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Subject: State aid SA.32037 (2010/N) – Sweden
Broadband development in Västra Götaland

Dear Sir,

1. PROCEDURE

- (1) By letter of 6 December 2010, pursuant to Article 108 (3) of the TFEU, the authorities of Sweden notified a measure to the Commission to support the development of basic and next generation broadband access networks in Västra Götalandsregionen.
- (2) The Commission sent a request for information on 18 January 2011, to which the Swedish authorities replied on 3 March 2011. A second request for information was sent on 19 April 2011 to which the Swedish authorities replied on 22 June 2011.

2. DESCRIPTION OF THE MEASURE

- (3) **Context:** Västra Götaland is a region in the south west of Sweden, relatively large in area and sparsely populated (around 1.55 million people, representing 17% of Sweden) who mostly live in urban areas.

Carl BILDT
Chef för Utrikesdepartementet
Arvfurstens palats
Gustav Adolfs torg 1
SE - 103 23 Stockholm

Commission européenne, B-1049 Bruxelles – Belgique
Europese Commissie, B-1049 Brussel – België
Telefon: 00-32-(0)2-299.11.11.

- (4) Regarding broadband development, in line with the general market trends, commercial operators have greater interest in undertaking investments in densely populated areas, while the challenge is greater in the remote and scattered parts where conditions for deploying infrastructure and upgrading technology are less favourable, because investments in infrastructure are expensive and necessitate a certain customer base to be profitable. Thus, as a result of the geographical structure, the prospects for investments in broadband are poorer in very sparsely populated areas of Västra Götaland. However, according to the Swedish authorities, the need for broadband is just as great in these areas as in other parts of the region.
- (5) Despite the overall good broadband coverage in Sweden, there are still areas of Västra Götaland region with permanent households and businesses without any adequate access to basic broadband services. Moreover, although the deployment of next generation access (hereafter: "NGA") networks is progressing well in Sweden, NGA-networks cover today mainly urban areas. According to Post och Telestyrelsen ("the NRA"), only 32% of the population in Västra Götaland have a fibre access point within 350 meters, and no more than 5.75% of the rural population of the region has access to NGA-network within 350 meters.
- (6) **Existing broadband measures in Sweden:** On 25/03/2010, the Commission approved the national broadband scheme of Sweden (N 30/2010¹) under the EU State rules, which has been amended by Commission decision in SA.33221². Despite the existing State aid broadband scheme, the Swedish authorities explained that the funds earmarked for Västra Götalandsregionen within that framework will not be sufficient for the region's broadband needs. Furthermore, those funds have already been depleted since the need for aid within the region was much higher than could be satisfied within the scheme (of a budget of around SEK 17.6 million, applications were made for around SEK 76.9 million).
- (7) Therefore, Västra Götalandsregionen has decided to complement the national aid scheme in the region with a regional scheme which focuses on its specific needs in order to achieve the ambitious objectives in the region. For reasons of difference in aim, scope and funding, the two aid schemes are not connectable. Although the target areas may overlap, the decision making authority will in such cases ensure that applicants do not benefit from both the schemes. Moreover, the aid cannot be cumulated with other aid measures, including the national broadband measure of Sweden³.
- (8) The rules and conditions of the current measure and the already approved national broadband scheme are almost identical. The special features of the scheme for Västra Götalandsregionen are described below.
- (9) **Objectives:** The objective of the broadband support scheme of Västra Götaland is twofold: to support the development of basic as well as NGA networks in areas of Västra Götaland where such services are currently unavailable and where no similar services are planned by market operators on commercial terms in the next three years. The aim of the project is to achieve universal broadband access of 2 Mbps in the region in the short term and also to contribute for the achievement of a

¹ State aid case N30/2010 – Sweden State aid to broadband within the framework of the rural development program. JOCE C/96/2010.

² SA33221 - Amendment of the State aid broadband scheme within the framework of the rural development program (modification of N30/2010). Not yet published.

