



EUROPEAN COMMISSION

Bruxelles, 23.05.2011  
C(2011)3498 final

**PUBLIC VERSION**

**WORKING LANGUAGE**

**This document is made available for  
information purposes only.**

**Subject:**                    **Subject: State aid SA.31687 (N 436/2010) – Italy  
Broadband in Friuli Venezia Giulia (Project Hermes)**

Sir,

## **I. SUMMARY**

- (1) I am pleased to be able to inform you that the European Commission has assessed the measure "*Broadband in Friuli Venezia Giulia (Project Hermes)*" (hereafter: "the measure") and decided not to raise objections as the State aid contained therein is compatible with Article 107(3)(c) Treaty on the Functioning of the European Union (TFEU).

## **II. PROCEDURE**

- (2) Following pre-notification discussions, on 7 October 2010, Italy notified to the Commission a measure aiming at deploying broadband infrastructure in the disadvantaged areas of the Region. The Italian authorities have also taken the opportunity to explain the scope of the measure during a number of meetings and informal contacts with the Commission case team. The Italian authorities submitted additional information on 15 December 2010, 25, 31 January 2011 and 5 April 2011.

S.E On. Franco FRATTINI  
Ministro degli Affari esteri  
P.le della Farnesina 1  
I - 00194 Roma

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

### **III. CONTEXT**

#### **III.1. The Friuli Venezia Giulia region**

- (3) The Region Friuli Venezia Giulia is an Italian “special statute” autonomous region situated in the North-East of Italy. It has a population of 1.222.061<sup>1</sup> spread over a total territorial surface of approximately 7.857 square kilometres, of which 2.996 are on level ground, 3.343 of mountains and 1.518 of hills. More than a half of the regional territory is, therefore, hilly and mountainous.
- (4) The average population density in this region is lower than the average national population density of Italy. In addition, as common also elsewhere in Europe, the majority of the population lives in the flat areas; the four main cities (Trieste, Gorizia, Udine and Pordenone) are indeed located in such flat areas. These are also the areas where most of the economic activities are concentrated, including the operations of the telecommunication industry. Conversely, the hilly and mountainous areas are not very attractive for the market players, due to the lower population density, difficult orographic conditions (infrastructures in non-flat areas are considerably more costly) and economic disadvantages.
- (5) The lower-density areas of the region and the areas affected by digital divide coincide, as shown in the maps annexed to the notification file. This confirms once again the occurrence of a market failure resulting from the remote and orographically difficult character of certain regions in Europe.
- (6) This socio-economic gap in the regional territory, which concerns not only the mountainous areas but also some fringe areas of the flat zone, represents a very critical element for a homogeneous regional development. This is confirmed by the scarce quality of broadband services reported by both residential and business users of those fringe areas.

#### **III.2. The “Ermes” Programme**

- (7) Analysing the conclusions of a study surveying the availability of infrastructure in the Region<sup>2</sup>, the Region Friuli approved the “Regional programme for the development of ICT infrastructures” (ERMES)<sup>3</sup>. The ERMES Programme promotes the development of advanced computer services in the regional territory by the Public Administration, as well as the economic development and the social and territorial cohesion to the service of private citizens and businesses.
- (8) With the ERMES Programme, the Friuli region aims at contributing to the technological development for the diffusion of value-added services. In the view of the Italian authorities, the Programme is fully in line with a market-based approach

---

<sup>1</sup> Census data of 2009.

<sup>2</sup> Study by the University of Udine

<sup>3</sup> Regional Government Resolution No 2634 of 14 October 2005 "Programma Regionale per lo sviluppo delle infrastrutture di ICT (information e communication technology) (ERMES).

to the development of the telecommunications market, since it favours competition and the entry of new competitors, lowers barriers to entry and, therefore, addresses the failure of the infrastructure market.

