans of the operators within a three year planning perspective. Results are published on the central online portal (see recitals (13)-(14)).

V. STATE AID ASSESSMENT OF THE AMENDED MEASURE: PRESENCE OF AID

- (33) 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 support measure to be qualified as State aid, it has to be granted

¹³ Such as the financing plan; the results of the market survey; the results of the selection procedure; a credible account of the profitability gap; information on the outcome of the project (such as the amount of connections and download speed reached and the technology used).

¹⁴ Under the original measure, the claw-back mechanism and these control rights at the operator only applied to projects with a profitability gap of over 10 million EUR.

out of State resources, confer a selective economic advantage to undertakings, and it has to be capable to distort competition and affect trade between Member States.

- (34) As described in recitals 36 to 38 of the Decision of 20 November 2012, these conditions are fulfilled.
- (35) The amendments to the measure not affecting this assessment, the Commission concludes that the notified amended measure still constitutes state aid within the meaning of Article 107(1) TFEU.

VI. COMPATIBILITY ASSESSMENT

- (36) The Commission has assessed the compatibility of the amended measure according to Article 107(3)(c) of the TFEU and in the light of the new Broadband Guidelines (see footnote 2) which explain how the Commission will apply Article 107(3)(c) of the TFEU with regard to this kind of state aid.
- (37) As explained in paragraphs 33 and following of the Broadband Guidelines, for aid to be found compatible with the Broadband Guidelines (and thus with Article 107(3)(c) of the TFEU), the following conditions must be fulfilled:
 - 1. The aid must contribute to the achievement of objectives of common interest
 - 2. Absence of market delivery due to market failures or important inequalities
 - 3. The aid must be appropriate as a policy instrument
 - 4. The aid must have an incentive effect
 - 5. The aid is limited to the minimum necessary
 - 6. Negative effects must be limited
 - 7. The aid measure must be transparent
- (38) If these conditions are fulfilled, the Commission balances the positive effects of the aid measure in reaching the objective of common interest against the potential negative effects.

6.1 The aid contributes to the achievement of objectives of common interest

- (39) In its Europe 2020 strategy¹⁵ the Commission defined 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." In pursuing this aim, "at EU level, the Commission will work ...to facilitate the use of the EU's structural funds in pursuit of this agenda", and "at national level, Member States will need ... to draw up operational high speed internet strategies, and target public funding, including structural

¹⁵ EUROPE 2020 - A strategy for smart, sustainable and inclusive growth, COM(2010) 2020, 3.3.2010, page 12.

funds, on areas not fully served by private investments." Key Action 8 of the Digital Agenda 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.

- (40) A well targeted State intervention in the broadband field contributes to bridge the '*digital divide*' that sets apart areas or regions within a country where affordable and competitive broadband services are on offer and areas where such services are not. The amended measure addresses a market failure as it targets only so called "NGA white" spots/areas in the sense of paragraph 75 of the Broadband Guidelines (see recital (12)), where very high speed broadband is currently not available and where there are no plans by private investors to roll out such infrastructure in the near future. By promoting the development of NGA networks with download speeds of at least 50 (respectively 30) Mbit/s in such areas (see recital (7)) and by abolishing the condition that funding must be limited to commercial or accumulation areas, the amended measure will (continue to) contribute greatly to achieving the objectives of the Digital Agenda and therefore to achieving an objective of common interest.

6.2 Absence of market delivery due to market failures or important inequalities

- (41) Because telecom undertakings are not willing to invest in NGA-networks in sparsely populated areas or in deprived areas in cities, only around 15% of households and undertakings in rural areas of the Free State of Bavaria benefit from connections with download speed of 50Mbit/s so far (see recital (4)).
- (42) As explained in recitals (12)-(14), the amended measure targets only so called "NGA white" spots/areas, where very high speed broadband is currently not available and where it is established, by way of detailed market consultation, that there are no plans by private investors to roll out such infrastructure in the near future.

6.3 The aid is appropriate as policy instrument

- (43) In the situation currently under assessment, efforts from alternative instruments (e.g. demand side measures, such as grants or tax incentives to end users) do not solve the problems related to the lack of supply (non-existence of infrastructure) of high speed broadband in the targeted areas and would fail to deliver the wider economic benefits of a widespread next generation broadband network comprehensively covering the target areas. The German authorities see no alternative but to grant public aid to the deployment of NGA broadband networks in the targeted areas of the Free State of Bavaria.
- (44) In line with points 40 and following of the Broadband Guidelines, the amended measure is designed as a (regional) scheme – ensuring consistency and coordination of local initiatives at regional level. Moreover, a high degree of transparency is secured (see recital (28)). Also the Bundesnetzagentur (the NRA) was involved in the design of the amended measure (see recital (32)), will be consulted with regard to determining the wholesale access prices and conditions and is consulted in case of disputes between access seekers and the subsidised infrastructure operator (see recitals (17) and (24)).
- (45) Finally, the Commission recognizes that without further public intervention, it would seem impossible to prevent the emergence of a new "*digital divide*" between areas that

benefit from high speed broadband connections and sparsely populated or deprived areas that do not. Hence in the current situation, State aid is an appropriate instrument to achieve the set objectives.