³ See references in footnote 1 and 2.

universal NGA coverage in the region in a longer term. The region also believes that with this support scheme it can reach far with its long term objective, which is to have 10 Mbps broadband capacity available in all parts of Västra Götalandsregionen at the latest by the end of 2013.

- (10) Therefore Sweden argues that the notified State aid measure will help to achieve the ambitious objectives of the Swedish national broadband strategy goal⁴, the Digital Agenda for Europe⁵ and is in line with the regional broadband strategy.
- (11) **Legal basis:** The legal basis is lagen (2010:630) om regionalt utvecklingsansvar i vissa län and förordning (2007:713) om regionalt tillväxtarbete. Västra Götalandsregionen and the municipalities are also bound by Kommunallagen (1991:900).
- (12) **Decision making authority:** Västra Götalandsregionen, County Council, is referred to as the Decision Making Authority.
- (13) **Project owners:** Affected municipalities or Västra Götalandsregionen will be the project owners. The project owners will prepare and submit the aid applications (including the market analysis and consultation with the market) to the Decision making authority. Following the approval of the Decision making authority of the aid application of a project, the project owners will be in charge of implementing those projects.
- (14) **Budget, financing and intensity:** The measure is financed by Västra Götalandregionen and the affected municipalities with a 50% share each. Total aid amount foreseen is maximum SEK 350 million (approximately EUR 38 million). The aid intensity of a project depends on the outcome of the tender procedure.
- (15) **Duration of the measure:** The scheme will be put into effect following the Commission's decision to approve the aid scheme under the EU State aid rules. Aid may be granted until 2014 (with payments until 2015).
- (16) **Target areas:** The proposed measures affect around 15% of the geographical areas of Västra Götalandsregionen and totally around 110.000 inhabitants (around 7% of the total of the regions inhabitants). For the remaining 93% of the population in Västra Götaland, it is assumed that the market will ensure an appropriate broadband development within the next 2-3 years. In case Västra Götalandsregionen and the municipalities do not help the targeted areas with public funds, the Swedish authorities argue that a digital divide would open up in the region.
- (17) In more precise terms, as a result of the mapping of the existing infrastructure, the Swedish authorities have identified the following reasons for the existence of inadequate broadband supply in Västra Götalandsregionen:

⁴ The National Broadband Strategy – endorsed on 2 November 2009 - aims to achieve the following objectives: (1) in 2020, 90% of all households and businesses should have access to broadband at a minimum speed of 100 Mbps, (2) in 2015, 40% of all households and businesses should have access to broadband at a minimum speed of 100 Mbps and (3) all households and businesses should have good opportunities to use electronic public services with broadband access.

⁵ Universal broadband coverage to be reached by 2013, and by 2020, all Europeans should have access to internet of above 30 Mbps and 50% or more of European households have subscriptions above 100 Mbps.