- (9) The Region intends to achieve the goals highlighted in the ERMES Programme through the rollout of a public optical fibre network, connecting each one of the 218 municipalities of the regional territory and pursues the following purposes:
1. rollout and migration of the current Unitary Network of the Regional public administration (RUPAR - Rete Unitaria della Pubblica Amministrazione Regionale) to the new optical fibre network infrastructure in order to meet the growing needs of effectiveness, efficiency, inexpensiveness and competitiveness of the services of the public administration, in line with the objectives of the e-Government action plan for the i2010 initiative<sup>4</sup>.
  2. use of the regional network to correct the failure of the infrastructural market (which is identified as the main cause of the digital divide) and attain the objectives of economic development and social and territorial cohesion, by making available the spare capacity of the public network to private operators.
  3. offering up-to-date broadband connection to all citizens of the Region at the latest by 2012.
- (10) The ERMES regional public network has been designed in such a way as to exhibit overcapacity in a structural way: it features a number of fibre pairs in excess of the needs of the public administration, to allow telecommunications operators to offer broadband connectivity services to the final users of the regional areas suffering from the infrastructural digital divide, in compliance with national and EC regulations on telecommunications and respecting the principles of openness, technological neutrality and non-duplication of infrastructures.
- (11) In addition to the ERMES programme, the Italian regional authorities intend to launch a complementary project to bring NGA services to the industrial districts in the Region.

## **IV. DESCRIPTION OF THE MEASURE**

### **IV.1. Objectives of the measure**

- (12) The Friuli Region intends to make a strong contribution to the economic growth and the development of the most disadvantaged areas of the region. It plans to do so by stimulating the offer of new connectivity services. The use and the development of products and services based on content require the existence of suitable infrastructures able to support adequate broadband services, therefore the regional

---

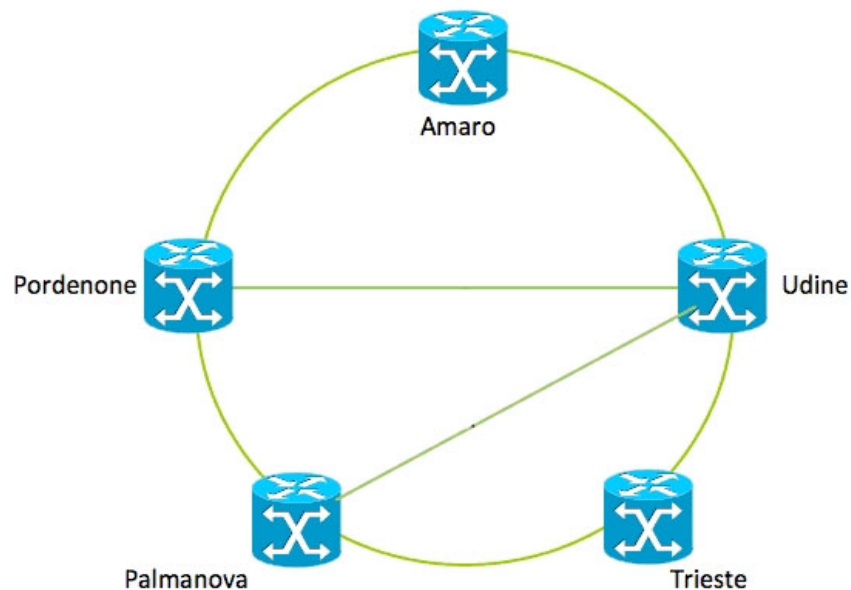
<sup>4</sup> COM(2006) 173 final of 25.04.2006

Administration intends to subsidise a state-of-the-art and future-proof infrastructure covering the whole regional territory. This platform will contribute to the economic development and to the pursuit of the objectives of social and territorial cohesion of the Region, currently characterised by significant socio-economic imbalances.

## IV.2. Design of the project

### IV.2.1. The *ERMES* project

- (13) In order to reach the above-mentioned objectives, the Italian authorities plan to rollout a public optical fibre network to connect all the 218 municipalities of Friuli with 5 municipal rings and hubs connected by backbone segments.



- (14) The rings are mainly used as backhaul networks, i.e. as networks carrying the traffic from the PoPs present in the territory to the regional interconnection hubs present in correspondence to the main network hubs. The length of the regional network rings is between 33 and 360 km.
- (15) The Region intends to use this network for two different purposes: the first one is the provision of advanced next-generation telecommunications services to the regional public administration (“RUPAR”); the second is the transfer of fibre pairs to private operators to allow them to offer advanced connectivity services on the private market in those areas of the Region where such services are non existent or inadequate (“*cessione al mercato*”).

