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**Subject: State aid SA. 33364 (2011/N) – Germany
Broadband infrastructure development in Thuringia**

Sir,

1. SUMMARY

- (1) I am pleased to be able to inform you that the European Commission has assessed the measure 'Directive of the Free State of Thuringia on the granting of subsidies from ERDF resources for the construction of broadband infrastructure in under-served areas of Thuringia - Broadband infrastructure development directive (*Richtlinie des Freistaates Thüringen über die Gewährung von Zuwendungen aus Mitteln des EFRE zur Errichtung von Breitbandinfrastrukturen in unterversorgten Gebieten Thüringens - Richtlinie Breitbandinfrastrukturausbau*)', hereinafter: 'the measure', and decided not to raise objections as the state aid contained therein is compatible with Article 107(3)(c) TFEU.

2. PROCEDURE

- (2) On 18 July 2011, the Federal Republic of Germany notified the measure to the Commission under Article 108(3) TFEU. By letter dated 6 September

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2011, the Commission requested additional information on the proposed measure. The German authorities submitted the answers to the Commission's requests for information by letters registered as received on 6 October 2011 and 11 October 2011.

3. DESCRIPTION OF THE MEASURE

- (3) **Objectives:** the objective of the measure is to enable modern information and communication technologies to be used in hitherto under-served areas of Thuringia by creating reliable, high-quality, affordable and sustainable broadband infrastructure. Thuringia is an assisted area and meets, at least up until 2013, the requirements of the regional aid rules (Article 107(3)(a))¹. The measure thus also aims to stimulate competitiveness and economic growth and to maintain and create jobs in a structurally weak region.
- (4) Support is to be given for expenditure on closing the profitability gap, i.e. the difference between investment costs and the profitability threshold for providing (basic) broadband services in under-served areas. The reasons for needing a subsidy must be set out convincingly in a detailed profitability calculation. NGA development within the meaning of the Broadband Guidelines will not be supported under this measure.
- (5) **Legal basis:** the notified measure is based on the Thuringia *Land* Budget Order (*Thüringer Landeshaushaltsordnung*), including the related administrative provisions in the Administrative Procedures Act (*Thüringer Verwaltungsverfahrensgesetzes*), and the legal provisions generally applicable to subsidies in Germany and Thuringia.
- (6) **Target areas:** the aid will be restricted to under-served areas of particular economic importance and under-served rural areas in Thuringia. Areas are considered to be under-served if broadband access via bandwidth of at least 2 Mbps is neither available nor planned in the foreseeable future, and also where justified economic demand is not met ('white/grey areas for basic broadband purposes'). Demand is considered to be economically justified if at least three enterprises² are asking for a greater bandwidth for their company than can be provided locally at an affordable price. The (requested) increase in the bandwidth should be at least 50% of the existing bandwidth and the bandwidth to be obtained should provide for symmetrical transmission of at least 30 MBit/s.
- (7) As laid down in the previously approved German broadband regulations³, the beneficiary (see paragraph 8 below) must for these purposes set out the demand for broadband connections in the area to be supplied that has been determined and forecast on the basis of development strategies. The demand must be broken down in terms of commercial or private use. The beneficiary must in addition prove that there is no or only insufficient broadband coverage in the area to be supplied, taking network operators' development

¹ Guidelines on national regional aid for 2007-2013 - National regional state aid map: Germany, OJ C 295, 5.12.2006, p. 6.

² See paragraph 29 of Decision N 53/2010, Federal framework programme on duct support.

³ See explanation in paragraph 15 of Commission Decision N 238/2008.

plans into account, and must to this end carry out market analysis. This will entail an analysis of the current situation and the publication of concrete broadband demand on the online portal of Thuringia's broadband competence centre (www.thueringen-online.de). Consultation will also be necessary to establish whether electronic communication network providers consider they would be able to supply under normal market conditions and without any financial involvement of third parties broadband services to cover the demand in the area to be served (Market testing procedure). Aid can only be granted if, according to this consultation, the market does not provide sufficient broadband services and cannot be expected to do so in the near future (the next three years).

