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Subject: State aid N 243/2009 – Germany
Extension of broadband services in Niedersachsen

Sir,

I. SUMMARY

- (1) I am pleased to be able to inform you that the European Commission has assessed the '*Extension of broadband services in Niedersachsen*' (hereafter: "the measure") and decided not to raise objections as the State aid contained therein is compatible with Article 87(3)(c) of the EC Treaty.

II. PROCEDURE

- (2) By letter registered on 23 April 2009, the German authorities notified pursuant to Article 88(3) of the EC-Treaty the above referred scheme (hereafter 'the notified scheme'). By letter dated 18 May 2009 the Commission requested further information on the notified scheme, which Germany provided by letters registered on 26 May 2009 and 15 June 2009. By letter dated 3 July 2009, the Commission requested further information, which the German authorities delivered on 24 July 2009.

III. CONTEXT

- (3) The notified scheme was designed on the basis of an existing State aid scheme of Niedersachsen, which the Commission authorised under the State aid rules on

5 November 2008¹. The objective of the existing scheme is to support the extension of adequate basic broadband coverage to the so-called '*white areas*' of Niedersachsen, which are defined as those geographic locations where no adequate and affordable broadband services are currently available and where there are no plans for coverage on commercial terms in the near future².

- (4) However, so far, no project received state support under the existing scheme. The German authorities state that the original scheme entered into force on 1 December 2008, while the federal government announced in mid December 2008 that within the framework of the German recovery packages³ significant amount of additional federal and regional⁴ funding will become available for broadband development. The authorities of Niedersachsen decided to design a new State aid scheme taking into account the additional public funding available and notified for state aid approval. On the basis of a preliminary market research, the German authorities argue that the additional funding will enable Niedersachsen to cover more "*white areas*" with better services than previously foreseen⁵.

IV. DESCRIPTION

- (5) **Objective:** The scheme intends to bridge the digital divide between rural and urban areas and to ensure universal adequate broadband access in Niedersachsen - in line with the federal objective that adequate universal broadband coverage should be established by 2010 all over Germany⁶.
- (6) To this end, the notified scheme supplements the existing State aid measures authorised in case N237/2008 by the Commission. Consequently there will be, for the duration of the notified scheme, the following two support measures in place in Niedersachsen.
- Projects, which are co-financed by the European Regional Development Fund and the municipalities as authorised by Commission decision in case N237/2008⁷.

¹ Commission decision in case N237/2008 - Broadband support in Niedersachsen. OJ C 18, 24.1.2009, p.1. The full text of the decision can be found under the following link http://ec.europa.eu/community_law/state_aids/comp-2008/n237-08.pdf.

² In this regard, the German authorities base themselves on a two years planning perspective, which they consider to be the normal planning horizon of the providers in case of basic broadband services.

³ In particular funding based on the second stimulus package, *Konjunkturprogramm II*. More details about the German recovery packages are available at <http://www.konjunkturpaket.de/Webs/KP/DE/Homepage/home.html>.

⁴ Means are also provided by the German Laender.

⁵ According to the preliminary results of the market research of the Niedersachsen authorities, the areas where no adequate broadband coverage of min. 2 MBit/s is available is much larger than anticipated when the existing broadband scheme was notified.

⁶ Broadband Strategy of the Federal Government, *Breitbandstrategie der Bundesregierung*, February 2009, p.5. Available at <http://www.bmwi.de/Dateien/BBA/PDF/breitbandstrategie-der-bundesregierung.property=pdf,bereich=bmwi,sprache=de,rwb=true.pdf>. The federal strategy plans to achieve 1 MBit/s of universal broadband coverage in Germany by 2010.

⁷ For reference, see fn. 1.