*RUPAR: Unitary Network for the Regional Public Administration*

- (16) The RUPAR part of the ERMES Programme intends to encourage the development of on-line public services to serve as a driver of users' demand for broadband connectivity. The RUPAR is meant to meet the needs of the Regional Government and other regional public bodies, which may apply to this service, along with decentralised offices of the State administration. As of today, RUPAR provides connectivity and services to the following categories of clients:
- Regional offices and institutions, including universities;
  - Provinces, Municipalities, Chambers of Commerce;
  - Local health authorities and Hospitals;
  - Other bodies belonging to Friuli Venezia Giulia Region.
- (17) The installation, development and management of the Regional ICT system is entrusted by the Regional Administration to an in-house company, INSIEL S.p.A.. The RUPAR part of the ERMES project aims at substituting the current network, based on dedicated links owned by telecommunications operators and rented by the Region, with a Region-owned optical fibre infrastructure.
- (18) The regional government (through INSIEL) has launched a number of public tenders for the construction of such network, in compliance with national and European regulation of public procurement, for the construction of the network, including the installation of multifibre ducts and the placing of dark fibre.
- (19) The Italian authorities have submitted that this part of the project is outside the scope of State aid rules, in conformity with the Commission's practice in this field<sup>5</sup> and to paragraph (13) of the Broadband Guidelines. RUPAR is not used for commercial purposes but only to provide connectivity services to bodies forming part of the public administration. Hence, in their view, such State intervention does not involve the granting of an economic advantage to undertakings and consequently falls outside State aid rules. The Italian authorities argue that the public entities mentioned above perform non-economic activities or, if some of them could conceivably be considered as undertakings (such as health care providers) such entities would be operating in the context of services of general economic interest (SGEI). The Italian authorities have given assurance that they would only grant this "aid" (if any) in the framework of Commission Decision 2005/842/EC on the application of Article 86(2) of the EC Treaty to State aid in the form of compensation for the operation of services of general economic interest (SGEI)<sup>6</sup>, and in compliance with all the conditions set by this Decision. Therefore

---

<sup>5</sup> Commission decision in case N407/2009 Xarxa Oberta OJ C/259/2010, Commission decision in case NN24/2007, Prague Municipal Wireless Network, OJ C/141/2007, Commission decision in case N46/2007 Welsh public network scheme, OJ C/157/2007.

<sup>6</sup> Commission Decision 2005/842/EC on the application of Article 86(2) of the EC Treaty to State aid in the form of public service compensation granted to certain undertakings entrusted with the operation of services of general economic interest, OJ L 312/67. Moreover, this Decision specifically exempts from State aid notification the funding of hospitals.

the RUPAR part of the ERMES project does not form part of the notification and is not covered by the present Decision

*The anti "infrastructural" digital divide part of the ERMES Programme ("cessione al mercato")*

- (20) The insufficiency of existing and planned infrastructures to provide adequate advanced services to end users in Friuli does not affect only the public administration but also citizens and businesses located in the region. Since the present situation in the Region is characterised by a lack of market competition with reference to broadband infrastructures in vast portions of the regional territory, the regional government wishes to make available to private operators the excess capacity of the public network.
- (21) The Italian authorities assert that a market failure is present in Friuli as regards the provision of NGA services and, in some areas, also of basic broadband services. Therefore, they consider State intervention necessary to correct it at infrastructural level. Therefore, for this part of the project, the Italian authorities have requested an authorisation following State aid rules and the *Community Guidelines for the application of State aid rules in relation to rapid deployment of broadband networks*<sup>7</sup> (hereafter: the "Broadband Guidelines").
- (22) With this part of the ERMES Programme, the Region aims at initiating a virtuous mechanism to bring down the main barrier to entry present in the electronic communications markets, i.e. the high costs for rollout of adequate infrastructures. The features of the measure guarantee a very performing platform, technologically neutral, open to all operators on non-discriminatory terms, in the areas where such infrastructure does not exist yet.
- (23) The Region intends to transfer the use of optical fibre pairs of the rings belonging to the regional backbone network to private operators. Typically, once the RUPAR needs have been met, 4, 5 or more pairs of optical fibres will remain available in each ring, allowing to fulfil the requests of the same number of operators in each ring. The use of fibres will be then transferred according to IRU<sup>8</sup> modalities via calls for tenders having as their object the use of the dark fibre. The regional authorities estimate that about 33% of the capacity of the network will be devoted to the use by private operators.
- (24) The regional authorities observed that the broadband coverage in its territory is patchy ("leopard-like") and thus intend to adopt a differentiated approach to each area according to its characteristics. The approach of the Region is rather conservative in the sense that the measure will target only those areas in which there are no adequate basic broadband services on offer (white) or where there is one infrastructure able to provide such services but due to access problems, the market is not competitive (grey).

