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Subject: **State aid SA.37685 (2013/N) – Finland**
 Modifications in the aid scheme concerning high-speed broadband
 construction in sparsely populated areas in Finland (modification of
 State aid cases N 62/2010 and SA.34290)

Sir,

I. SUMMARY

- (1) I am pleased to inform you that the European Commission has assessed the “*Modifications in the aid scheme concerning high-speed broadband construction in sparsely populated areas in Finland*” 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) In accordance with Article 108(3) TFEU, on 8 November 2013, Finland notified its plans to amend the State aid measure approved by the Commission on 6 May 2010¹

¹ State aid case N 62/2010 – Finland – High-speed broadband construction aid in sparsely populated areas of Finland, decision of 6 May 2010.

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and on 7 September 2012². Additional information was provided by the Finnish authorities by letter received on 20 December 2013, and by e-mails dated 20 and 21 January 2014.

- (3) The Finnish authorities have provided a language waiver and agree that the decision will be adopted in English as the authentic language.

III. CONTEXT

- (4) In its decisions on State aid N 62/2010 and SA.34290³ the European Commission concluded that the Finnish state aid broadband scheme was in compliance with the criteria set out in the *Community Guidelines for the application of State aid rules in relation to rapid deployment of broadband networks*⁴ and therefore compatible with Article 107(3)(c) TFEU. In line with the approved scheme public funding is granted only to non-built-up areas where it is not economically viable for commercial operators to build high-speed networks. Since the previous Commission decision considering the Finnish state aid broadband scheme to be compatible with Article 107(3) TFEU, new Broadband Guidelines⁵ have entered into force, which are now applicable for the assessment of the amended scheme.

IV. DESCRIPTION OF THE MEASURE

- (5) **Objective:** The now notified modification consists of an amendment of the so called claw-back mechanism, i.e. the possibility for public authorities to retroactively request re-payment of aid from beneficiaries in cases where the revenues of the project exceed a certain limit. Whereas the claw-back mechanism which is part of the approved scheme sets out a threshold of State aid of EUR 1 million in total for each beneficiary, the Finnish authorities now propose to increase the threshold of State aid to EUR 10 million per project. The reason for the proposed modification is to reduce the administrative burden of monitoring of revenues and costs in small projects, particularly for beneficiaries running several small projects. Small projects being typically the case in Finland, the situation is considered unnecessarily resource consuming also for the Finnish Communications Regulatory Authority.
- (6) **Duration:** Until 31 January 2015.
- (7) **Legal basis:** The modification subject to this notification is a proposal for amendment of the Act on Broadband Construction Aid in Sparsely Populated Areas.
- (8) **Budget and financing instruments:** The proposed modification has no budgetary impact on the aid scheme.

² State aid case SA.34.290 – Finland – Modifications in the aid scheme supporting the development of high-speed broadband infrastructure in sparsely populated areas of Finland, decision of 7 September 2012.

³ See footnotes 1 and 2.

⁴ OJ C 235 of 30.9.2009, p. 7.

⁵ Communication from the Commission - EU Guidelines for the application of State aid rules in relation to the rapid deployment of broadband networks, OJ C 25, 26.1.2013, p.1.