- Area 1. Areas with no broadband at all or very limited ADSL capacity (typically maximum 0.25 Mbps download speeds). This area comprises approximately 11.000 inhabitants.
 - Area 2. Areas with limited ADSL capacity because of radio based backhaul networks. Other technologies, such as mobile broadband networks may exist in these areas, but also with very limited capacity (around 0.384 Mbps download speeds). This area comprises approximately 22.000 inhabitants.
 - Area 3. Areas with limited ADSL capacity due to long distances of copper cables. The ADSL capacity is limited (around 2 Mbps downstream), and these areas can have large capacity deficiencies, due to the long distances⁶ (more than 3 kms) of the end user premises from the exchanges⁷. These areas comprise approximately 77.000 inhabitants.
- (18) ***Scope of the measure:*** The current measure will support the deployment of backhaul networks⁸ and/or establishing new access points on the backhaul network in these areas. The network will offer open wholesale access to third-party operators who will be able to add their access infrastructures and deliver broadband services to end-users.
- (19) ***Verification of the target areas and consultation with stakeholders:*** Before approving aid for a project, in line with the national broadband scheme, (1) a market analysis and a consultation with market operators in that area shall be conducted by the project owners to identify the existing broadband networks and services on the target areas⁹. (2) The result of the market analysis, including the mapping, the exact target areas as well as the subject of the measure will be studied by the Decision Making Authority. The project application will be announced on the website of the Decision Making Authority for at least a month. If any operator during this time raises concerns on the planned state aid measure, the Decision Making Authority will analyze the concerns. An operator who plans to invest in a comparable broadband network on the targeted area in the near future has to prove the credibility of such investment plans. The operator could supply the business plan, a detailed calendar deployment plan, proof of adequate financing or any other type of evidences that would demonstrate the credible and plausible character of its planned investment. (3) Aid may only be granted if, as a result of such market analysis and consultation with stakeholders, there is no comparable broadband offer provided or expected to be provided by the market in the next three years.
- (20) ***Tender procedure:*** After the Decision Making Authority has approved a project application prepared by the project owner, the aid will be allocated on the basis of a public tender. The tender procedure will be conducted in accordance with the principles of the law on public procurement. There will be an open tender with equal and non-discriminatory treatment of all bidders. Award criteria will be inter alia aid amount, quality of the proposal, use of existing network, pricing, wholesale access conditions. The project owner will specify in advance the relative weighting

⁶ Due to the nature of the technology, the available bandwidth via copper network using ADSL technology is significantly deteriorating as the distance between the exchange and the end users sites increase.

⁷ Exchange is defined as the geographic area within which sites are connected via the local loop (i.e. telephone cables that run to home and business).

⁸ Backhaul networks comprise the intermediate links between backbone (core) networks and access (or last mile) networks.

⁹ The web link that will be used for that purpose is the following: www.vgregion.se/bredband.

which it will give to each of the qualitative criteria chosen. The investment should reasonably be completed within two years from the end of the tender procedure.

- (21) **Objective to minimize public funding:** The Decision Making Authority will actively encourage the use of existing infrastructure to avoid unnecessary and wasteful duplication of resources. That could for instance comprise the re-use of existing ducts, utilizing public infrastructures (municipalities have their infrastructure registered in a digital database) or coordination of civil works also with other utility sectors. Västra Götalandsregionen and the affected municipalities will also encourage non-paid voluntary work¹⁰ to reduce financial grant necessary.
- (22) **Technology neutrality:** The measure is technology neutral. As regards the backhaul network segment, in accordance with the current technological and market development, only fibre technology has sufficient capacity to transport huge amount of data traffic that is required for a backhaul network and which would enable adequate capacities at the access network part. As regards the access network segment connecting to the backhaul network, the measure will enable several alternative platforms (such as wireline, wireless, mobile solutions) to utilise the subsidized infrastructure. Therefore, it does not favour any particular technology or network platform leaving it to commercial operators to come up with the most appropriate technological solutions to provide retail broadband services to the end users.
- (23) **Wholesale access and prices:** The infrastructure will provide access to third parties including both passive and active infrastructure (including access to duct, dark fibre and cabinet level for at least three operators, as well as access to active products). Third party operators will have wholesale access to the subsidised networks during a period of at least 7 years for the completion of the project. The wholesale prices will be in line with the average published or regulated prices in comparable more competitive markets in Sweden. Both the access conditions and prices will follow the general guidelines on third parties effective wholesale access, including conditions on openness, non-discrimination and effective wholesale access as defined in the Guidelines of the NRA¹¹.
- (24) **Beneficiaries:** The direct beneficiaries of the aid will be electronic communications operators offering broadband services. In some rare cases the Swedish authorities foresee the possibility that no commercial operator would be willing to own the network (e.g. due to high maintenance costs), they would only be interested in the (wholesale) operation. In such cases, non-profit associations and/or municipalities may own the network, but the operator of the network shall be selected in a tender procedure. The direct beneficiary may thus in such scenarios also be a non-profit association and/or municipality. Indirect beneficiaries will be electronic communication operators utilising the new network for offering retail services to end users and primarily micro-enterprises in the areas concerned who will benefit from better broadband services.