---

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

<sup>8</sup> IRU: infeasible right of use

- (25) Accordingly, Friuli considers it in compliance with the Broadband Guidelines to allow the actual use of the regional backhaul network by private operators only to provide services in those areas affected by market failure (i.e. traditional white and grey areas). In addition, for white areas, the selected operators will have an obligation to provide services.
- (26) Conversely, the section of the infrastructure crossing (traditional broadband) black areas shall be used exclusively for transit and technical connection, but with the prohibition of tapping and supplying broadband connection services to users. In black areas, which are NGA white, in order to incentivize the rollout of next generation access infrastructures, the regional authorities will allow the operators to access the ERMES network only if they connect an NGA segment<sup>9</sup>.
- (27) The municipalities have been aggregated in the following categories:

	<b>Number of Municipalities</b>	<b>Existing fibre backhaul infrastructures (including dark fibre)<sup>10</sup></b>	<b>Basic Broadband retail offer</b>	<b>NGA infrastructures or plans for the near future</b>	<b>Access conditions to the ERMES network</b>
<b>1</b>	White: 114	No	No	No	All operators can connect to ERMES, because no infrastructure is available
<b>2</b>	Grey: 86	Telecom Italia	Telecom Italia	No	All operators can connect to ERMES because only the incumbent is present at backhaul and at retail level.
<b>3</b>	Grey: 10	Telecom Italia	Telecom Italia + 1 alternative operator	No	All operators can connect to ERMES because there is only one infrastructure and the areas are deemed not competitive

<sup>9</sup> In line with Commission Decision Xarxa Oberta cit. in footnote 5.

<sup>10</sup> The Italian authorities have indicated that in certain areas limited amounts of optical fibre has been laid down, but they are solely for the use by the company that owns them, with no access possible for third-party operators. Therefore they have not been considered alternatives to the only backhaul infrastructure reported.

	Number of Municipalities	Existing fibre backhaul infrastructures (including dark fibre) <sup>10</sup>	Basic Broadband retail offer	NGA infrastructures or plans for the near future	Access conditions to the ERMES network
4	Black: 8	Telecom Italia + others	Telecom Italia + others	No	Only NGA last mile infrastructures can connect to ERMES

- (28) In the 114 "white areas", the Italian authorities submitted that no adequate broadband infrastructure is present, including 25 municipalities in which there is no telephone exchange at all within their territory. These areas are affected by total market failure. In the "grey areas", only one infrastructure is able to provide broadband services. However, in such areas, according to the information submitted by the Italian authorities, the prices and access conditions of the incumbent's infrastructure are not suitable for creating a competitive environment and therefore are still affected by market failure. In the 10 "grey municipalities" where one alternative operator is active at the retail level, the Italian authorities consider that market failure still exists: the operator is bound to the prices and quality levels decided by the incumbent and therefore cannot constitute effective competition. In the 8 "black areas", more than one broadband infrastructure is present but the telecom operators declared to have no interest in rolling out a NGA access infrastructure in the near future.

#### ***IV.2.2. The role of INSIEL***

- (29) Regional Law no 22/1972 defined the provision of ICT services to the Friuli Regional administration as a regional SGEI. The in-house company INSIEL has been entrusted with the tasks of rolling out, develop and manage the ICT infrastructure for the Region. Accordingly, INSIEL is in charge of the development of the RUPAR part of the ERMES project. This intervention does not form part of the present notification, as explained in paragraph (19) above.
- (30) The Italian authorities explained that INSIEL will run the tenders on behalf of the Region to rollout the RUPAR but will not provide wholesale service and will not engage in any economic activity, being barred by law from providing services to any third party different from the Region. Therefore, the regional government will manage directly the tenders for the selection of the commercial operators and will directly collect the fees from them. Since the passive infrastructure will be directly granted in use by the Region to commercial operators, no further network management activity is foreseen in connection with this part of the ERMES project.

