



EUROPEAN COMMISSION

Brussels, 23.02.2009

C(2009)1339

**PUBLIC VERSION**

**WORKING LANGUAGE**

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**Subject: State aid N 238/2008 – Germany**  
**Broadband infrastructure development in Germany**

Sir,

**I. SUMMARY**

- (1) I am pleased to be able to inform you that the European Commission has assessed the measure "*Broadband infrastructure development in Germany*" (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 13 May 2008, pursuant to Article 88 (3) of the EC Treaty, the German authorities notified the above mentioned measure to the Commission. By letter registered on 9 July 2008 and 5 December, the Commission requested additional information on the proposed measure. The German authorities submitted the answers to the Commission's requests of information by letters registered on 20 August 2008, 14 October 2008, 12 January 2009 and 23 January 2009.

**III. CONTEXT**

Seiner Exzellenz Herrn Frank-Walter STEINMEIER  
Bundesminister des Auswärtigen  
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- (3) The "*Rahmenplan der Gemeinschaftsaufgabe zur Verbesserung der regionalen Wirtschaftsstruktur*" (hereafter: "GA") is a central instrument of regional policy in Germany with the objective to improve the regional economic structure since 1969<sup>1</sup>. Within the framework of the GA, the federal government and the *Länder* are jointly entitled to determine the subsidised areas as well as the conditions of granting aid: *inter alia* the maximum aid amounts, the form of aid, the eligibility criteria and the distribution of the GA-resources. The GA also provides as a framework of coordination for other policy areas, as for example the regional aid programmes of the *Länder* or the distribution of European Regional Development Fund (ERDF) resources. The funding for the initiatives under this framework is granted by the federal government, the *Länder* and the municipalities.
- (4) The GA framework targets "structurally weak economic areas" which are predominantly found in the new *Länder*, but some underdeveloped areas in the old *Länder* are also concerned<sup>2</sup>.
- (5) For the period from 2007 to 2013, the measure also includes support of broadband infrastructure in structurally disadvantaged regions. The German authorities have already provided public funding to improve the broadband infrastructure in Germany under the current scheme, but until now, all aid were granted in line with the "*de minimis*"<sup>3</sup> or "*aid to SMEs*"<sup>4</sup> regulations: hence no State aid notification was required<sup>5</sup>. However, the German authorities expect that the aid granted under this framework in the forthcoming years will most probably exceed the respective thresholds possible under the *General Block Exemption Regulations*<sup>6</sup> or the "*de minimis*"<sup>7</sup> Regulation, therefore the current measure was notified to the Commission.
- (6) The measure under assessment is a federal level broadband support scheme promoting equitable broadband access in Germany. The German authorities took into account the general rules and conditions of the already approved State aid broadband schemes when designing the current one<sup>8</sup>.

#### IV. DESCRIPTION OF THE MEASURE

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<sup>1</sup> More detailed information about this instrument is available at the following website: <http://www.bmwi.de/BMWi/Navigation/Wirtschaft/Wirtschaftspolitik/Regionalpolitik/gemeinschaftsaufgabe.html>.

<sup>2</sup> The GA development areas are in conformity with the Regional Aid rules of the Commission. The detailed map is available on the website referred in footnote 1.

<sup>3</sup> Commission Regulation (EC) No 1998/2006 of 15 December 2006 on the application of Articles 87 and 88 of the Treaty to *de minimis* aid, OJ L 379 of 28.12.2006.

<sup>4</sup> Commission Regulation No 70/2001 of 12 January 2001 on the application of Articles 87 and 88 of the EC Treaty to State aid to small and medium-sized enterprises, OJ L 10, 13.01.2001.

<sup>5</sup> Two projects received aid under this framework in 2005 in the *Land of Mecklenburg-Vorpommern*, both below the eligible thresholds.

<sup>6</sup> See Commission Regulation (EC) No 800/2008 of 6 August 2008 declaring certain categories of aid compatible with the common market in application of Article 87 and 88 of the Treaty (General block exemption Regulation).

<sup>7</sup> See footnote 3.

<sup>8</sup> See for instance, Commission decision of 02.07.2008 in case N115/2008 – "*Broadband in rural areas of Germany*". OJ C/194/2008 of 31.07.2008 or Commission decision of 5.11.2008 in case N266/2008 "*Broadband in rural areas of Bayern, Germany*".