¹⁰ As defined in Article 54 of Commission Regulation (EC) No 1974/2006 of 15 December 2006 laying down detailed rules for the application of Council Regulation (EC) No 1698/2005 on support for rural development by the European Agricultural Fund for Rural Development (EAFRD). OJ L 368/15, 23.12.2006 Commission Regulation (EC) No 1974/2006.

¹¹ Available at:
http://www.pts.se/upload/Ovrigt/Internet/Bredband2010/riktlinjer_bredbandsstod_landsbygd_2010-09-16.pdf

- (25) **Monitoring and clawback:** The Decision Making Authority will for a period of five years be responsible to monitor obligations in cooperation with the contracting municipality. Monitoring includes: revenue changes, number of customers using the new infrastructures, number of service providers, reliability of the infrastructure, wholesale access conditions and functionality, and pricing. A claw-back mechanism will be part of the contracts: the bidders must commit themselves to pay back part of the payment if the demand for broadband in the target area grows beyond anticipated levels and this leads to that the profit from the targeted area is unreasonably high. The claw back mechanism will be maintained for five years after the network is operational. Profits will be calculated cumulatively and checked after the five year period has expired. If the cumulative profitability in these five years was higher than the average profitability of the industry, the Decision Making Authority will reclaim part of the extra profit that corresponds to the aid intensity of the measure. In line with the Commission's case practice¹², aid will only be reclaimed from beneficiaries who have, in total and cumulatively, received aid of more than SEK 10 million (approximately EUR 1 million) as Sweden argues that setting up a claw-back mechanism for very low aid amounts (i.e. less than EUR 1 million) would impose a disproportionate burden on the granting authority.

3. ASSESSMENT OF THE MEASURE

3.1. Existence of aid

- (26) 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 measure to qualify 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.
- (27) The current measure will be financed by State resources, more specifically from resources of the municipalities and the region. It will provide selective economic advantage to the electronic communication operators offering broadband services in the relevant rural areas (direct beneficiaries). There will be also an advantage for the end-users (including in particular SMEs) in the targeted areas.
- (28) The measure has the potential to distort competition. The notified aid measure allows a selected number of undertakings to be relieved, by means of State resources, of a part of their costs regarding the financing of the broadband deployment in the region of Västra Götaland. Moreover, the third party providers of broadband services and business end users located in the coverage area might also benefit indirectly from the measure at stake. Consequently, the support from the state strengthens the position of a selected number of beneficiaries in relation to their competitors in the EU and therefore has the potential of distorting competition. Since the direct beneficiaries are active in deploying broadband

¹² See for instance Commission decisions in cases N388/2009 and N62/2010 High-speed Broadband Construction Aid in Sparsely Populated Areas of Finland.

networks, a market which is, at least potentially, subject to intra-EU trade, this support is likely to affect trade between Member States.

- (29) 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 during the notification. Having established that the project involves aid within the meaning of Article 107(1) TFEU to the selected service provider, third party providers and businesses, it is necessary to consider whether the measure can be found to be compatible with the internal market.

3.2. Compatibility of the aid

- (30) The Commission has assessed the compatibility of the notified measure with the internal market in the line with the Broadband Guidelines¹³, which contain a detailed interpretation of Article 107(3)(c) of the TFEU in this area of State aid law. As regards the applicable substantive provisions, the Commission has essentially analysed the measures in the light of the criteria developed in paragraphs 31 to 79 of the Broadband Guidelines. In order to be compatible under Article 107(3)(c) of the TFEU, the aid must pursue an objective of common interest in a necessary and proportionate way.