#### ***IV.2.3. Rollout of an NGA network to the industrial districts (FTTH)***



- (31) The second intervention of the Region aims at bringing an NGA infrastructure to 17 industrial districts, as a complementary measure to the rollout of the ERMES network. This project concerns 77 industrial areas and 81 municipalities. Aggregation of industrial activities into districts is an important factor to favour employment and socio-economic development in the concerned areas. To deliver the best results, the Italian authorities are convinced that the availability of future-proof next generation networks is crucial. The regional intervention will not only allow to leapfrog the existing digital divide, but also to increase the long-term competitiveness of the companies.
- (32) With this project, the Region intends to fund the rollout the access segment connecting the targeted districts with the backhaul of the ERMES network. Only the passive infrastructure will be deployed and will be assigned in use to private telecommunications operators via tenders. The infrastructure will be financed with ERDF funds and Friuli's own regional resources and will remain in the ownership of the region.
- (33) In the views of the Italian authorities, only a fibre-based NGA network will allow to satisfy the bandwidth needs of the local businesses, by offering virtually unlimited capacity, without the limitations of current-generation technologies (such as the degradation due to distance, the existence of out-dated local exchanges etc.).

#### **IV.3. Other characteristics of the project**

- (34) **Legal basis:** The legal bases of this project are: Legislative Decree No. 259 of 1 August 2003 "Code of Electronic Communications"; Legislative Decree No. 82 of 7 March 2005 "Code of Digital Public Administration"; Regional Government Resolution No 2634 of 14 October 2005, approving the ERMES Programme; Regional Government Resolution no 1882 of 24/09/2010.
- (35) **Aid amount:** The Italian authorities consider the building of the network for use as RUPAR as falling outside the scope of State aid rules. Nevertheless, since the network thus built will be used also for the provision of services on the market, the Italian authorities have notified this part of the measure as they consider that the latter requires State aid to be commercially viable. The Italian authorities indicated that the aid component of the ERMES project should correspond to EUR 25 million. For the part of the measure concerning NGA to the industrial districts, the estimated costs to be borne by the region amount to EUR 22,6 million, of which EUR 19 million coming from the ERDF.
- (36) The aid foreseen in this measure cannot be cumulated with other aid schemes, such as the existing National Plan for Broadband in rural areas<sup>11</sup> or future measures planned by the Italian (central or local) authorities.

---

<sup>11</sup> Commission Decision of 30/04/2010, in case N 646/2009 National broadband plan for rural areas in Italy. The Friuli Region will use the funds authorised under the mentioned national scheme to connect to the ERMES network the most rural areas (so-called Zones D).

- (37) **Mapping and coverage analysis:** As far as the ERMES network is concerned, the pattern that the network will follow is dictated by the need to connect all the public administration sites. However, to identify the municipalities in need of State-funded wholesale infrastructure, mapping of existing infrastructure and coverage analysis is necessary.
- (38) The consultation of stakeholders to collect the relevant information has been carried out in different ways. Besides the publicly available information on the legacy network, direct meetings and questionnaires have been used to gather the availability of infrastructure and the investment plans of the main telecommunications operators<sup>12</sup>. The Region decided to map the availability of broadband in its territory using as a reference the area covered by the local exchange and the existence of fibre infrastructures reaching each exchange, the lack or unsuitability of the devices necessary for the functioning of the network (e.g. DSLAM) or the inadequacy of the copper last mile.
- (39) The result of the coverage analysis is that 126 out of 259 telephone exchanges in the regional territory are still lacking optical fibre connections. Moreover, in many cases along the access telephone network there are multiplexer devices that do not allow the supply of broadband services even to users covered by telephone exchanges equipped with optical fibres.
- (40) As far as the project on NGA to industrial districts is concerned, both local businesses and telecommunication operators have been surveyed to identify the areas in need of intervention. As a result, only those area identified as NGA white areas will be targeted, i.e. those areas in which no NGA infrastructure exists and there are no plans by the operators to invest in the near future of 3 years. Areas in which non-telecommunication operators have already rolled out NGA infrastructures have been excluded.
- (41) **Public consultation:** Besides the direct contacts with the operators described above in paragraph (38), the regional government has undertaken a public consultation, by publishing a questionnaire on the website of the Region<sup>13</sup> for a period covering the whole duration of the pre-notification and notification process before the Commission. The questionnaire asked about investment plans of the operators within the next three years in the targeted areas and concerned both the ERMES project and the industrial districts.
- (42) The Italian authorities informed the Commission that no operator indicated any existing or planned investment in the targeted areas.
- (43) **Open tender:** For the ERMES project, the Italian authorities intend to launch a number of tenders, each covering one of the municipal rings/hubs. A number of

---

<sup>12</sup> Including wired, wireless, mobile and satellite operators. The results of this consultation, however, highlighted a general reticence from the operators to give information on the current and on the short - and medium-term investment forecasts, thus reducing, the data available to the Regional Administration.