- The additional public funding available for broadband development under the German recovery packages, which involves co-financing from the German State, the Land of Niedersachsen and the municipalities.
- (7) **Legal basis:** The measure is based on the "*Landeshaushaltsordnung Niedersachsen*" and the "*Verwaltungsvorschriften zur Landeshaushaltsordnung – VV-LHO*" and the "*Nebenbestimmungen zur Landeshaushaltsordnung*"⁸.
 - (8) **Target areas:** The measure concerns geographic locations in Niedersachsen where no adequate broadband services (apart from expensive satellite or leased line solutions⁹) are available to citizens and business users. Adequate broadband services are defined as broadband services of minimum 2 MBit/s download speeds available at affordable prices¹⁰.
 - (9) **Market research:** The newly established Broadband Competence Centre in Niedersachsen is currently conducting a detailed mapping analysis¹¹ on the available broadband coverage in Niedersachsen to clearly identify white areas where no adequate broadband services of minimum 2 MBit/s are available (including xdsl, cable, wireless, mobile, satellite technologies).
 - (10) **Transparency and consultation with existing operators:** The German authorities confirmed that the Broadband Competence Centre will publish the results of the survey and the information provided by the telecommunication providers during summer 2009¹² on the internet pages of the Land Niedersachsen (www.stk.niedersachsen.de, www.mw.niedersachsen.de, www.ml.niedersachsen.de) and Broadband Competence Centre (www.breitband-niedersachsen.de) to allow private operators to comment. If an existing operator raises credible concerns on the targeted areas arguing that it is already providing adequate broadband services of 2 Mbit/s or intends to do so in the near future – regardless of the technology, such area, in principle, shall not receive any state support.

⁸ <http://www.voris-niedersachsen.de/jportal/portal/t/rke/page/bsvorisprod.psml?doc.hl=1&doc.id=jlir-HONDpP44%3Ajuris-lr00&showdoccase=1&documentnumber=1&numberofresults=3&doc.part=S&doc.price=0.0¶mfromHL=true#focuspoint> and VV zur LHO 11.07.1996, Nds. MBl 1996, p. 1868, last amended on 26.11.2008, Nds. MBl 2008, 1254.

⁹ According to the Niedersachsen authorities, satellite operators are currently not providing affordable broadband services on the targeted areas on commercial terms. These services are considered costly, as they require the purchase of the respective technical equipment, thus causing estimated initial costs of EUR 250 to 450. The monthly retail prices for satellite broadband are estimated to be at around EUR 60. The Niedersachsen authorities consider approximately EUR 30 to be an affordable remuneration, based on a study by WIK consult, *Breitband für jedermann – Infrastruktur für einen innovativen Standort* (2008), p.34 and 35 with reference to a 2006 JP Morgan benchmark study for broadband prices in Europe.

¹⁰ This is in line with the definition used by the federal support programme for broadband which has already been authorised by the Commission. See Commission decision in case N238/2008, Broadband infrastructure development in Germany, OJ C 154, 7.7.2009, p.2.

¹¹ OJ S S102 29/05/2009 D-Hanover: networks 2009/S 102-146894 Prior information Works.

¹² According to the preliminary estimates of the market research, the number of "white areas" in terms of broadband coverage is substantially larger than originally foreseen. The Niedersachsen authorities state that many of the inadequately served broadband connections are widely dispersed and mainly located in rural areas.

- (11) **Budget and funding mechanism:** A total budget of EUR 80 million¹³ can be used for the increased broadband availability in Niedersachsen, whereby EUR 37,5 million will come from federal means, EUR 6,25 from means supplied by the Land of Niedersachsen and up to EUR 36,25 million by the municipalities.
- (12) **Project design:** The Land of Niedersachsen will be divided into two broad geographical areas which will be subject to two different support programmes.
- (a) **Programme A – "municipal competition":** The programme comprises six towns and 18 counties and foresees that the towns and county municipalities compete with each other in a so-called municipal tender procedure to receive public funds for broadband development.
 - (b) **Programme B – "clusters":** The rest of the country is divided into three larger geographical clusters which comprise several counties and towns and which are governed by this programme¹⁴. The provision of adequate broadband services for these three geographical clusters will be tendered out by the Niedersachsen government.
- (13) Both programmes will contribute to the objective of a larger coverage of white areas the provision of universal adequate services by 2010. State support of the two programmes cannot be cumulated. Neither is cumulation possible with other EU funds or with other State aid broadband measures, e.g. with the federal State aid programmes¹⁵ nor with the aid scheme authorised as N237/2008. The details of the respective mechanisms are described below.