The aid is in line with the EU policy

- (31) The measure targets “white areas”¹⁴ which are also “white NGA areas” within the meaning of the Broadband Guidelines, where no adequate basic broadband services are currently available and where there are no prospects of such investments on commercial basis in the next three years. Hence the objective of the measure is in line with the Digital Agenda¹⁵ which calls Member States to use public financing in line with EU competition and State aid rules in order to meet the coverage, speed and take-up targets defined in Europe 2020 Strategy¹⁶. Therefore the measure at stake pursues well defined EU policy objectives also in line with Section 3.1 of the Broadband Guidelines.

Aid is the appropriate instrument

- (32) The Swedish government has adopted a comprehensive broadband strategy with the overall objective for Sweden to have world-class broadband. The strategy also envisages several alternative measures to support broadband and NGA deployment in the country to achieve the main objectives of the document.
- (33) However, in the situation currently under assessment, the efforts from alternative instruments (including *ex ante* regulation) do not solve the problems related to the lack of supply of basic or high speed broadband on the targeted areas. In line with paragraphs 47 and 48 of the Broadband Guidelines, in order to ensure the supply of basic and high-speed broadband services the Swedish Government sees no alternative but to grant public aid to the construction of backhaul networks in the sparsely populated areas of the country.

¹³ 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.

¹⁴ In line with Commission's case practice if no adequate basic broadband services of 2 mbps are available, the area shall be considered as a "white area" within the meaning of the Broadband Guidelines. See for instance, Commission decisions N238/2008 or N461/2009.

¹⁵ A Digital Agenda for Europe. COM/2010/0245 f/2.

¹⁶ The Europe 2020 Strategy has underlined the importance of broadband deployment to promote social inclusion and competitiveness in the EU.

- (34) Backhaul networks are able to sustain both basic as well as next generation access networks, hence have they the potential to support both types of development, depending on the choice of the operators and the end users. Aid to backhaul networks is considered to be a pro-competitive intervention, since such network types can reduce the entry barriers in the access network segment for several technology platforms; they could incentivize investments in the access network segments and hence have the potential to increase competition and strengthening choice for consumers. By allowing different broadband technology platforms to obtain open access to the new state funded network, the project has the potential of stimulating infrastructure-based competition in the targeted areas, similarly to adequately covered areas.
- (35) The Commission's analysis therefore confirms that the measure is an appropriate instrument to deliver those common interest objectives to the target areas of the measure.

The aid provides the right incentives to operators

- (36) Regarding the incentive effect of the measure, the Broadband Guidelines set out in paragraph 50 that it needs to be examined whether the broadband network investment concerned would not have been undertaken within the same timeframe without any State aid. The market analysis and the public consultation described in paragraphs (19) will guarantee that in the targeted areas no adequate broadband network investment would take place without public funding, hence the aid produces a change in the investment decisions of the operators. Moreover, as explained in paragraph (20), the recipients of the aid will be selected by public tender. Therefore, the aid should provide a direct and appropriate investment incentive for the selected operators.

Design of the measure and the need to limit distortions of competition

- (37) The measure at stake is considered proportionate because the conditions indicated in paragraph 51 of the Broadband Guidelines are respected, and amongst other features, the following can be identified:
- a) A detailed mapping and coverage analysis and consultation with existing operators will be conducted by the Swedish authorities to clearly identify which geographic areas will be covered by the support measure in question (see paragraph (19) above). Aid may only be granted if, as a result of such market analysis and consultation with stakeholders, there is no comparable broadband offer provided or expected to be provided by the market in the next three years.
 - b) The tender procedure will be conducted in accordance with the rules on public procurement and awards granted according to established criteria. This procedure has the effect of maximising the effect of the aid provided while minimizing any potential advantage granted for the selected operator.
 - c) Within the context of an open tender procedure, the granting authorities will select the most economically advantageous offer as described in paragraphs (20) and (21). Under the terms of the open tender, at similar if not identical quality conditions, the bidder with the lowest amount of aid requested receives more priority points within the overall assessment of the bid. In line with paragraph 51 c) of the Broadband Guidelines, for the purpose of determining the most

economically advantageous offer, the awarding authority will specify in advance the relative weighting which it will grant to each of the qualitative criteria chosen (see fn. 55 of the Broadband Guidelines).