<sup>13</sup> [www.regione.fvg.it](http://www.regione.fvg.it). The questionnaire is still available in the telecommunication section of the regional website.

operators will be selected in the tenders (the Region foresees 5-6) on the basis of the criterion of the most economically advantageous offer and will be granted the use of the passive infrastructure (dark fibre pair). For the industrial districts, there will be a tender for each industrial area or for clusters, with the object of granting the right to use the passive infrastructure (single dark fibre) to two operators for 10 years.

- (44) ***Use of existing infrastructure:*** The roll-out of the public network is subject to an obligation to reuse, wherever possible, existing telecoms and non-telecoms infrastructures. Access to all regional infrastructures has explicitly been granted for the construction of the ERMES network.
- (45) ***Technological neutrality:*** The Italian authorities remark that backhaul (transport) services are technologically neutral in the sense that they can be used by any wireless, mobile or wire-based operator to connect its access network. Therefore any third party operator, regardless of the type of technology used, can benefit from the measure. As far the rollout of an infrastructure for the industrial districts is concerned, the Italian authorities observe that at this stage of technological developments, only optical fibre is able to provide the NGA services to satisfy the needs of business users.
- (46) ***Duration of the measure:*** The total duration of the measure foreseen by the Friuli Region is from 2011 to 2026.
- (47) ***Wholesale access:*** For both lines of intervention described above, there will be a wholesale access obligation imposed on the winning bidders for the entire duration of the contract and regardless of the existence of significant market power. All possible forms of access to the fibres will have to be granted, in line with the principles of fairness, transparency and non-discrimination. The price for wholesale access will be based on average prices for comparable services in more competitive areas. The Italian authorities note that at this point in time the incumbent operator is already under the obligation to publish its Reference Offer concerning: (i) Full Unbundling of the Local Loop, Shared access, sub-loop unbundling; (ii) access to passive infrastructure and dark fibre; (iii) bitstream access and associated services; (iv) Wholesale Line Rental and associated services. In any event, the regional government indicates that whenever a Reference Offer is not available, wholesale prices and access conditions will be approved by the NRA, who will also remain competent to solve possible disputes between the operators, should they arise.
- (48) ***Monitoring and claw-back mechanism:*** The winning bidders will have a reporting obligation towards the regional authorities every 6 months for a period of 5 years after entry into force of the contract. Moreover, on the basis of such reports, the regional authorities devise a claw-back mechanism, to limit ex post the overcompensation to the beneficiary: whenever the beneficiary's revenues go beyond the normal remuneration of the sector (identified by the Italian authorities in the amount of 10%<sup>14</sup>), the operator is obliged to give back the exceeding amount to the public administration.

---

<sup>14</sup> In line with the previously observed practice, see for example Commission Decision in case N626/2009 - NGA for industrial districts of Lucca.

#### **IV.4. The opinion of AGCOM**

- (49) The Italian National Regulatory Authority (NRA) for the electronic communications sector AGCOM has been informed of the details of the planned measure and commented on the access obligations included in it, pursuant to the provision of paragraph 79 of the Broadband Guidelines. AGCOM noted that the regulation of NGA is still being defined at national<sup>15</sup> level and that therefore its analysis is ad hoc and circumscribed to the specific case of the Friuli measure.
- (50) AGCOM considered that the measure is generally in line with the principles of the sectoral regulation regarding access to broadband infrastructures. The NRA provided detailed indications of the relevant access products for which a Reference offer by the incumbent already exists and recalled that the terms and conditions in such Reference Offer can be considered as fulfilling the criteria of fair, reasonable and non discriminatory. Therefore, the NRA invited the Friuli regional authorities to incorporate such elements directly in the tender documents to define the economic conditions for access.
- (51) In addition, AGCOM invited the regional authorities to specify in the tender documents that the access obligations cover also the active infrastructure (in particular bitstream) and the transmission capacity of the backhaul rings, whenever access to dark fibre is not possible.