- (7) **Objectives:** the objective of the measure to support the provision of broadband services in structurally weak economic areas. The measure shall contribute to the reduction of the competitive disadvantage in terms of access to broadband connectivity for undertakings situated in those predominantly rural areas.
- (8) **Legal basis:** The notified measure is based on the "36<sup>th</sup> Rahmenplan der Gemeinschaftsaufgabe zur Verbesserung der regionalen Wirtschaftsstruktur".
- (9) **Target areas:** The measure targets GA development areas<sup>9</sup> where no adequate broadband services are available due to the economic principles or technologic restrictions of broadband networks. Given the longer timeframe of the scheme and the rapidly increasing broadband need of end-users, the German authorities consider insufficient broadband coverage if a minimum (download) bandwidth of 2 Mbps is not available at affordable prices<sup>10</sup>. According to the German authorities these areas are mainly rural areas at the periphery or out of reach of existing telecommunication technologies.
- (10) **Beneficiaries:** The direct beneficiaries of the aid will be electronic communications operators offering broadband services. As the measure primarily aims to improve connectivity for undertakings, the indirect beneficiaries of the aid will be mainly local SMEs.
- (11) **Budget:** The aid takes the form of direct grants, and will be financed from federal, *Länder* and municipal sources. The total aid shall amount to approximately €60 million until the end of 2013.
- (12) **Aid amount and aid intensity:** The aid intensities of each single project will depend on the outcome of the local selection procedures. Similarly to the other German broadband schemes<sup>11</sup>, 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 to urban areas<sup>12</sup>. The value of the "*profitability gap*" for each project will be calculated and submitted by the tenderers to the granting authority in the course of the selection procedure. Based on preliminary estimates, the German authorities foresee typical aid amounts of €50.000 to €200.000 and aid intensities in the range of 30-50%.
- (13) **Funding instruments:** The amount of public support for each of the projects will be granted from federal, state (*Länder*) as well as from municipal funds divided as follows:

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<sup>9</sup> See para (4).

<sup>10</sup> The German authorities argue that many undertakings that only has access of less than 2 Mbps – given the rapidly increasing bandwidth need of the internet services - are not able to sufficiently participate in the e-economy. See for instance „*Breitband für jedermann – Infrastruktur für einen innovativen Standort*“, WIK-Consult of January 2008; available at : [http://www.wik.org/content/breitbandkonzeption%20RLP%20Gesamttext%20Stand%2027\\_2\\_081.pdf](http://www.wik.org/content/breitbandkonzeption%20RLP%20Gesamttext%20Stand%2027_2_081.pdf)

<sup>11</sup> For reference see footnote 8.

<sup>12</sup> According to the German authorities the "*profitability gap*" derives from the diseconomies of establishing broadband networks in rural areas (for instance, due to low population densities and high fixed costs of network deployment). As a consequence, electronic communication operators do not provide widely available broadband services at affordable prices in typically rural and remote areas with low population density.

GA framework		Municipality <sup>13</sup>	Total
Max 90%		Min. 10 %	100%
50 % Federal	50 % <i>Länder</i>		

- (14) Concerning the source of funding, in order to better utilize the different aid instruments available for regional development, it is not excluded that the granting authorities might use other regional aid instruments to co-finance the measure (for instance, ERDF funds). In any case, aid will be limited to the identified "*profitability gap*", and the respective municipalities shall in any case be obliged to finance minimum 10% of the aid amount. Furthermore, no cumulation is possible with any other State aid broadband measures.
- (15) ***The selection procedure:*** Similarly to other German broadband schemes<sup>14</sup>, the granting authority will have to prove the need for broadband services and the absence of insufficient broadband offers in the area. The municipality also have to consult operators of electronic communication networks whether they would be ready to provide broadband without public support. Aid may only be granted if, as a result of such market research, there is no sufficient broadband offer provided or expected to be provided by the market in the near future. Each municipality will publish the envisaged measure at least in its official newspaper and on its website. The aid amounts will be allocated on the basis of open tender procedures, which will be conducted in a transparent manner and in full compliance with the national procurement rules (*Vergaberecht*) and the rules governing budget law<sup>15</sup>.
- (16) ***Award criteria:*** on the basis of the technical specifications determined beforehand, the operator requesting the lowest aid amount will be selected.
- (17) ***Pricing:*** the retail prices of the broadband services provided by the selected supplier will be established in the course of the selection procedure. However, the retail prices should be similar to those in other, non assisted areas.
- (18) ***Technology:*** The selection procedures will be technology neutral, allowing tenderers to propose any suitable technological solutions.
- (19) ***Wholesale offer:*** The selection procedure will oblige the selected operator to provide wholesale access to the subsidised infrastructure to all electronic communications operators on equal and non-discriminatory conditions that will enable them to compete with the former, thereby strengthening choice and competition in the areas concerned by the measure<sup>16</sup>.