6.4 The aid has an incentive effect

- (46) 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 be undertaken within the same timeframe without any State aid. The scheme ensures that aid can only be provided if it is established that in the targeted areas no comparable investment would take place without public funding within three years (see recitals (12)-(14)). Hence the investment would not be made within the same timeframe without the aid, which thus produces a change in the investment decisions of the operators and therefore has an incentive effect.

6.5 The aid is limited to the minimum necessary

- (47) Germany has designed the amended measure in such a way as to minimise the State aid involved and potential distortions of competition arising from it. In this respect, the Commission notes the following positive elements in the design of the amended measure (cf. paragraph 78 of the Broadband Guidelines):

- (a) *Detailed mapping and coverage analysis, consultation with stakeholders:* as described in recitals (13) and (14), municipalities must prove their thorough analysis of the existing broadband infrastructures (as well as investment plans for the next three years) in order to identify the areas where public intervention is necessary. This analysis and its results must be based on a public consultation involving all stakeholders and are published on a central online portal, ensuring a high degree of transparency. Therefore it will be ensured that public funds will be used only in (NGA white) areas where it is necessary because no interest for commercial NGA deployment is present. This will limit the possibility of crowding out private investments and distorting competition vis-à-vis existing operators to a minimum.
- (b) *Open tender process:* as described in recitals (16) to (20), the network operator is selected by way of a transparent and non-discriminatory selection procedure in full compliance with German and European public procurement rules. All notices regarding selection procedures under the amended measure are moreover published on a central online portal, allowing all potential bidders to be easily aware of all on-going projects.
- (c) *Most economically advantageous offer:* On the basis of predefined and published technical specifications, the network operator requesting the lowest aid amount is in principle to be selected (see recital (20)).
- (d) *Technology neutrality:* The tender documents must be technology and provider neutral, leaving it to commercial operators to come up with the most appropriate technological solutions (see recital (17)).

- (e) *Use of existing infrastructure*: as explained in recital (22), the municipality will encourage bidders to have recourse to existing infrastructure, including that of other bidders by publishing in the tender notice any known infrastructure that can be used for the project and any work that it may intend to perform itself. Unnecessary and wasteful duplication of resources should in this way be avoided and the profitability gap (and hence the funding) should thus be minimised.
- (f) *Wholesale access*: in conformity with points 78(g) and 80(a) of the Broadband guidelines, the selected operator must ensure full and effective unbundling and provide full open access to the subsidised network (including but not limited to access to ducts, dark fibre, street cabinets, and bit-stream and unbundled access to fibre) on equal and non-discriminatory terms for at least 7 years (see recitals (17)(i) and (23)-(24)). Such access shall apply on the entirety of the subsidised network, including on the parts of such network where existing infrastructure has been used (see recital (23)). If at the end of the 7 years period, the operator of the infrastructure in question is designated as having significant market power in the market concerned, the access obligation may be extended. Furthermore, full access, without limitation in time, is always to be guaranteed to any new passive infrastructure elements. Finally, independent experts and the Bundesnetzagentur are consulted in settling conflicts regarding access prices and conditions and the Bundesnetzagentur is to be consulted on any draft contract between a selected operator and any access seeker, allowing it to assess concrete wholesale access price and conditions (see recitals (17)(i) and (26)).
- (g) *price benchmarking*: Access wholesale prices are to be based on the regulated prices or the average wholesale prices which prevail in other, more competitive, parts of the country for the same or comparable access services (benchmarking). The wholesale access price should be set taking also into account the aid received by the network operator. In the absence of published or regulated prices, the pricing should follow the principles of cost orientation pursuant to the methodology established in accordance with the sectorial regulatory framework. In case of disputes between the network operator and access seekers and where the price is not regulated, the municipality sets the price at the level suggested by an independent expert appointed in consultation with the licensing authority. Also the Bundesnetzagentur must be consulted with the objective to keep these prices at a reasonable and non-discriminatory level (its opinion being requested on any draft contract between a selected operator and any access seeker, as well as specifically in case of conflicts (see recitals (17), (25) and (26))).
- (h) *Monitoring and clawback provision*: As under the original measure, all milestones of the project must be documented and published on a central online portal. Moreover, before any aid can be granted under the amended measure, the municipality must in principle submit documents to the licensing authority establishing that the conditions for (partial) payment of the grant are fulfilled. The licensing authority, the Bavarian Supreme Court of Auditors and, in case the municipality finances the aid alone, the Landratsamt, moreover have the right to verify that all conditions of the amended measure are respected. Also the clawback mechanism described in points 32-33 of the Decision of 20.11.2012 has not been amended, but is extended to projects with a profitability gap of 4 million EUR or more and can be made stricter in the future (see recitals (30) and (31)).

