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**Subject:**        **State aid SA.35562 (2012/N) – Germany**  
                         **Brandenburg Glasfaser**

Sir,

## **I. SUMMARY**

- (1) I am pleased to inform you that the European Commission has assessed the measure "Entwicklungskonzept Brandenburg Glasfaser " (hereafter: "the 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) Germany notified the measure to the Commission on 11 October 2012 pursuant to Article 108 (3) of the TFEU. The German authorities replied to the Commission's request for information of 9 November 2012 by letter of 27 November 2012.

## **III. CONTEXT**

- (3) Outside the major towns and their surroundings, Brandenburg is largely under- or non-served in NGA broadband infrastructure (with bandwidth of at least 50 Mbit/s). Especially in the rural areas the economic gap of operators to fund NGA broadband access is so significant that no such (market) investments are to be expected in the long term. NGA access is, however, considered essential to preserve economic strength of

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these regions and their integration into the national economic structure. According to the German authorities, only the consistent expansion of NGA networks creates the conditions for many middle-sized entrepreneurs in these areas of Brandenburg to remain at top level, to secure jobs and to avoid a digital divide between urban and rural areas.

#### IV. DESCRIPTION OF THE MEASURE

- (4) **Objective:** Purpose of the measure is to promote the development of an NGA broadband backhaul network with download speeds of at least 50 Mbit/s in areas which have not yet access to high speed broadband infrastructure and where basic broadband services are not being delivered by competing broadband infrastructures. Support is also intended for connecting companies located in commercial areas to the high-speed internet infrastructure.
- (5) The purpose of the investment is to build a passive optical fibre backhaul network<sup>1</sup>. The optical infrastructure potentially supports unlimited capacity and, in this respect, will allow an open access at equitable market conditions to all fixed and mobile operators offering broadband services to end-users. All (wired and wireless) telecommunications operators will be able to connect to the network at equal and non-discriminatory conditions.
- (6) **Duration:** The measure consists in a single award to an individual company which will be charged with rolling out and operating the envisaged infrastructure.
- (7) **Legal basis:** the notified measure is based on Council Regulation (EC) No 1083/2006 of 11 July 2006 laying down general provisions on the European Regional Development Fund, the European Social Fund and the Cohesion Fund, and the Landeshaushaltsordnung of Brandenburg.
- (8) **Budget and financing instruments:** The estimated maximum budget of the measure is 30 million EUR, funded from the budget of the European Regional Development Fund.
- (9) **Aid intensity:** Under the measure, the aid will support the undertaking selected to put in place and operate the NGA backhaul infrastructure. In any case, the aid intensity is limited to a maximum of 75% of the construction costs.
- (10) **Target areas:** Support will be granted for the network rollout in areas of Brandenburg, where currently no NGA network is in place or being deployed in the coming three years. An NGA network is defined as enabling a download speed of 50 Mbit/s. Only so called "NGA white" areas in the sense of paragraph 68 of the Broadband Guidelines<sup>2</sup> will be eligible and this only in areas in which – without State support – no adequate high speed internet services would be available on commercial terms. NGA "white" areas, where just one basic broadband network already exists (traditional "grey" areas), will also be eligible, if the download speed is not more than 6 Mbit/s. "Grey" or "black" NGA areas are not eligible. Traditional "black" areas will not be eligible either.

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<sup>1</sup> Backhaul (or middle mile) networks comprise the intermediate links between backbone (core) networks and access (or last mile) networks.

<sup>2</sup> Community Guidelines for the application of State aid rules in relation to rapid deployment of broadband networks, OJ C 235 of 30.9.2009, p. 7.