<sup>13</sup> In case the municipality does not have the sufficient financial background to finance min. 10% of the project, local non-profit organizations could also provide this part of the funding.

<sup>14</sup> For reference see footnote 8.

<sup>15</sup> Similarly to the other broadband measures approved under the State aid rules (see for instance N115/2008), in a few exceptional cases, when the call for tenders remains unsuccessful or the aid amount required by the tenderer is significantly higher, the municipalities could initiate the investment themselves. In such cases municipalities will not engage in retail broadband service provision, but will grant wholesale access to third party operator(s) in an open, non-discriminatory procedure afterwards.

<sup>16</sup> The selected operator is exempted from setting up wholesale access only in those very rare occasions when this would raise the investment costs disproportionately, by at least 50%. As explained by the German authorities, this exemption might be applied in case of connecting a few, isolated settlements that are situated in areas with very difficult telecommunication topology, where the investment costs would be

- (20) ***Duration of the measure:*** The measure will run after the approval of the Commission until 31 December 2013. In line with the GA rules, the selected operators will have to provide services for at least 15 years at prices that are in line with the market.
- (21) ***Monitoring:*** the monitoring of the projects will be performed by the respective *Länder*. It is also within the competence of the *Länder* to monitor whether the respective municipality has taken the steps necessary from the State aid point of view. The federal government also inspects the subsidized infrastructure projects concerning the compatibility of the projects with the conditions set forth by the GA Framework plan.

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

### *De minimis aid*

- (22) As laid down in the *de minimis* Regulation<sup>17</sup>, aid not exceeding a ceiling of €200,000 over any period of three years in favour of one company is deemed to have no substantial effect on competition and trade between Member States if all requirements of said Regulation are met, and hence does not constitute State aid. As explained in para (5), the German authorities expect that the aid granted under this framework in several cases will most probably exceed the respective thresholds possible under the "*de minimis*"<sup>18</sup> Regulation.

### *Presence of aid*

- (23) 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.

### V.1. State resources

- (24) The measure is financed by resources of the federal government, the *Länder* and the municipalities. Hence State resources are involved.

### V.2. Economic advantage

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disproportionally increased in case of granting an open wholesale access. This exemption will be only exceptionally applied and would not be possible if undertakings are connected by the new, subsidized network. In such cases the German authorities should also verify whether providing bitstream access to third parties would be possible and whether that would also lead to 50% increase in the investment costs.

<sup>17</sup> Commission Regulation (EC) No 1998/2006 of 15 December 2006 on the application of Articles 87 and 88 of the Treaty to *de minimis* aid, OJ L 379 of 28.12.2006

<sup>18</sup> See footnote 3.

- (25) *Selected operators:* the selected operators will receive financial support which will enable them to enter the market and provide broadband services on conditions not otherwise available on the market. The selected operators will also be in ownership of the networks as well as other tangible and intangible assets acquired with State funds (for instance equipment, customer relations) even after the lifetime of the projects and hence enjoy continuing benefits partly funded with State resources after the end of the project. In view of the above, economic advantage will be granted to the selected operators.
- (26) *Third party providers:* In the areas covered by the project, there is no or limited broadband connection and therefore no or limited broadband wholesale offer, preventing market entry of third party service providers which do not have their own infrastructure. Therefore, third party providers of broadband services using wholesale access provided under the measure might also benefit from the measure, as they will offer services via the subsidized network in areas where they did not previously have presence.

### **V.3. Selectivity and distortion of competition**

- (27) The notified measure supports the supply of certain electronic communication services, namely broadband services. The intervention of the State alters the existing market conditions by allowing the provision of broadband services by the selected telecommunication operators and, potentially, third party providers. A number of undertakings are likely to subscribe to the services provided by the selected suppliers instead of more expensive market-based solutions (for instance satellite or leased lines). Therefore, the fact that a new broadband service becomes available at a lower price than existing has the effect of distorting competition.
- (28) In addition, while the German authorities will intervene only in case of lacking private initiatives in the targeted areas, it cannot be excluded that market initiatives could become viable in some areas in the longer term. By securing this project, the chosen operators will be capable of establishing their business and developing their customer base, enjoying a first mover advantage over prospective competitors.
- (29) The measure is also selective in that it is addressed to undertakings active only in certain regions or in certain markets for electronic communications services. These selectivity elements also induce a potential distortion of competition.<sup>19</sup>

### **V.4. Effect on trade**

- (30) Insofar 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. There may also be an effect on trade between the businesses using the broadband services enabled by the measure and their competitors in other Member States.