- (8) **Beneficiaries:** Beneficiaries are regional and local authorities or municipal associations (hereinafter: 'municipalities') in Thuringia. Within the framework of a public invitation to tender or a similar open, transparent and non-discriminatory procedure, they may transfer the implementation and/or the operation of the subsidised infrastructure project to natural or legal persons seeking profit. In this case, compliance with the objectives of the funding, the conditions governing the measure and the requirements laid down by the authorising body must be guaranteed. The beneficiary is also responsible for the funding being used in accordance with the objectives and, if necessary, will be obliged to reimburse the subsidy.
- (9) The direct beneficiaries of the aid are therefore generally electronic communications operators offering broadband services. As the measure primarily aims to improve connectivity for undertakings, the indirect beneficiaries of the aid will mainly be local SMEs.
- (10) Only if the procedure for selecting a network operator is unsuccessful or if realisation of the investment by a private provider would require a higher subsidy than implementation by the beneficiary, can beneficiaries (municipalities) carry out the investment themselves. In doing so, the municipality must comply fully with the requirements of the Broadband Guidelines and the measure, and its activity must be limited to the level of wholesale trading. The question whether realisation of the investment by a private provider would require a higher subsidy than realisation by the municipality is determined through submission of a profitability calculation which must meet the same requirements as a calculation by a private provider in the course of the selection procedure.
- (11) **Funding, amount of the aid and financing instruments:** the aid provided in the form of subsidies amounts, for the period up until the end of 2015, to a total of about EUR 17.2 million. The funding comes from the EU Structural Fund (EUR 12 million), from resources of the municipalities (EUR 4 million)⁴ and from *Land* resources (EUR 1.2 million). Cumulation with other broadband measures is not possible.

⁴ The municipalities thus finance over 10% of the aid amount in line with the broadband regulation approved at federal level; see paragraph 14 of Decision N 238/2008, of 23.2.2009, at http://ec.europa.eu/eu_law/state_aids/comp-2008/n238-08.pdf.

- (12) **Aid intensity:** the aid intensities of each single project will depend on the outcome of the local tendering procedures. As in the approved federal broadband regulations⁵, the maximum amount of the grant will not be the total cost of the project, but the so-called 'profitability gap', i.e. the difference in investment costs and profitability threshold between providing broadband services in rural areas compared with urban areas. This 'profitability gap' will be calculated for each project and submitted by the tenderers to the granting authority in the course of the selection procedure. The amount of the aid will be up to 90% of the expenditure eligible for aid, in principle no more than EUR 100 000 per area or municipality.
- (13) **Revocation clause:** funding is subject to revocation if, within five years from entry into service, the subsidised broadband infrastructure is no longer being used in line with the purpose of the aid (earmarking period). If the aid is used to subsidise a network operator, the beneficiary must place the network operator under the same obligation.
- (14) **The selection procedure:** the municipality will publish the envisaged measure in its official gazette and on the website of Thuringia's broadband competence centre (www.thueringen-online.de). The selection of projects must be conducted in a transparent, open and non-discriminatory manner and in full compliance with German procurement rules (*Vergaberecht*). The description of the work in the open and transparent tendering procedure must be based on demand that has been established and forecast, and must be technology and provider neutral.
- (15) **Award criteria:** in the application of the subsidy criteria, each individual project is assessed using a scoring model established in advance comprising different sub-criteria that are divided into three main categories: 1. General description, 2. Technical planning and 3. Service model. The aid will be granted to the bidder with the most economically advantageous offer.
- (16) **Pricing:** the retail prices of the broadband services provided by the selected supplier will be established in the course of the selection procedure. The tender documents will contain a price benchmarking system in accordance with paragraph 51(g) of the Broadband Guidelines. The retail prices should be similar to those in non-assisted and more competitive areas. The German Telecommunications Act⁶ does already provide for price-setting for operators with considerable market power. Even in the absence of market power, however, the measure lays down that if the operator selected cannot reach an agreement with competitors, the prices for open wholesale access will be set in line with those prices laid down by the regulatory authority for more competitive areas.
- (17) **Wholesale access:** the German authorities confirm that, if competitors demand this, German regulatory law allows for open wholesale access to be

⁵ See explanation in paragraph 12 of Commission Decision N 238/2008. See also paragraph 24 of Commission Decision N 368/2009.