Programme A - municipal competition

- (14) Whereas under the original scheme projects are developed by the municipalities and directly tendered out to the market, municipalities will now first enter a municipal competition in order to receive project funding from the German stimulus package. This means that under programme A two selection procedures will be carried out, one to allocate funds from the stimulus package to the municipal project, another – organised on the level of the municipality – to select the individual network provider. The following steps will be followed to grant public funding under programme A.
- (15) *Market analysis and consultations:* Based on the results from the survey by the Broadband Competence Centre Niedersachsen, each municipality will first carry out its own market analysis. Consultation with broadband service providers will take place to determine whether a deployment of broadband without state support would be feasible and if so, in which areas¹⁶. If the discussions show that coverage without state intervention is not feasible, the municipality will develop a project plan which forms the basis for its application base for the municipal tender.

¹³ The earlier scheme, which still continues, has a budget of EUR 16,4 million.

¹⁴ The three clusters cover approximately 50% of the Land of Niedersachsen.

¹⁵ See Commission decisions State aid in cases N115/2008, OJ C 194, 31.07.2008, p.1 and N238/2008, reference above see fn. 10.

¹⁶ The Niedersachsen authorities confirmed that discussions will take place with various operators and be technology neutral.

- (16) *Call of interest*: In a second step, the municipality will raise a call of interest (*Interessenbekundungsverfahren*) in order to ascertain the dimension of the potential state support. The municipality will publish the project which should receive state support in the municipal gazette as well as on the web pages of the municipalities involved and the Broadband Competence Centre¹⁷.
- (17) *Municipal tender*: Municipalities should enter the municipal tender in principle with inter-municipal projects, i.e. minimum two municipalities should design a joint application for public funding. By encouraging municipalities to jointly plan broadband projects, the authorities of Niedersachsen expect to see synergy effects in investments, potentially a greater number of white areas to be covered and ideally a mix of various technologies for covering larger locations. The project must contain a calculation of the investment costs, a financing plan, a time perspective, be technology neutral and document that there is currently no broadband access of 2 MBit/s. The existence of white areas must further be documented by a user survey and be accompanied by a map which demonstrates the technology involved.
- (18) The projects will be ranked by a Committee consisting of government representatives of Niedersachsen and members of the Broadband competence centre and subsequently receive financing in accordance with their ranking. When the budget is exhausted, no further projects will be financed. If a budget remains, a second municipal tender will be organised and projects not considered in the first tender can apply again.
- (19) *Allocation criteria*: The municipal projects will be assessed according to a new scoring model that contains five categories: i) implementation, ii) inter-municipal concept, iii) need for broadband coverage, iv) sustainability and v) tax capacity of the municipality. Projects which are not technology or provider neutral will not be admitted to enter the tender procedure. In line with the objective of covering as many white areas as possible, in particular in remote areas, projects which cover remote locations or a higher number of white areas will be credited more scoring points.
- (20) *Tender procedures for the individual projects*: After confirmation that the municipal project will receive federal and regional funds, the municipalities will tender out the individual project in the market. This tender procedure will be conducted in a transparent manner and in full compliance with applicable national and EU procurement rules in line with the principles of technology and provider neutrality.
- (21) No separate scoring model has been developed for the individual projects. According to the Niedersachsen authorities the fact that the project had already been tested in the preceding municipal tender procedure provides a sufficient guarantee that the scheme's objective of covering white areas will be implemented. The condition that white areas need to be covered will be mentioned in the act allocating funds to the municipality and the respect of this condition will be monitored.

¹⁷ Participants not taking part in the call for interest can still participate in the tender for the individual project.

- (22) *Aid intensity and aid amount:* For municipal projects, the funding intends – after a tender procedure will have been carried out for each individual project, whereby the award should be granted to economically most advantageous offer - to close the so-called "*profitability gap*"¹⁸, which can be funded up to 100%. All projects will be supported with a 12,5% minimum contribution of the municipality. The maximum financing out of federal and regional funds will be EUR 875 000 per project to which a minimum contribution of EUR 125 000 EUR by the respective municipality will be added.
- (23) The German authorities expect some larger projects to aim at the coverage of all white areas within the region covered by them. For these projects the profitability gap is likely to exceed the envisaged general support threshold of EUR 1 million. Project support can thus be granted up to EUR 4 million, whereby the federal and regional maximum support of EUR 875 000 will not be altered, but the municipality may decide according to its discretion to grant further funding of up to EUR 3,25 million. Niedersachsen expects that among the 20 to 30 support cases under that programme will include 10 of those larger projects.