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<sup>19</sup> As regards the sectoral specificity, see for instance Judgement of the Court in Case C-143/99 *Adria-Wien Pipeline and Wietersdorfer & Peggauer Zementwerke* [2001] ECR-I8365.

## VI. ASSESSMENT OF THE MEASURE: COMPATIBILITY

- (31) The Commission notes that the project aims to maintain the widespread availability and use of broadband services and, as such, does not fall under one of the existing frameworks and guidelines.
- (32) It should be noted that although most of the areas covered by the measure are eligible to receive regional investment aid under the derogation of Article 87(3)(a) or (c). However, not all of the targeted locations are assisted areas within the meaning of the Regional Aid Guidelines<sup>20</sup>.
- (33) The Commission therefore 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<sup>21</sup> which states that:

*“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.

- (34) In order to be compatible under article 87(3)(c), an aid must pursue an objective of common interest in a necessary and proportionate way. In particular, the measure shall be assessed 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

<sup>20</sup> See "Guidelines on national regional aid for 2007-2013", OJ C 54, 4.3.2006 and Commission decision in case N459/2006 – "German regional aid map 2007-2013" OJ C 295, 5.12.2006. 23. GA eligibility areas are available on the webpage of Bundesministerium für Wirtschaft und Technologie: <http://www.bmwi.de/BMWi/Navigation/Wirtschaft/Wirtschaftspolitik/Regionalpolitik/gemeinschaftsaufgabe.html>.

<sup>21</sup> This approach was also followed by the Commission in other cases, see for instance: Commission decisions in cases N266/2008 *Broadband in rural areas of Bayern, Germany* or N508/2008 *Provision of Remote Broadband Services in Northern Ireland*, United Kingdom. The public versions of all broadband decisions are available at the following website: [http://ec.europa.eu/comm/competition/state\\_aid/register/ii/](http://ec.europa.eu/comm/competition/state_aid/register/ii/).

- (35) As outlined in its Communication “i2010 – A European Information Society for growth and employment”<sup>22</sup> and the *eEurope* Action Plan 2005<sup>23</sup>, the Commission actively supports the widespread availability of broadband services. There is clear evidence of regional economic development benefits resulting from greater broadband deployment, including job creation and retention as well as improved health and education services<sup>24</sup>. By supporting equitable provision of coverage and access to broadband communications in Germany, the measure helps achieving greater cohesion and is therefore in line with the common interest.

### **Market failure and equity considerations**

- (36) Lack of broadband coverage is due, among other factors, to some of the typical economic problems associated with networks industries. In particular, due to economics of density, broadband networks are generally more profitable to rollout where potential demand is higher and concentrated, i.e. in densely populated areas. Because of high fixed costs, costs increase significantly as population densities drop. Remoteness also plays a role, requiring bridging longer distances in the backhaul and in the last mile. In areas where demand is not very developed and coverage of cost is uncertain, private operators do not have sufficient market incentives to offer broadband services similar to densely populated, urban areas.
- (37) Due to these constraints, local undertakings may suffer competitive disadvantage compared to other companies because the relative cost of the supply of services to these areas is not comparable to those in urban areas. Furthermore, because the costs are seen to be significantly higher this inhibits investment by undertakings thereby reducing potential economic activity in the region.
- (38) Hence, by providing financial support for the establishment of infrastructure to provide wholesale and retail broadband services in such areas of Germany, the authorities pursue genuine cohesion and economic development objectives.

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

### ***(a) Aid is the appropriate instrument***

- (39) As explained by the German authorities, the scheme should be used only in case no market operator is willing to provide adequate broadband services to the undertakings on market terms. Whereas *ex ante* regulation, for example, has facilitated broadband deployment in urban and more densely populated areas, it is unlikely to lead to sufficient investments for the provision of broadband services to underserved areas as it presupposes the existence of broadband access infrastructure.

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<sup>22</sup> COM(2005)229 final, 1 June 2005.

<sup>23</sup> COM(2002)263 final, “*eEurope 2005: An information society for all*”.