- (11) **Detailed mapping and coverage analysis, consultation with stakeholders:** To ensure that the network is rolled out only where no NGA offer or where no competing broadband infrastructures exist, and where the available infrastructure is not sufficient to meet actual and forecasted demand, a detailed mapping and coverage analysis has been conducted. Brandenburg analysed the market structure and consulted all possible stakeholders, in particular the undertakings in the telecommunication sector. This consultation, which was conducted by directly addressing all potential stakeholders and by publishing it, concerned the expected telecommunication needs, the existing infrastructure, and the relevant plans of telecommunication undertakings for the next three years to offer the demanded broadband services or roll out the necessary network in the area concerned at market conditions without third party financing.
- (12) For areas in which one basic broadband network is available, but in which there is no comprehensive NGA network present or planned for the next three years (traditional grey area, NGA white area), Germany stated that there are no less distortive ways (including ex ante regulation) to meet actual and forecasted demand. For that purpose, and regarding the other conditions for supporting the construction and marketing of the network, the national regulatory authority, the Bundesnetzagentur, was consulted.
- (13) **Choice of the network operator and obligations imposed on it:** The network operator will be selected by way of an open, transparent and non-discriminatory selection procedure in conformity with European and German public procurement rules. The contract with the operator will contain an obligation to establish and maintain the network and its 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. It will also have to contain an obligation to inform third parties, on demand, on all infrastructure (such as ducts, fibre, street cabinets, etc.) built in the context of this measure.
- (14) The bidder with the lowest amount of aid requested for the expected works and requested capacity of the net as specified by the Land Brandenburg will be chosen, to ensure the selection of the most economically advantageous offer. The bidder will also have to demonstrate its ability to co-finance and run the network.
- (15) **Technology:** The goal of the project is to develop a backhaul network for NGA. At the current stage of development of telecommunications technologies there is no transmission medium for such networks other than optical fibre links that would allow providing NGA services. Therefore, the project envisages construction of the network using fibre-optics links. The services provided on the wholesale market will be such as to enable the interconnection to the backhaul network of any possible technology, which operators wish to use for their access infrastructure.
- (16) **Use of existing infrastructure:** The bidder will be requested to use as much as possible existing backbone infrastructure. All telecommunication undertakings active in Brandenburg have agreed to give access to their existing infrastructure to allow connection of the rural areas.
- (17) **Wholesale access:** the network owner will be required to 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 will support effective and full unbundling and satisfy all different types of

network access that operators may seek (including but not limited to access to ducts, dark fibre, street cabinets, and bitstream and unbundled access to fibre). 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 pursuant to the regulatory framework. The details on how the network owner must provide and ensure this effective wholesale access and unbundling are part of the tender process.

- (18) The Bundesnetzagentur is consulted on the contract to be concluded between the municipality and the operator, thus also on the proposed conditions for wholesale network access.
- (19) **Pricing:** The chosen operator will have to base its wholesale prices for network access on the average published wholesale prices that prevail in more competitive regions for the same or comparable access services or at the price set or approved by the Bundesnetzagentur for the same or comparable access services.
- (20) **Beneficiaries:** The selected operator of the network will be the principle aid beneficiary. Indirect beneficiaries will be electronic communication operators utilising the new network for offering retail services to end users, and business end users.
- (21) **Transparency, Monitoring, Control and Claw-back mechanism:** The granting authority only pays out the grant upon submission of documentary evidence of use of the funds in compliance with the measure. It can moreover require access to any documents regarding the planned project. If the actual demand for services of the network operator exceeds the originally assumed level by more than 30% and there has been no equivalent retail price reduction, then the network operator must refund the profit made on the turnover exceeding this 30%.

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

- (22) 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 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.
- (23) The measure is financed by the Land Brandenburg with funds from the European Regional Development Fund. Although these funds are originating from the budget of the EU, their expenditure takes place upon the discretion (within the limits of the relevant rules) of Member States. The award of financial support to companies from this fund is therefore imputable on the State.
- (24) The scheme results in a selective economic advantage for the electronic network operator selected in the tendering procedure and for third parties who gain wholesale access to the subsidised network and can consequently offer their services on conditions not otherwise available on the market.