Programme B - Geographical clusters

- (24) By identifying three larger geographical clusters for programme B, Niedersachsen intends to create synergy effects and obtain planning benefits. These synergies should free capacity and resources which could be used to achieve a larger coverage of white locations, in particular in remote rural areas. The smaller scale solutions envisaged with the original scheme proved costly while still leaving many remote white locations without adequate broadband access. In view of the German authorities, larger networks are easier to maintain and can be upgraded more swiftly for future technological developments. In addition, it is expected that larger areas will create incentives for telecom operators to further invest and cover even more white areas. While higher amounts of state support are needed to cover a larger number of white areas, the support for connecting each single white location will according to the Niedersachsen authorities probably not increase.
- (25) The authorities of Niedersachsen formed the clusters on the basis of two criteria, a) the cluster covers significant amount of rural areas and b) overnight stay rates indicate the importance of tourism for that region¹⁹ which should help the typically local micro and small sized enterprises active in this area (smaller hotels, hostels, etc.) to get access to adequate broadband services. While the first criterion should bridge the digital divide between urban and rural broadband access, the second criterion takes note of the fact that tourism providers increasingly need capable broadband access to offer their services. This concerns e.g. the installation of webcams, high dissolving pictures and online booking systems.

¹⁸ The profitability gap is defined as the difference between the discounted investment costs and discounted revenues of the project. The calculation includes a reasonable profit rate for the sector.

¹⁹ Despite high overnight stay rates, the region of Hannover was not included in a cluster as Hannover has sufficiently satisfactory broadband access.

- (26) Based on those criteria, the authorities of Niedersachsen identified three clusters, Cluster *Heide*, which will receive EUR 8 million of state support, Cluster *Nordwestniedersachsen* und *Küste* with EUR 12 million and Cluster *Süd-niedersachsen* with EUR 10 million state support.
- (27) In compliance with national procurement rules, the Niedersachsen government will tender out the clusters on a European level in a technology neutral manner. Details of the selection procedure will be described below.
- (28) In the tender procedure for each of the three clusters, the bidders have to specify the "profitability gap" as defined above. Nevertheless, there are two maximum thresholds. Firstly, the financing cannot exceed the maximum amount for each cluster, which is EUR 8 million for Cluster 1 as well as EUR 12 and 10 million respectively for Cluster 2 and 3. Secondly, not more than 50% of the total investment costs can be financed. I.e. even if the budget for the cluster is not exhausted, no further money will be allocated once the 50% of the investment costs have been covered.
- (29) *Award criteria:* The aid will be granted to the bidder with the most economically advantageous offer. For the application of this award criterion, a new scoring model will be used with the following six criteria: i) at least two white areas per county and one white area per town need to be covered by the project, ii) non-discriminatory open wholesale access must be granted, iii) the costs for covering each white areas and the expected revenues for the next three years must be specified and iv) a sustainable provision of broadband services for the next five years on the same or improved technical level should be guaranteed and v) the closure of white areas will be prioritised according to a scoring model²⁰ and vi) number of white areas. Areas which are the least adequately served, i.e. no broadband coverage at all and/or broadband coverage below 1 MBit/s are given priority points for the scoring.
- (30) **Subject of the aid:** The notified scheme will grant support for '*last mile access*'. However, the Niedersachsen authorities state in some cases the support of the "*backhaul connections*" would also be necessary.
- (31) The network structure in Niedersachsen can be described as follows. A backbone for the whole of Niedersachsen (*landesweites Backbone*) is connected to the regional backhaul (*regionales Netzwerk*), which in turn connects to the last mile network (*lokales Netzwerk*)²¹. The Niedersachsen authorities state that a lot of the regional backhauls in Niedersachsen are outdated copper-based infrastructures that are not able to sustain bandwidth capacities of 2 MBit/s or more. The Niedersachsen authorities therefore intend to also support, where necessary and within the framework of the above mentioned programmes A and B, backhaul infrastructure. They foresee that support to backhaul structures will in particular take place in the framework of the cluster support, especially for the connection of more remote rural areas. The Niedersachsen authorities

²⁰ This means that areas which are difficult to cover should receive higher points.