<sup>24</sup> For an overview, see for instance: Lehr, Osorio, Gillet and Sirbu (2005): “*Measuring Broadband’s Economic Impact*”, and Orazem, Peter, University of Kansas Business School (2005), “*The Impact of High-Speed Internet Access on Local Economic Growth*”.



- (40) Hence, in situations such as those under examination, there is no alternative to granting public funding to overcome the lack of broadband connectivity. In view of these considerations, the Commission concludes that, in the case at hand, public funding for the provision of broadband services is an appropriate instrument to achieve the set objectives.

***(b) The aid provides the right incentives to operators***

- (41) The measure will enable municipalities to ensure that operators requesting funding 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 and revenues and the verified "*profitability gap*". The objective of the German authorities in this regard is that the public funding granted provides a direct and appropriate investment incentive for the selected operators.

***(c) Proportionality***

- (42) The German authorities have designed the scheme in a way which encourages municipalities to minimise the State aid involved and hence the potential distortions of competition. In this respect, 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:

- (a) *Market analysis and consultation of operators:* Before any aid is granted, municipalities have to carry out a market analysis to identify the targeted areas. Municipalities also have to confirm whether there are other means than State aid to provide broadband services on their territory – for example by providing access to empty ducts. The municipalities also have to consult operators of electronic communications networks, whether they would be ready to provide broadband services without public support. A subsidy may only be granted if, after such consultations, there is no broadband offer provided by the market or expected to be provided in the near future at affordable prices.
- (b) *Transparency and open selection of projects:* Each municipality shall publish the envisaged measure at least in its official newspaper and on its website. The selection of projects shall be conducted in a transparent manner and in full compliance with the procurement rules (*Vergaberecht*). On the basis of the predefined technical specifications, the electronic communication operator requesting the lowest aid amount shall be selected.
- (c) *Technology neutrality:* The scheme is technologically neutral, i.e. it does not favour a priori any given technology.
- (d) *Wholesale access:* The selected operators have to grant wholesale access to their networks to all electronic communications operators on equal and non-discriminatory conditions that enable them to replicate their own retail offers<sup>25</sup>. Such a wholesale access will enable third party operators to

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<sup>25</sup> Operators deemed to have significant market power are in any case obliged by regulation to offer wholesale access to their networks. Whereas wholesale access is obliged by the scheme, in some rare cases, the

compete with the selected operators, thereby strengthening choice and competition in the areas concerned by the measure.

- (e) *Minimisation of price distortion:* The selected operators will have to offer retail services at prices that are comparable to the average prices in other not supported areas. These prices under no condition can be set below this threshold. The German authorities expect that in light of the wholesale access of the network and the increased competition between the service providers, retail prices will follow the likely decrease of the market prices in medium term.
- (f) *Monitoring:* the projects will be examined on a regular basis and the monitoring mechanisms implemented<sup>26</sup> will ensure that if the beneficiary fails to comply with the rules, the granting authorities will be in the position to recover aid.

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

- (43) 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 affordable broadband services due to the insufficient density of potential and actual subscribers to provide broadband services on a purely market-driven basis. The measure may strengthen competition by granting open wholesale access to other operators and by this measure acting as an incentive to companies who supply broadband service via satellite or other alternative technology. Furthermore, the measure aims at ensuring equitable access to broadband rather than giving rural and remote businesses a competitive advantage that will ensure that any distortions of competition are minimised.
- (44) In view of the characteristics of the project and of the safeguards applied by the German authorities, the overall impact on competition is deemed to be positive. On the effect on trade, the Commission does not identify negative spill-overs for other Member States.
- (45) 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.

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

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selected operator is exempted from setting up free wholesale access if this would raise the investment costs disproportionately: by at least 50%. See also footnote 16. In view of the limited size of the local projects and the low aid amounts concerned, in this specific case, the Commission is of the opinion that this does not distort competition or affect trading conditions to an extent contrary to the common interest.

<sup>26</sup> See para (21).

- (46) In the light of the above, the Commission has come to the conclusion that the aid involved in the notified measure is compatible with Article 87(3)(c) of the EC Treaty.

## VII. DECISION

On the basis of the foregoing assessment, the Commission has accordingly decided that the aid measure "*Broadband infrastructure development in Germany*" is compatible with Article 87(3)(c) of the EC Treaty.

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.

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:

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Yours faithfully,

For the Commission

*Neelie KROES*  
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