⁶ Telecommunications Act of 22 June 2004 (BGBl. I p. 1190), as amended by the Act of 24 March 2011 (BGBl. I p. 506).

provided in line with demand, also with regard to operators without significant market power. Moreover, the operator selected will be obliged to provide for at least seven years open, non-discriminatory network access at wholesale level enabling as many third parties as possible to provide end customers with broadband access suited to their needs. In cases where the municipality, as the aid beneficiary, operates the network itself, this open network access is to be guaranteed for an unlimited period.

- (18) **Duration of the measure:** the measure will apply from its approval by the Commission until 31 December 2015.
- (19) **Monitoring:** the aid will be paid on the basis of submission of original, paid invoices. The aid provider will monitor the support measures' achievement of targets in accordance with the administrative provisions pursuant to the Thuringia *Land* Budget Order and the authorising body will be entitled to request and examine records, supporting documents and other business documents, and to monitor, or have monitored, in on-the-spot surveys how the aid is being used. The German authorities confirm that there is a claw-back mechanism according to which the aid recipient must provide proof of revenue earned. If this proof does not justify the aid received, the aid paid in excess will be clawed back from the applicant.

4. ASSESSMENT OF THE MEASURE

4.1. Presence of aid

- (20) **State resources:** the measure will be financed from resources of the *Land* and municipalities and from EU funds which are paid out by Germany. Hence it is financed from state resources.
- (21) **Selective economic advantage:** the scheme results in a selective economic advantage for both the electronic network operators selected in the tendering procedure and for third parties who gain wholesale access to the subsidised network and can consequently offer their services. There will be also an advantage for commercial end users in the targeted areas. The municipalities also experience a similar advantage if, through the grant, they themselves operate the infrastructure.
- (22) **Distortion of competition and effect on trade:** the measure is liable to distort competition. At network operator level, state support may deter other operators in the region from setting up or developing their own networks under commercial conditions. The state support may also encourage local undertakings to take advantage of services offered in the subsidised network rather than more expensive market solutions. In so far as the intervention is liable to affect providers of electronic communications services from other Member States, the measure has an effect on trade. The markets for electronic communications services are open to competition between operators and service providers, which generally engage in activities that are subject to trade between Member States.

- (23) **Conclusion:** the Commission therefore concludes that the notified aid measure constitutes state aid within the meaning of Article 107(1) TFEU, as moreover confirmed by the notifying Member State in the notification.

4.2. Compatibility of the aid with the internal market

- (24) The Commission's compatibility assessment of the notified measure with the internal market did not point up any serious difficulties. Germany designed the measure in question in accordance with the state aid broadband schemes in Germany already approved by the Commission⁷. However, the current measure differs in the target areas from the existing broadband schemes referred to above. In particular, it applies not only in 'white' areas but also in 'grey' areas' of basic broadband coverage (see paragraph 3).
- (25) The Commission has assessed the compatibility of the notified measure with the internal market in the light of the Broadband Guidelines⁸, which contain a detailed interpretation of Article 107(3)(c) 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 paragraphs 31 to 51 of the Broadband Guidelines.
- (26) As described in paragraphs 34 and 35 of the Broadband Guidelines, in order to assess whether a measure is compatible under Article 107(3)(c) TFEU, the Commission balances positive and negative effects of the aid according to the criteria set out in the Guidelines. In applying the balancing test, the Commission will assess 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?

⁷ See in particular State aid case N 368/2009 - Germany: Amendment of State aid broadband scheme N 115/2008 – Broadband coverage in rural areas in Germany - and State aid case N 238/2008 – Germany: promotion of communication links in the framework of the GA infrastructure support.

⁸ Communication by the Commission - 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.