²¹ The local net is defined as the part of the network from the local hub (*Kernverteilungszentrum*) over the main distribution frame (*Hauptverteiler*) to the customer. This last mile will be supported with the measures described above and with the measures authorised by the Commission's decision N 237/2008.

underline that the support for the backhaul structure will only be given to the extent necessary to cover white areas. No public funding will be provided for backbone structures.

- (32) The German authorities intend to *inter alia* provide backhaul infrastructure funding for the following components i) active net components for upgrading the existing local distribution frames (*Vermittlungsstellen*), e.g. routers, switches, network interface cards, ii) active net components to open the local distribution frames for other technologies such as interface cards and modulators and iii) local hubs (*Kernverteiler*) and main distribution frames (*Hauptverteiler*) and iv) installation of glass fibre cables construction works, wires, cables, fire protection material, etc. to connect the local and regional nets to the national net, if necessary. Customer equipment will not be supported.
- (33) **Pricing:** The German authorities confirm that retail prices should be similar to those in other, non assisted areas.
- (34) **Wholesale offer:** The tenders will oblige the selected operator to provide open wholesale access (LLU and bitstream) to the subsidised infrastructure to all electronic communications operators on equal and non-discriminatory conditions. The open wholesale obligation applies to both network levels, i.e. backhaul infrastructure and the last mile.
- (35) **Monitoring:** Each individual project will be examined on a regular basis by the granting authorities in accordance to the National Household Regulation (i.e. *Haushaltsvorschriften*). The monitoring foresees, *inter alia*, the following indicators: number of projects supported, theoretically served areas, expected number of new broadband connections, expected penetration rate, etc. and also includes the auditing on the expenditure of the funds and regular examination whether the network is functional. If the selected operator fails to carry out the service in accordance with the provisions of the contract, the granting authority would be in the position to recover the aid.
- (36) **Clawback mechanism:** Both programmes foresee a clawback mechanism. If, three years after the new broadband access is put into force, the number of acquired customers exceeds the number of predicted customers by more than 30%, the respective state support will be clawed back. The Niedersachsen authorities explain that since the "*profitability gap*" to cover the white area was supported in full, all additional revenues from the customers exceeding the 30% mark will have to be reimbursed. For projects under the municipal tender procedure, the addressee for reimbursing the federal and regional funds is the municipality who in turn claws back the money from the telecom provider. For the cluster support, the same clawback mechanism is foreseen – equally after three years - towards the telecom provider.
- (37) **Entry into force and duration:** The notification stated that the notified scheme will be put into effect as of 1 April 2009. However, the German authorities confirm that no funds will be paid out under the scheme before the European Commission will have issued a decision. The available public funding need to

be earmarked until December 2010 and need to be spent until 31 December 2011²².

V. ASSESSMENT OF THE MEASURE

V.1. Presence of aid

Presence of aid

- (38) According to Article 87 (1) of the EC Treaty, “*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 common market*”.

It follows that in order to be qualified as State aid, the following cumulative conditions have to be met: 1) the measure has to be granted out of State resources, 2) it has to confer an economic advantage to undertakings, 3) the advantage has to be selective and distort or threaten to distort competition, 4) the measure has to affect intra-Community trade.