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

- (52) 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 trade between Member States.

##### State resources

- (53) As explained above in paragraph (35), the ERMES project in its entirety is going to be funded by the resources of the Friuli Region (including ERDF resources). The infrastructure rolled out with public funds will then be made available for use by selected private operators. Hence state resources are involved.

---

<sup>15</sup> A public consultation on the proposed regulation of access to NGA networks is ongoing at the time of this Decision.

### Economic advantage

- (54) *Selected operators*: The selected operators will be granted use of an infrastructure not otherwise available on the market. In other words, the aid will allow the selected operators to offer services at lower prices than if they had had to bear all costs themselves and thus attract more customers than under normal market conditions. The selected operators will also benefit from certain tangible and intangible assets with State funds (e.g. equipment, customer relations) even after the lifetime of the projects. In view of the above, it is clear that an economic advantage will be granted to the selected operators.
- (55) *Third party providers*: The regional network will provide third party operators with access to a state of the art, future-proof infrastructure. This way, also third party operators will be granted an economic advantage since they will have access to the capacity made available by State funding, as they will be customers of the selected electronic communication operators. By using such capacity, they can sell advanced broadband services to end customers.
- (56) *End users*: Both lines of intervention contained in the measure at hand ultimately aim at improving the provision of existing broadband services to residential and business users. Undertakings in the targeted areas will therefore benefit from the provision of the new and improved services.

### Distortion of competition

- (57) The intervention of the State alters existing market conditions by allowing the provision of enhanced broadband services by the selected telecommunication operators and third party providers.
- (58) The scheme 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>16</sup>.
- (59) Therefore, the fact that improved broadband services become available has the effect of distorting competition.

### Effect on trade

- (60) 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. Moreover, the measure has the potential to distort competition between business users located in Italy and those located elsewhere in the European Union.

---

<sup>16</sup> Judgement C-143/99, *Adria Wien Pipeline*, Slg. 2001, I-8365.

## Conclusion

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

## **VI. ASSESSMENT OF THE MEASURE: COMPATIBILITY**

- (62) The Commission has assessed the compatibility of the scheme according to Article 107 (3) (c) 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>17</sup>. The Broadband Guidelines contain a detailed interpretation of Article 107 (3) (c) TFEU in this area of State aid law. As regards the applicable substantive provisions, the Commission has essentially analysed the measure in the light of the criteria developed in particular in paragraphs 31-79 of the Broadband Guidelines.

### **VI.1. The balancing test and its application to aid for the broadband network deployment**

- (63) As described in paragraphs 34 and 35 of the Broadband Guidelines, in order to assess whether a measure is compatible under article 107 (3)(c), the Commission balances positive and negative effects of the aid according to the criteria set out in the Guidelines. In applying the balancing test, the Commission will assess the following questions:
- (1) Is the aid measure aimed at a well-defined objective of common interest (i.e. does the proposed aid address a market failure or other objective)?
  - (2) Is the aid well designed to deliver the objective of common interest? In particular:
    - (a) Is the aid measure an appropriate instrument?
    - (b) Is there an incentive effect, i.e. does the aid change the behaviour of firms?
    - (c) Is the aid measure proportional, i.e. could the same change in behaviour be obtained with less aid?
  - (3) Are the distortions of competition and the effect on trade limited, so that the overall balance is positive?

---

<sup>17</sup> OJ C 235 of 30.9.2009, p. 7.