- (9) ***“Step change” in availability of broadband capacity:*** The Finnish authorities estimate that by 2015 connection rates of 100 Mbps will be the norm. The aim of the “Broadband 2015” project is to provide almost all residents in Finland with high-speed broadband network of 100 Mbps by the end of 2015.
- (10) So far, the Finnish Communications Regulatory Agency, FICORA, has at the time of this decision analysed the network plans of 69 projects. The network analysis is used for determining the maximum volume of the eligible project costs in projects supported by FICORA. On average, 59 % of the network is eligible for aid. The telecommunications company must finance 1) the part of the network that is not eligible for aid (the part that is not eligible for aid at all) and 2) the company's share of the network which is eligible for aid (telecommunications companies shall pay at least one third of the eligible project costs). Altogether the share that the telecom company finances of the projects is on average 61 percent (includes the whole project costs, the parts that are eligible for aid and the parts that are not). According to section 8(4) of the Act on Broadband Construction Aid, state aid is allowed only to the extent that it has only little or no distortive effects on competition or the functioning of the market. When conducting the market analysis, FICORA shall take a stand on whether the possible state aid has other than only little or no distortive effects on competition or the functioning of the market in the project area.
- (11) State aid can be only granted if the applicant undertakes in its application to assume responsibility for the provision of progressive network and communication services in the communication network subject to procurement for at least ten years from the date when the last instalment was paid. According to the explanatory statement for section 11 of the Act, broadband services of at least 100 Mbps speed are currently considered as progressive communication services. Symmetry and operational reliability are also characteristics of a progressive communication service. Furthermore, network and communication services are subject to the technical requirement that the offered services shall comply with the Communications Market Act and provisions laid down pursuant to it and also otherwise be technically progressive, reliable and safe.
- (12) ***Transparency obligations - Public consultation, mapping and analysis of coverage:*** The Finnish authorities have confirmed that the NRA (the National Regulatory Authority, FICORA) has carried out detailed mapping, coverage analysis and a consultation with the existing operators in order to define the areas eligible for support under the aid scheme. Eligible areas are amongst the most sparsely populated areas of Finland. The defined area comprises approximately 130.000 households. A map of eligible areas shall be made public by a Decree of the Ministry of Transport and Communications. Maps of areas eligible for aid by province are available on the website of FICORA. According to the Finnish authorities, FICORA will furthermore have to conduct an open and public hearing in accordance with the Finnish Administrative Procedure Act, on the possible state aid and draft market analyses in all project areas. The purpose of such consultations is to find out whether any commercial investments or investment plans for the next three years have been made in the broadband construction project areas. Information on the consultations shall be available in a centralised manner on the websites of FICORA and the Regional Councils. The projects take place in very sparsely populated areas in Finland, where there are no available high-speed internet connections and where operators are not

interested in investing in this type of networks on commercial terms within the next three years (so called “*white NGA areas*”). Good internet connections are considered important in remote rural areas where the need for e-services is significant due to long distances. The scheme therefore aims to promote social and regional equality in Finland. The Regional Councils have proposed approximately 800 network projects around Finland, of which 240 projects have started at the time of this decision. Municipal network companies and cooperatives are among the most active players implementing projects.

- (13) ***Competitive selection process and most economically advantageous offer:*** The Regional Council will invite applicants for the implementation of a certain network project according to the selection criteria publicized. The Regional Council sets out and publishes the selection criteria. According to Section 6a of the Act, the Regional Council will select the applicant which will implement the network project in the most economically advantageous manner in accordance with the selection criteria. Moreover, section 6a(1) of the Act provides that at least the amount of state aid applied for shall be used as a criterion for selecting the recipient of aid. The following criteria can also be used: 1) fees collected from users; 2) period of time during which the telecommunications company undertakes to provide services to users; 3) other corresponding criteria related to technical, financial, qualitative or functional characteristics. The criteria and their relative weighting shall be specified in the call for applications. According to Section 6(2) of the Act on Broadband Construction Aid, the application procedure shall be transparent, equal and non-discriminatory. The applicants are treated equally so that the criteria applied for selecting the operator to implement the project will be specified in advance. The criteria shall be objectively reasoned and measurable. The criteria applied shall be non-discriminatory so that they will not favour certain operators.
- (14) ***Technological neutrality:*** The Act on Broadband Construction Aid is technology-neutral, which is also specifically mentioned in the Government proposal related to the Act (176/2009). Thus, granting of aid is not conditional on the choice of a specific technical solution; aid can be granted to a broadband network based on any technical implementation. Pursuant to section 6 of the Act, the application procedure for state aid shall be non-discriminatory which means, among other things, that the application criteria shall be technology-neutral.
- (15) ***Use of existing infrastructure:*** When conducting the market analysis, FICORA shall find out about the location of existing progressive communication networks and arrange a public consultation concerning project areas for which the Regional Councils have announced public aid to be applied for. During the public consultation, the telecommunications companies shall be requested to give an account of their investment plans concerning progressive communication networks in the project area in the near future (three years) and on the possible impact of state aid on competition in the project area and on investments made previously in the area. On the basis of this information, FICORA shall prepare a market analysis of each project area, defining possible areas that are not eligible for aid on the basis of network information or investment plans. The prepared market analyses are also available on the website of FICORA. In addition, in the aid application the selected operator shall include information on how the subsidized network is intended to be interconnected to other networks. This way the operators are encouraged to have recourse to any

available existing infrastructure. FICORA has a website dedicated to the "Broadband 2015" project, providing detailed information on the project in a centralised manner.