4.2.1. *Objective of the measure: the aid is in line with EU policy*

- (27) The aim of the measure is to extend basic broadband coverage to areas in which there are still no suitable broadband services with download speeds of a minimum of 2 Mbps ('white areas'), or in which a justified economic demand is not satisfied ('grey areas'). Aid can only be granted if the market does not provide sufficient broadband services and cannot be expected to do so in the near future (see also paragraphs (6) and (7)). With this, the aims of the EU defined in paragraphs 37-40 of the Broadband Guidelines are pursued. The objective of the measure is also in line with the Digital Agenda⁹, which calls on Member States to use public financing in line with EU competition and State aid rules in order to meet the coverage and speed and take-up targets defined for broadband coverage in the Europe 2020 Strategy¹⁰. The measure is therefore in line with the common interest.

4.2.2. *The aid is well designed to deliver the objective of common interest*

Aid is the appropriate instrument

- (28) The measure can only be used in cases where no market operator is willing to provide adequate broadband services to undertakings on market terms. This will be verified with an analysis of the supply situation and through the publication of the planned support measure in the official gazette of the municipality and on the online portal of Thuringia's broadband competence centre. The measure therefore only targets 'white areas' within the meaning of paragraphs 41 und 42 and 'grey areas' within the meaning of paragraphs 44 to 46 of the Broadband Guidelines (see also paragraphs (7) and (14)).
- (29) In the context of alternative instruments, such as demand side measures, end users could receive grants or tax incentives. However, in the situation currently under assessment, the efforts from alternative instruments (including ex ante regulation) would not seem to solve the problems related to the lack of supply (lack of investment in infrastructure) of broadband in the targeted areas. In line with paragraphs 47 and 48 of the Broadband Guidelines, there is in situations such as those examined here therefore no alternative to state funding in order to overcome the lack of broadband service provision.
- (30) The Commission also recognizes that, without further public intervention, it would seem impossible to prevent the emergence of a new 'digital divide' between rural and urban areas, which could lead to the economic and social

⁹ A Digital Agenda for Europe. COM/2010/0245 f/2.

¹⁰ 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.

exclusion of local citizens and undertakings. Hence, in the current situation, state aid is an appropriate instrument to achieve the set objectives.

The aid provides the right incentives to operators

- (31) Regarding the incentive effect of the measure, according to paragraph 50 of the Broadband Guidelines, the question needs to be examined whether the broadband network investment concerned would not have been undertaken within the same timeframe without any state aid. Under the measure, only expenditure to overcome the profitability gap will be subsidised (see paragraph (4)). On the basis of the market analysis and the public consultation (see paragraph (7)) it is established that in the targeted areas no investment in (economically satisfactory) broadband networks would take place within the next three years without public funding. Hence the aid produces a change in investment decisions of the operators. Moreover, as explained in paragraphs (8) and (14), the recipients of the aid are selected by public tender. Therefore, the aid should provide a direct and appropriate investment incentive for the selected operators.

The aid is proportionate

- (32) The scheme is designed in such a way that municipalities are encouraged to minimise the state aid involved and hence the potential distortions of competition. In this regard the Commission notes the following positive elements in the overall design of the measure upon which all aid granted under the notified measure must be based and which comply with paragraph 51 of the Broadband Guidelines:
- a) *Market analysis and consultation of operators:* Before municipalities can grant any aid or themselves become active using the aid, they have to carry out a market analysis to identify the targeted areas. They also have to check whether the operators of electronic communication networks would be prepared to offer or to expand broadband services also without any financial support from third parties (without any public support). A subsidy can only be granted if, after such consultations, it is clear that no adequate broadband offer is provided at affordable prices by the market or is expected to be provided in the near future (the next three years) (see paragraphs (6) and (7)).
 - b) *Transparency and open selection of projects:* Each municipality must publish the envisaged measure at least in its official gazette and on the website of Thuringia's centre of broadband competence. The selection of projects is to be conducted in a transparent manner and in full compliance with the public procurement law (see paragraphs (14) and (15)).
 - c) *Most economically advantageous offer:* On the basis of the predefined and published technical specifications, the electronic communication operator requesting the lowest aid amount is to be selected (see paragraph 15).
 - d) *Technology neutrality:* The scheme is technologically neutral, i.e. it does not favour a priori any given technology (see paragraph (14)).