- d) The measure is technologically neutral: it will enable several alternative platforms (such as wireline, wireless, mobile solutions) to utilise the publicly funded infrastructure. Therefore, it does not favour any particular technology or network platform leaving it to commercial operators to come up with the most appropriate technological solutions to provide retail broadband services to end users.
 - e) The measure ensures the use of existing infrastructure to the extent possible as described in paragraph (21).
 - f) Third party operators will have wholesale access to the subsidised broadband networks in an open, transparent, non-discriminatory way during a period of 7 years from the completion of the project. The access conditions will follow the NRA's guidelines on third parties effective wholesale access to subsidised broadband, including conditions on openness, non-discrimination and effective wholesale access, published by the NRA.
 - g) The Decision Making Authority will ensure that the wholesale access prices will be based on average prices for comparable services in more competitive areas in Sweden.
 - h) The Swedish authorities have ensured appropriate monitoring and claw-back mechanisms to ensure that the network operator does not make excessive profits as a result of the measure as described in paragraph (25)¹⁷.
- (38) Since the measure targets "white NGA areas" that are also "white" from basic broadband point of view, in accordance with paragraph 79 of the Broadband Guidelines, no further compatibility criteria need to be assessed. However, the Swedish authorities have also proved that the following conditions will be met:
- i) Effective wholesale access: as the access obligations imposed on the chosen operator include access to both passive and active infrastructure for at least 7 years without prejudice to any similar regulatory obligations that may be imposed by the NRA. The access obligation imposed also includes the right to use ducts or street cabinets in order to allow third parties to have access to passive and not only active infrastructure. This is without prejudice to any similar regulatory obligations that may be imposed by the NRA in the specific market concerned in order to foster effective competition or measures adopted after the expiry of that period.
 - j) As explained in paragraph (23), the access products and their pricing will be set in accordance with the Guidelines of the NRA. Furthermore, the Decision Making Authorities together with the NRA will approve the access conditions under the applicable Community rules upon demand of third party operators.

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In line with Commission decisions in cases N388/2009 and N62/2010, the claw-back clause is applied to all cases except the case when an operator receives aid through this measure under EUR 1 million. The cumulative effect of the aid is taken into account so that if an operator receives smaller amounts of aid through several projects of the measure, the claw back will be applied to all of these projects if the cumulative sum of the aid is over EUR 1 million.

- k) Effective and full unbundling: as explained in paragraphs (23), the NGA network architecture that will benefit from State aid 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, fibre and bitstream.
- (39) On balance, the Commission concludes that the overall effect of the measure is deemed to be positive. The measure is in line with the objectives of Article 107(3)(c) TFEU as it facilitates the development of broadband services in remote and rural areas. The intervention is designed in a way that does not distort competition or adversely affect trading conditions to an extent contrary to the common interest.

3.3. Conclusion

- (40) On the basis of the foregoing assessment, the Commission's analysis confirms that the compatibility criteria set out in the Broadband Guidelines are met, hence the aid involved in the notified measure is compatible with Article 107(3)(c) of the TFEU. In view of the duration of the scheme, the Commission would like to draw the Swedish authorities' attention to future revisions of the Broadband Guidelines, which might make appropriate measures to the scheme necessary.

4. DECISION

- (41) In the view of the above, the Commission finds that the aid granted on the basis of the measure in question is compatible with the internal market in accordance with Article 107(3) (c) of the TFEU and has accordingly decided not to raise objections to the notified measure.
- (42) The Commission reminds Sweden to submit annual reports on the application of the aid measure and to inform the Commission pursuant to Article 108(3) TFEU on all plans to approve a new or to modify this aid measure.

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:

European Commission
Directorate-General for Competition
State Aid Greffe
Rue Joseph II 70
B-1049 Brussels
Fax No: +32 2 2961242

Yours faithfully,
For the Commission

Joaquín Almunia
Vice-president of the Commission