- (25) Finally, 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. The intervention is liable to affect providers of electronic communications services from other Member States. 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. Therefore this support is also likely to have an effect on competition and trade between Member States.
- (26) The Commission therefore concludes that the notified aid measure constitutes state aid within the meaning of Article 107(1) TFEU.

## VI. COMPATIBILITY ASSESSMENT

- (27) The Commission has assessed the compatibility of the scheme according to Article 107(3)(c) of the TFEU and in the light of the *Community Guidelines for the application of State aid rules in relation to rapid deployment of broadband networks*<sup>3</sup> (the "Broadband Guidelines") which contain a detailed interpretation of Article 107(3)(c) of the TFEU for this kind of state aid.
- (28) When assessing whether an aid measure can be deemed compatible with the internal market, the Commission balances the positive impact of the aid measure in reaching an objective of common interest against its potential negative side effects, such as distortions of trade and competition.
- (29) In applying this balancing test, the Commission will assess the following questions:
- a. 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)?
  - b. Is the aid well designed to deliver the objective of common interest? In particular:
    1. Is the aid measure an appropriate instrument, *i.e.* are there other, better placed instruments?
    2. Is there an incentive effect, *i.e.* does the aid change the behaviour of firms?
    3. Is the aid measure proportional, *i.e.* could the same change in behaviour be obtained with less aid?
  - c. Are the distortions of competition and the effect on trade limited, so that the overall balance is positive?

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<sup>3</sup> OJ C 235, 30.9.2009, p.7.

### **VI.1. The aim of the aid is in line with EU policy**

- (30) In its Europe 2020 strategy<sup>4</sup> 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 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.
- (31) 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 notified measure addresses a market failure as it targets only so called "NGA white" areas in the sense of paragraph 68 of the Broadband Guidelines, 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 50 Mbit/s in such areas, the measure will contribute greatly to achieve the objectives of the Digital Agenda.

### **VI.2. Well-designed aid**

#### *Aid is the appropriate instrument*

- (32) When broadband coverage is considered insufficient, state intervention may be necessary. A first question to be asked is whether state aid is an appropriate policy instrument to address the problem or whether there are alternative, better-placed instruments. Alternative instruments, such as demand side measures could consist of grants or tax incentives to end users. However, in the present case, the efforts from alternative instruments do not solve the problems related to the lack of high-speed broadband infrastructure in the targeted areas and would fail to deliver the wider economic benefits of a widespread next generation broadband network. The German authorities see no alternative but to grant public aid to the deployment of NGA broadband networks in the targeted areas of the Land of Brandenburg. Furthermore, for traditional grey areas, it is to be established that there are no less distortive ways to meet actual and forecasted demand before any aid can be granted.
- (33) The Commission also recognizes that without further public intervention, it would seem impossible to prevent the emergence of a new "*digital divide*" between urban and more rural areas, which could lead to the economic and social exclusion of the local citizens and undertakings. Hence, State aid is an appropriate instrument to achieve the set objectives.

#### *The aid provides the right incentives to operators*

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<sup>4</sup> EUROPE 2020 - A strategy for smart, sustainable and inclusive growth, COM(2010) 2020, 3.3.2010, page 12.

- (34) As set out in paragraph 50 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. 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.