- (39) *State resources*: The measure will be co-financed by resources of the municipalities and means from the German stimulus package, which involves federal resources and means by the Land Niedersachsen. Hence State resources are involved.
- (40) *Economic advantage*: Through the tender process, the selected operators will receive financial support which will enable them to enter the market and provide broadband services on conditions not otherwise available. Although the competitive tender tends to reduce the amount of financial support required, it will still offer operators the possibility to offer services *prima facie* at lower prices as if they had to bear the costs themselves. The selected operators will also acquire ownership of the networks and other tangible and intangible assets. Under the notified scheme these advantages will not only accrue to operators providing broadband access on the last mile, but also to operators which are selected for upgrading the backhaul. There will also be advantages for third party electronic communication operators that will be able offer their services via wholesale access to the subsidized network.
- (41) These advantages are also selective. The notified measure supports the supply of certain electronic communication services, namely broadband and only applies to operators selected by the tender procedure. The measure is addressed to undertakings active only in certain regions or in certain markets for electronic communication services and is therefore selective also for that reason.
- (42) *Distortion of competition*: The measure has the potential to distort competition. At the level of network operators, support given to one operator may discourage other competitors to deploy or expand their own networks in the targeted area. Distortion of competition could also arise at the level of business customers of the broadband network: public funding could encourage local undertakings to

²² Since the original scheme will continue to run until 31 December 2015, for the years 2012-2015 only the existing state aid scheme of N237/2008 will be in place.

subscribe to the services offered via the subsidized network instead of more expensive market-based solutions.

- (43) *Effect on trade:* Insofar as the intervention affects providers of electronic communications services from other Member States, the measure has an effect on trade²³. 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.
- (44) Therefore, the Commission considers that the scheme constitutes State aid within the meaning of Article 87 (1) of the EC Treaty.

VI. ASSESSMENT OF THE MEASURES: COMPATIBILITY

- (45) The Commission considers that the assessment of the compatibility of the measure with the common market needs to be based directly on Article 87(3)(c) of the EC Treaty that reads “*aid to facilitate the development of certain economic activities or of certain economic areas, where such aid does not adversely affect trading conditions to an extent contrary to the common interest*” may be considered to be compatible with the common market”.
- (46) The Commission will assess the necessity and proportionality of the notified additional measures with respect to the following questions:
- (1) Is the aid measure aimed at a well-defined objective of common interest (i.e. does the proposed aid address a market failure or other objective)?
 - (2) Is the aid well designed to deliver the objective of common interest? In particular:
 - (a) Is the aid measure an appropriate instrument?
 - (b) Is there an incentive effect, i.e. does the aid change the behaviour of firms?
 - (c) Is the aid measure proportional, i.e. could the same change in behaviour be obtained with less aid?
 - (3) Are the distortions of competition and the effect on trade limited, so that the overall balance is positive?

VI.1. The support of broadband rollout is in line with the common interest

Community policy

- (47) Analogously to similar public funding measures in support of broadband assessed by the Commission in the past²⁴, the scheme is in line with Community policies to bring broadband to all Europeans²⁵. The Commission

²³ The Niedersachsen authorities submitted e.g. a list of providers of backhaul and backbone structure, which shows the existence of operators such as *Telefonica, British Telecom, Arcor and others*.

²⁴ For reference, see fn. 15.

²⁵ As outlined, *inter alia*, in the Commission Communication *i2010 – A European Information Society for growth and employment*, COM (2005) 229 of 1 June 2005.

encourages Member States to put comprehensive national broadband strategies in place²⁶ and to mobilize all relevant policy instruments to bridge the "*broadband gap*"²⁷. By improving broadband access for citizens and businesses in areas of Niedersachsen where these services are not satisfactorily available, the measure helps achieving greater cohesion and is therefore in line with the common interest.

- (48) In light of the financial and economic crisis effecting severely the European economies, as emphasized by the Commission²⁸, broadband investments can be considered as "*smart investments*" that are able to provide short term (employment) benefits and long term (economic) advantages for the EU economies²⁹. Hence by accelerating broadband deployment with the current measure (all funding has to be earmarked until end of 2010) the current measure is in line with the European interest to support fast recovery of the European economies³⁰.