- (i) *Transparency*: in line with point 78(j) of the broadband guidelines, relevant information regarding any aid granted will be published on a central online portal and remain available for at least 10 years. Also, the aid beneficiary will be obliged to provide entitled third parties with comprehensive and non-discriminatory access to information on its infrastructure deployed under the amended measure (see recitals (17)(ii) and (28)).

6.6 The aid has limited negative effects

- (48) Given the design of the amended measure and its compliance with the conditions of Article 78 of the Broadband Guidelines (see recital (47) above), it is unlikely to have a crowding out effect on private investments.
- (49) In particular, the aid is confined to NGA white areas/spots, where no operator is willing to invest in NGA infrastructure without state aid in the next 3 years. Also, where a broadband network already exists, the "step change" condition of the amended measure (see recital (12)) ensures that as a result of the public intervention (i) the selected bidder makes significant new investments in existing broadband networks and (ii) the subsidized infrastructure brings about significant new capabilities in terms of broadband service availability and capacity. This "step change" condition also ensures that public intervention does not crowd out comparable private investments, as the subsidized network must provide significantly better broadband quality and availability (faster, reliable download and upload speeds) than existing operators are able to provide in a near future of three years (see recitals (12)-(15)).
- (50) Furthermore, the operator is to be selected by competitive tender in conformity with EU rules; full open access is to be granted to the subsidized infrastructure and there are several mechanisms to prevent wholesale access prices from being excessive (see recitals (16)-(20) and (23)-(28)).
- (51) In line with point 80(b) of the broadband guidelines, the selection procedure, the access and pricing conditions and the high level of transparency, monitoring and control (see recitals (16)-(20), (23)-(26) and (28)) ensure that the subsidised infrastructure will enable the provision of competitive and affordable services to end-users by competing operators. Also, the obligation to immediately request independent experts or the Bundesnetzagentur to settle any conflict on wholesale access (see recitals (17) and (24) to (26)) should solve any conflict of interest or undue discrimination. Any other hidden indirect advantages should further be limited to the maximum possible extent by the high transparency requirements throughout the lifetime of the project (see recital (53)).
- (52) Therefore, negative effects of the amended measure, if any, are expected to be limited.

6.7 Transparency

- (53) As explained in recitals (17)(ii), (28) and (47)(i), the amended measure ensures that the interested public and the Commission should have easy access to all relevant acts and pertinent information about the aid awarded thereunder.

6.8 Overall balancing: the positive effects of the aid measure are expected to outweigh its potential negative effects

- (54) The Commission concludes that the notified amended measure will offset a geographical and commercial handicap and is objectively justified to address the lack of availability of high speed broadband services in the targeted areas.
- (55) In view of the characteristics of the project and of the safeguards applied, the overall impact on competition is deemed to be positive.
- (56) The increase in network capacity is expected to stimulate market entry by service providers and the provision of a larger variety of services. Access of competing operators is ensured by requiring open access to the subsidised network on equal and non-discriminatory terms for at least 7 years, which has a pro-competitive impact, as it allows several network operators to use the subsidized infrastructure and compete. The risk of crowding out private investments and the negative effects of the amended measure are expected to be limited (see recitals (48)-(52)). On the effect on trade, there does not appear to be any significant negative spill-over for other Member States. Accordingly, the amended measure is designed in a way that does not distort competition or adversely affect trading conditions to an extent contrary to the common interest and is in line with the objectives of Article 107(3)(c) TFEU.

6.9 Conclusion

- (57) The Commission concludes that the amended measure notified by Germany meets the compatibility criteria set out in the Broadband Guidelines and is thus compatible with Article 107(3)(c) TFEU.

VII. CONCLUSION

- (58) The Commission has accordingly decided that the amended aid measure as laid down in the "*Richtlinie zur Förderung des Aufbaus von Hochgeschwindigkeitsnetzen im Freistaat Bayern*" is compatible with the TFEU, in accordance with Article 107 (3)(c) TFEU.
- (59) The Commission would remind Germany of the requirement to submit every two years reports on the application of the aid measure and to inform it pursuant to Article 108(3) TFEU of all plans to amend/extend this (amended) measure.
- (60) If this letter contains confidential information which should not be disclosed to third parties, please inform the Commission within fifteen working days of the date of receipt. If the Commission does not receive a reasoned request by that deadline, you will be deemed to agree to the disclosure to third parties and to the publication of the full text of the letter in the authentic language on the internet site:
<http://ec.europa.eu/competition/elojade/isef/index.cfm>.

- (61) 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 Registry
1049 Brussel/Bruxelles
BELGIË/BELGIQUE
Fax No: +32 2 2961242

Yours faithfully,
For the Commission

Joaquín ALMUNIA
Vice-President