#### *Proportionality*

- (35) Germany has designed the measure in such a way as to minimise the State aid involved and potential distortions of competition arising from the measure. In this respect, the Commission notes the following positive elements in the design of the measure (paragraph 51 of the Broadband Guidelines):
- (a) *Detailed mapping and coverage analysis, consultation with stakeholders:* The granting authority has analysed the existing broadband infrastructures and investment plans for the next three years in order to identify the areas where public intervention is necessary. This analysis and its results is based on a public consultation involving all stakeholders and ensures a high degree of transparency. 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:* The network operator will be selected by way of an open, transparent and non-discriminatory selection procedure in full compliance with German and European public procurement rules.
  - (c) *Most economically advantageous offer:* On the basis of predefined and published technical specifications, the network operator requesting the lowest aid amount will be selected.
  - (d) *Technology neutrality:* The project envisages construction of the network using optical fibre links. This specification is acceptable because at the current stage of development of telecommunications technologies there is no transmission medium for such networks other than optical fibre links that would allow providing NGA services. However, the bidder will have to propose a technical design which enables the interconnection to the backhaul network of any possible technology, which operators wish to use for their access infrastructure.
  - (e) *Use of existing infrastructure:* The bidder will have recourse to existing infrastructure. Unnecessary and wasteful duplication of resources should in this way be avoided and the funding thus be minimised.
  - (f) *Wholesale access:* The selected operator must ensure full and effective unbundling and provide full open access to the subsidised network on equal and non-discriminatory terms for at least 7 years. 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, it has to be ensured that the access obligation may be extended.

- (g) *Price benchmarking:* Access wholesale prices will be based on the average wholesale prices which prevail in other, more competitive, parts of the country for the same or comparable access services or on the price set or approved by the Bundesnetzagentur for the same or comparable access services.
- (h) *Monitoring and claw back provision:* The granting authority has the right to verify that all conditions of the measure are respected. If the actual demand exceeds the expected level, a part of the surplus profit generated through the operation of the subsidized network must be reimbursed.

*Special conditions for NGA deployment*

- (36) Germany will respect the conditions of paragraph 73 of the Broadband Guidelines for NGA white areas, where one basic broadband network already exists (traditional grey area). Indeed, support for broadband deployment/upgrading is only envisaged where existing services and services envisaged to be provided over the next 3 years are not capable to meet current and forecasted demand for enhanced services and where there are no less distortive means to meet the current and forecasted demand.
- (37) For projects envisaged in NGA white, but traditional grey areas, it will moreover be warranted that the conditions of paragraph 79 of the Broadband Guidelines are complied with: It will thus be ensured that for a period of at least seven years the selected network operator will offer effective and full and unbundled access to the subsidised passive network and satisfy all different types of network access that operators may seek..
- (38) In accordance with paragraph 79, second dash, the Bundesnetzagentur has moreover been consulted on the measure and had no objections. Further, the Bundesnetzagentur will continue to regulate ex ante or monitor very closely the competitive conditions of the overall broadband market and impose, where necessary, regulatory remedies. It should be noted that this does not only apply to firms with significant market power, but that the German telecommunications law also foresees possibilities for the German regulator to intervene for companies without such significant market power.

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

- (39) The Commission concludes that the notified 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.
- (40) In view of the characteristics of the project and of the safeguards applied, the overall impact on competition is deemed to be positive. The project design allows several network operators to use the subsidized infrastructure and compete. The subsidized infrastructure brings about significant new capabilities in terms of broadband service availability and capacity. The public intervention does not crowd out comparable private investments, as the subsidized network must provide significantly better broadband quality and availability than existing operators are able to provide.
- (41) The increase in network capacity is expected to stimulate market entry by service providers and the provision of a larger variety of services. On the effect on trade, there



does not appear to be any significant negative spill-over for other Member States. Accordingly, the 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.

#### **VI.4. Conclusion**

- (42) The Commission concludes that the 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. DECISION**

- (43) The Commission has accordingly decided that the aid measure "Entwicklungskonzept Brandenburg Glasfaser" is compatible with the Treaty on the Functioning of the European Union, in accordance with its Article 107 (3)(c).
- (44) The Commission would remind 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 amend/extend this measure.
- (45) 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>.
- (46) Your request should be sent by encrypted e-mail to [stateaidgreffe@ec.europa.eu](mailto:stateaidgreffe@ec.europa.eu) or, alternatively, by registered letter or fax to:

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Yours faithfully,  
For the Commission

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