- e) *Use of existing infrastructure*: The criterion of using existing infrastructure will not favour the dominant operator. According to German regulatory legislation, other operators can also make use of the infrastructure of the dominant operator in order to apply for state aid (since the latter must under the German Telecommunications Act grant access to this infrastructure)¹¹. The German authorities moreover confirm that, where there are legal possibilities for laying down that infrastructure should be shared, these should be availed of.
- f) *Open wholesale access*: The selected operator must grant all electronic communications operators wholesale access to its network for at least seven years under equal and non-discriminatory conditions, enabling them to offer their own retail services. Should the municipality itself operate the network, it must grant such open wholesale access for an unlimited duration (see paragraph (17)). This will enable third-party operators to compete with the selected operator, thereby increasing choice and competition in the areas concerned by the measure.
- g) *Price benchmarking (minimisation of price distortion)*: The selected operator must offer retail services at prices comparable to the average prices in more competitive areas not receiving support. The tender documents will contain the criteria for setting the prices of open access defined in accordance with paragraph 51(g) of the Broadband Guidelines. The applicable national regulatory regime will be used as a basis (see also paragraph (16)).
- h) *Monitoring and clawback mechanism*: The projects will be examined on a regular basis. The chosen monitoring mechanisms will thereby ensure that the granting authority can recover the aid if the beneficiary fails to comply with the rules (see paragraph (19)). The German authorities confirm that a clawback mechanism in accordance with paragraph 51(h) of the Broadband Guidelines will also be included in the procedure for final verification of the use of funds at the end of the limitation period (5 years). This requires the operator to provide proof of actual revenue so that the real profitability gap can be determined. If the original level of aid granted is not shown to be justified, the excess will be clawed back from the applicant.

- (33) Since the measure also allows aid to be granted for the provision of broadband services in areas where there is already an operator ('grey areas for basic broadband purposes', see paragraph (27)), the Commission has also verified whether the conditions set out in paragraph 46 of the Broadband Guidelines are complied with. This is the case: The aid will be granted only if the overall market conditions are inadequate (see paragraphs (6) and (7)) and the same objectives cannot be achieved by less distortive means.
- (34) In particular, during a technical examination in the framework of the tender procedure, it should be demonstrated why ex-ante regulation or measures by the regulatory or competition authority could not guarantee actual network

¹¹ See, for example, Decision N 53/2010, paragraph 62(e).

access. In addition, the barriers to entry should be clearly described and analysed (see also paragraph (29)).

- (35) As explained in paragraphs (32), (33) and (34), the conditions of paragraph 46 of the Broadband Guidelines are therefore met.

4.2.3. *The distortion of competition and the effect on trade are limited, so that the overall impact of the measure is positive*

- (36) On balance, the Commission considers that the overall effect of the measure is 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 areas which have hitherto been underserved for economic reasons. The state support is designed in a way that does not distort competition or adversely affect trading conditions to an extent contrary to the common interest.

4.3. Conclusion

- (37) 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) TFEU.

5. DECISION

- (38) In view of the above, the Commission finds that the aid granted on the basis of the measure in question is compatible with the internal market in accordance with Article 107(3)(c) TFEU and has accordingly decided not to raise objections to the notified measure.
- (39) The Commission would remind the Federal Republic of Germany of the requirement to submit to it annual reports on the application of the aid measure and to inform it pursuant to Article 108(3) TFEU of all plans to modify this aid measure or approve a new one. In view of the duration of the scheme, the Commission would draw Germany's attention to any future revisions of the Broadband Guidelines, which might make appropriate changes to the scheme necessary.

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/eu_law/state_aids/state_aids_texts_en.htm

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

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Yours faithfully,

For the Commission

Joaquín ALMUNIA
Vice-President of the Commission