- (16) **Wholesale access:** According to Section 9 of the Act on Broadband Construction Aid, the selected operator will have to offer wholesale services and access to the subsidized network to other operators. The Act will be amended in order to provide that the selected operator will have to offer other operators access to a subsidized network, to a network element and to the capacity of the network at a reasonable price and on non-discriminatory terms for a period of 10 years. Access to ducts and poles will not be limited in time.
- (17) The access obligation will satisfy all different types of network access that operators may seek in the network in question including access to ducts, fibre and capacity of the network. The access obligation is technologically neutral in the sense that there are no technological restrictions as to the purposes for which access to the subsidized network is used. The legislation allows all different technology platforms to use the subsidized network. The access obligations are necessary in order to allow other operators to have access to passive, and not only active, infrastructure.
- (18) FICORA may also impose any similar regulatory obligations in the specific market concerned after the expiry of ten years based on significant market power (SMP) analysis and the finding of an SMP operator in the market in question.
- (19) According to the Act, access shall be provided at a reasonable price and on non-discriminatory terms. In practice, a reasonable price referred to in the Act shall at least not be higher than the obligation based on SMP to price a corresponding product or service according to the principles of cost orientation. The recipient of aid has the burden of proof for reasonable pricing and non-discriminatory terms. The selected operator will also have to publish the prices of its services.
- (20) When necessary, FICORA may provide more detailed instructions on what kind of an account the telecommunications company shall give and in what form. FICORA will monitor that the prices are reasonable and ultimately define the reasonable price.
- (21) **Monitoring:** According to section 17 of the Act on Broadband Construction Aid, FICORA monitors the progress of broadband projects and maintains a separate register established for this purpose (monitoring register). Among other things, the following information on the broadband project, the applicant for aid, the recipient of aid and the use of aid can be saved in the monitoring register: applicant's name and contact information, content, objectives and results of broadband project, estimated and actual cost and total funding of broadband project. The register also includes information on the application for aid or payment, the decision on the application and the aid specification. Furthermore, it may include other necessary information compiled during the processing of the application.
- (22) **Claw-back mechanism:** The proposed amendment would be applied retroactively when deciding that a part of the revenues shall be repaid for the period before the entry into force of the Act. Hence, the proposed amendment would concern all broadband projects introduced in Finland. The first Finnish broadband projects were introduced in 2009. The proposed amendment is intended to be applied to all commenced and commencing projects regardless of the date of their introduction and of the period for which the revenues are calculated.

- (23) In order to treat projects commencing before and after the entry into force of the amendment on the claw-back mechanism equally, the Finnish authorities will apply the amendment retroactively also when examining the revenues in the period before the entry into force of the Act. The proposed amendment would then apply equally to all introduced, finished and commencing broadband projects in Finland, including revenues in the period before the entry into force of the Act. Following the amendment, all projects would be subject to the regulation concerning the repayment of excess revenues when the amount of aid for the project is at least ten million euros. When calculating the threshold value, public aid granted to all of the recipient's projects would be taken into consideration.
- (24) **Transparency:** Information contained in the monitoring register shall be retained for ten years from the payment of the aid and, if the aid is included in a programme partly funded by the European Union, for five years from the date when the European Commission pays the last instalment of the Community contribution. FICORA's website provides collected information on the project, maps of areas eligible for aid, consultations on project areas, market analyses, state aid decisions, opinions and on-going application processes in provinces, aid recipients, aid decisions, used technology, aid intensity, etc. Aid recipients shall also be obliged to publish the service delivery terms and other information relevant to the obligation to provide access for ten years from the date when the last instalment was paid.
- (25) **Reporting:** FICORA shall, in accordance with the Broadband Guidelines, report the essential information on the aid project to the European Commission every two years.

V. COMPATIBILITY ASSESSMENT

- (26) As described in recital 28 of the decision of 6 May 2012, the approved aid scheme constitutes State aid in the meaning of Article 107(1) TFEU.
- (27) The now notified modification to the approved scheme modifies the claw-back mechanism of the scheme, increasing the threshold for the claw-back to projects where the aid amount is above EUR 10 million, in line with the new Broadband Guidelines, and will be applied to all projects and beneficiaries under the scheme.
- (28) The Commission has assessed the compatibility of the original 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*⁶. Upon publication on 26 January 2013 in the Official Journal, the new *EU Guidelines for the application of State aid rules in relation to the rapid deployment of broadband networks* (the "Broadband Guidelines") entered into force⁷. Following the notification of a modification to the scheme, the Commission shall assess whether the approved scheme in its entirety complies with the new Broadband Guidelines.
- (29) The assessment focuses on those elements of the scheme for which the criteria of the former guidelines have been changed in substance. The Commission re-assessed the balancing test with regard to the required "step change", the requirements for the

⁶ OJ C 235, 30.9.2009, p.7.