Market failure and cohesion considerations

- (49) Lack of broadband coverage is due, among other factors, to some of the typical economic problems associated with networks industries. Given the cost structure of such networks, commercial providers have limited economic incentive to invest in broadband infrastructure in areas which are not densely populated (in particular rural areas).
- (50) However, availability of adequate broadband services in such areas would be beneficial from a wider economic and social perspective. Positive externalities arise where market players do not internalize the whole benefit of their actions. In that case they will invest less than what is optimal from the perspective of society as a whole. In the case of broadband networks, market failure considerations are related to such positive externalities. For instance, the broadening of the broadband network does not only generate benefits to the newly connected consumers but also to old ones. Second, a broader coverage of population with access to broadband will stimulate the development of new services. Such services will be to the benefit of the newly connected customers but they may also benefit consumers outside the targeted area. Third, the availability of the broadband infrastructure may generate new investments either in sectors which depend on the access to such infrastructure or in providers of new services. In turn, this may generate additional employment and revenues.

²⁶ Commission Communication COM(2004) 369 of 12.05.2004, "Connecting Europe at High Speed – National Broadband Strategies".

²⁷ See Commission Communication on *Bridging the broadband gap*, COM (2006) 129 of 20.03.2006.

²⁸ Communication from the Commission to the European Council: A European Economic Recovery Plan, Brussels, 26.11.2008.

²⁹ Katz et al. (2009) in the paper of "*The Impact of broadband on jobs and the German economy*" estimate that broadband network development within the framework of the National Broadband Strategy of Germany could create 407.000 jobs between 2010 and 2014 as a result of network construction and network externalities.

³⁰ See for instance Communication from the Commission to the European Council: A European Economic Recovery Plan. Brussels, 26.11.2008 COM(2008) 800 final.

- (51) From a cohesion perspective, the insufficient coverage of rural areas leads to a "*digital divide*" between the areas which have access to affordable broadband services and those that have not. This puts the latter at a disadvantage which goes beyond the mere fact that the local population does not have access to particular services. It may negatively affect the competitiveness of local business and thereby generate a dislocation of industry and qualified labour. Therefore, regional economic development benefits from broadband deployment by the creation and retention of jobs, improved education and health systems. For rural and remote communities, broadband is a crucial element to avoid economic and social exclusion and to provide the opportunity to participate in the knowledge based economy.
- (52) To the extent that private investors do not (sufficiently) take into account such positive spill-over effects, a pure market solution would lead to insufficient investment into broadband networks.
- (53) According to the proposed measures, no State aid will be granted to areas which have adequate broadband connections above 2 MBit/s download speed. Instead, the notified measures provide State aid only for those areas, where the above described market failure applies. According to the Niedersachsen authorities, many of the inadequate broadband connections are located in rural, often remote areas. In these "white" areas, currently the market does not provide adequate broadband services, nor will it do so within the near future. As the notified measures aim at overcoming these difficulties, the Commission finds that the German authorities pursue genuine cohesion and economic development objectives.

VI.2. Well-designed aid

(a) Aid is the appropriate instrument

- (54) The measure at hand is part of an overall strategy of the German authorities to provide universal basic broadband services for all citizens and undertakings, including *inter alia* regulatory measures³¹. So far, private investments have not targeted the areas envisaged by the notified scheme. Although regulatory measures have facilitated broadband deployment in urban and more populated densely areas, so far such measures have not solved the identified absence of adequate broadband networks in parts of Niedersachsen, in particular in rural areas.
- (55) As neither a pure market solution nor regulatory intervention have delivered adequate broadband coverage in the areas concerned, without further public intervention, the reduction of the 'digital divide' between rural and urban areas does not seem to be possible.
- (56) In view of these considerations, the Commission concludes for the notified scheme that the granting of public funds is an appropriate measure to overcome the lack of adequate broadband connectivity.

³¹ See Broadband strategy paper of the Federal Government, cited above, fn. 6. It cites *inter alia* changes of laws on construction works, investigation into access conditions, information campaigns on infrastructural measures, etc.

(b) The aid provides the right incentives to operators

- (57) The direct beneficiary of the aid will be selected by public tender in which bidders will indicate the amount of public funding they consider necessary to carry out the required investment on the basis of the anticipated total investment, operating costs revenues and the verified "*profitability gap*"³². The objective of the German authorities in this regard is that the public funding granted provides a direct and appropriate investment incentive limited to the amount required by the selected operators. The selection procedure encourages prospective contractors to operate efficiently by minimising estimated losses.