⁷ OJ C 25, 26.1.2013, p.1.

design of NGA deployment, in particular the transparency obligations, and obligation to provide wholesale access of Member States as determined by the new guidelines.

- (30) With the balancing test, the Commission compares in particular 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. In this respect, paragraph 51 of the Broadband Guidelines clarifies that the subsidised network should ensure a "step change" by which the selected bidder makes significant new investments and the new infrastructure adds significantly new broadband capacity, availability and competition on the market. The approved scheme constitutes such a step change in that only basic broadband, in the sense of the Broadband Communication, was available in the designated areas before the measure, which aims at providing connection rates of 100 Mbps to most residents in Finland by end 2015.
- (31) The scheme is also in line with the more detailed criteria established in paragraph 78 of the Broadband Guidelines for the design of the aid for broadband roll-out. As described in detail in section VI.3 of the Commission decision of 6 May 2010 and recital 12 of this decision, the Finnish authorities have designed the measure in such a way as to minimise the State aid involved and potential distortions of competition arising from the measure. The issue of design of the aid concerns the necessity of the aid. It furthermore concerns its proportionality in terms of mapping, the tender process, technological neutrality, the use of existing infrastructure, wholesale access with full and effective unbundling and full open access to the subsidised network on equal and non-discriminatory terms, price benchmarking, and monitoring provisions.
- (32) As concerns the use of existing infrastructure, any operator which owns or controls infrastructure in the target area and participates in the tender shall inform the NRA about the infrastructure during the public consultation and provide relevant information to other bidders. A national database on existing infrastructures should be set up. As far as pricing is concerned, the wholesale access price should be calculated and set out in accordance with the principles contained in paragraph 78 g) of the Broadband guidelines, be based on the pricing principles set out by the NRA, and should take into account the aid received by the network operator.
- (33) The wording of the proposed claw back provision is in line with paragraph 78 i) of the new Broadband Guidelines, according to which Member States should implement the clawback mechanism if the aid amount of the project is above EUR 10 million. Indeed, the aim of the proposed amendment is that the monitoring of possible overcompensation would not put a disproportionately high administrative burden on small, local projects. According to the Finnish authorities, in small projects, which are typical in Finland, the monitoring of revenues by the Finnish Communications Regulatory Authority has proved to be effort consuming, because, in order to be able to monitor revenues and costs in each project area, they have to be allocated in the main accounts to the project area in question, and this may cause significant administrative costs, especially to those beneficiaries with several small projects. Thus, after the amendment, there would be no unreasonable administrative burden on small projects, since operators carrying out small projects would not be required to monitor or report to the Finnish Communications Regulatory Authority the revenues and costs of each project in the project area. Exclusion of small projects from provisions concerning repayment of profit that is higher than foreseen would also

reduce the administrative costs accrued to the Finnish Communications Regulatory Authority.

- (34) As stipulated in paragraph 80 of the Broadband Guidelines with regard to deployment of NGA networks, it will also be ensured that for a period of at least seven (ten in the case of Finland) 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.
- (35) The Commission notes in particular that Finland assured that the newly introduced condition for NGA deployment in paragraph 80 of the Broadband Guidelines is fulfilled in that the right of access to ducts or poles will not be limited in time is complied with.
- (36) Finland will also fulfil the new element of transparency required now by paragraph 78 j) of the Broadband Guidelines and publish on a central website the full text of the approved aid scheme and its implementing provisions, name of the aid beneficiary, aid amount, aid intensity and used technology. Such information will be kept for at least 10 years and be available for the general public without restrictions.
- (37) In addition, in compliance with paragraph 78 k) of the Guidelines, the Finnish authorities will report, every two years, key information on the aid projects to the Commission.
- (38) In view of the characteristics of the scheme and of the safeguards applied, the overall impact on competition is deemed to be positive. The design of the scheme allows several network operators to use the subsidized infrastructure and to compete. The subsidized infrastructure significantly increases 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. 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.
- (39) The Commission concludes therefore that the approved aid scheme offsets 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) Accordingly, the Commission concludes that the approved aid scheme including the measure now notified by Finland meets the compatibility criteria set out in the Broadband Guidelines and 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 thus compatible with the internal market pursuant to Article 107(3)(c) TFEU.

VI. DECISION

- (41) The Commission has accordingly decided that the aid measure *"High-speed broadband construction aid in sparsely populated areas of Finland"* continues to be considered compatible with the internal market pursuant to Article 107 (3)(c) TFEU.

- (42) The Commission would remind Finland 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.

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Yours faithfully,
For the Commission

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