(c) Proportionality

- (58) The German authorities designed the scheme in a way which minimises the State aid involved and potential distortions of competition.
- (59) *Market analysis and consultation of operators:* The Commission has highlighted that market analysis and consultations with existing operators are essential pre-requisites for a state aid approval. The German authorities undertook to carry out such a market analysis via the Broadband Competence Centre and to publish the mapping of white areas in order to give competitors a possibility to comment. Projects for areas, which turn out to be adequately covered, will not be able to receive funding under the municipal tender or cluster support programmes. The mapping and the transparency requirements shall limit the crowding out of private investment and ensure that State aid is only given to areas where it is necessary.
- (60) *Open tender procedures:* The German authorities will select operators for the construction and maintenance of the last mile and backhaul network in full compliance with EU and national procurement rules. Open tender procedures are considered an effective means to further minimise the aid necessary for the measure. By further obliging the municipalities to compete against each other for the federal and regional funds in the municipal tender procedure, the German authorities introduce another competition element which should ensure that State funds are granted to projects which are considered to be the most efficient to realise the scheme's objective of universal broadband coverage.
- (61) *Technology neutrality:* Neither the municipalities nor the government of Niedersachsen will specify the technology to be used for the deployment of broadband networks in the areas concerned. Tenders will be conducted in a technology and provider neutral manner and it will be left to commercial operators to suggest the most appropriate solutions to provide broadband services.
- (62) *Open wholesale access:* The operator of the network will provide wholesale access to all interested parties in an open, transparent and non-discriminatory manner. This obligation equally applies to the last mile and the backhaul infrastructure. By allowing different broadband technology platforms to

³² See fn. 18.

obtain open access to the state funded backhaul network, the project has the potential of stimulating infrastructure based competition in the targeted areas.

- (63) *Clawback mechanism:* The clawback provision will ensure that if the beneficiaries make profits that are higher than initially foreseen (based on a threshold of customer subscriptions) in its investment plan, the aid will be repaid. This will ensure that the aid recipient will not make excessive returns and will further minimise ex post and retroactively the amount of aid deemed initially to have been necessary.
- (64) *Monitoring:* The project will be regularly monitored and the monitoring mechanism implemented will ensure that the granting authorities are in a position to recover the aid in case the beneficiary does not comply with the rules.
- (65) *Cumulation rules:* The German authorities ensure with respective cumulation provisions that a project cannot receive funding from other sources, neither from the federal State aid schemes, nor from the already authorised State aid scheme N 237/2008.

VI.3. The distortions of competition and the effect on trade are limited, so that the overall impact of the measure is positive

- (66) As set out in paragraph (42), the aid measure has the potential to distort competition and trade between Member States. However, the geographical scope of the aid (white areas) and its design (in particular the open tender procedure and the claw-back mechanism) should ensure that these distortions are limited to the minimum.
- (67) According to paragraphs (49) until (53), the aid measure addresses a market failure. It offsets a geographical and commercial handicap due to the lack of broadband services. Absent the aid, the insufficient density of potential and actual subscribers would make the delivery of broadband services commercially unviable.
- (68) On balance, the Commission concludes that the overall effect of the measure is deemed to be positive. The measure is clearly in line with the objectives of Article 87(3)(c) EC Treaty as it facilitates the development of certain economic activities (retail and, indirectly, wholesale broadband services) in certain remote and rural areas. The intervention is designed in a way that does not distort competition or affect trading conditions to an extent contrary to the common interest.

VII. DECISION

- (69) On the basis of the foregoing assessment, the Commission has accordingly decided that the notified scheme '*Extension of broadband services in Niedersachsen*' is compatible with the EC Treaty.
- (70) The German authorities are reminded that, pursuant to Article 88(3) of the EC Treaty, they are obliged to inform the Commission of any plan to extend or amend the measure.

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

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

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

European Commission
Directorate-General for Competition
State Aid Greffe
Rue de Spa 3
B-1049 Brussels
Fax No: +32 2 2961242

Yours faithfully,

For the Commission

Neelie KROES
Member of the Commission