## VI.2. Objective of the measure

*The aid is in line with the policy of the Union*

- (64) The Commission has stressed in over 70 decisions the importance of broadband infrastructure deployment for the short-term economic recovery and for the long-term competitiveness of European countries and regions. The Europe 2020 Strategy<sup>18</sup> recognised the importance of broadband deployment to promote social inclusion and competitiveness in the EU. In order to reap all these benefits, in its flagship initiative “A Digital Agenda for Europe”<sup>19</sup>, the Commission has acknowledged that not only shall universal broadband coverage be ensured to all citizens by 2013 but also that, by 2020, (i) all Europeans should have access to much higher internet speeds of above 30 Mbps and (ii) 50% or more of European households should subscribe to internet connections above 100 Mbps.
- (65) Recent studies<sup>20</sup> have emphasised the crucial impact of public funding of broadband network infrastructures. However, it is important to underline the goal of achieving ambitious infrastructure development targets needs to be qualified in the sense that *effective competition* shall also take place between and on these infrastructures. Effective competition will help to maximise “consumer welfare”<sup>21</sup>, in the form of lower prices and of better and more services for European citizens and companies. The proper use of public funds could lead to wider coverage, increased competition, more investments and better end-user prices<sup>22</sup>.
- (66) The current measure intends to provide backhaul services to areas in which there is no suitable backhaul infrastructure and where end-users cannot enjoy adequate broadband services. By granting access to the backhaul of the ERMES network to third party operators, the measure aims at bridging the digital divide affecting certain areas of the Region. The public backhaul network will also help to create additional competition in the targeted areas. Moreover, the measure enables third party operators to provide in the underserved areas NGA service, in line with the objectives of the Broadband Guidelines. Hence the objectives of the measure are in line with Section 3.1 of the Broadband Guidelines: by extending backhaul and NGA coverage to areas where private operators have no commercial interest to invest, the Italian authorities pursue genuine cohesion and economic development objectives.

---

<sup>18</sup> EUROPE2020: A European strategy for smart, sustainable and inclusive growth. See: [http://ec.europa.eu/europe2020/index\\_en.htm](http://ec.europa.eu/europe2020/index_en.htm).

<sup>19</sup> A Digital Agenda for Europe. COM/2010/0245 f/2.

<sup>20</sup> Report I-Com Istituto per la Competitività "Intervento pubblico e Banda Larga: un'analisi dell'efficacia delle politiche a livello internazionale e italiano" <http://www.i-com.it/AllegatiDocumentiHome/420.pdf>

<sup>21</sup> See State aid Action Plan: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:52005DC0107:EN:NOT>.

<sup>22</sup> See for instance: *L'intervention des collectivités territoriales dans le secteur des communications électroniques*. Arcep report, 2009..

*Aid is the appropriate instrument*

- (67) In the situation currently under assessment, due to the economics of networks, the problem of the lack of supply of high-speed and very-high-speed broadband networks cannot be solved solely by measures involving demand stimulation or regulatory interventions. As regards regulation, despite its crucial role in ensuring competition and supply in the market for electronic communications, evidence shows that, in the remote areas of Friuli, regulation has not fully been able to ensure effective competition and has not led to sufficient investments to bridge the digital divide. Regulation is, indeed, a necessary, but not a sufficient instrument for the development of broadband services as alternative providers need to combine the use of wholesale products from the incumbent with own network investments which may not be profitable in areas where demand is low.
- (68) The Commission can agree that without further public intervention, avoiding the emergence of a new "*digital divide*" between different areas of the country seems not possible, which could lead to the economic exclusion of citizens and of the local undertakings. Hence in the current situation, State aid is an appropriate instrument to achieve the set objectives.

*The aid provides the right incentives to operators*

- (69) 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 have been undertaken without any State aid. According to the results of the public consultation and market research referred to above in paragraph (41), in the targeted areas no investment would take place without public funding, hence the aid produces a change in the investment decisions of the operators. Therefore, the aid provides a direct and appropriate investment incentive for the selected operators.

**VI.3. Design of the measure and the need to limit distortions of competition**

- (70) The Italian authorities have designed the measure in such a way as to minimise the State aid involved and, since it only concerns deployment of passive infrastructure, potential distortions of competition arising from the measure are also minimised.
- (71) As set out in paragraphs 51 and 79 of the Broadband Guidelines, in assessing the proportional character of the notified measures, a number of conditions has to be met in order to minimise the State aid involved and the potential distortions of competition:
- (a) *Mapping, coverage analysis and public consultation:* As set out in detail in paragraph (37) and following, the Italian authorities have undertaken a thorough analysis of the existing broadband infrastructures in order to identify the areas



where State intervention is necessary. A public consultation has been conducted as described above in paragraph (41). The relevant stakeholders have been consulted and the opinion of the NRA has been gathered. This way, the Italian authorities will ensure that public funds are used only in areas where there are no comparable infrastructures and no plausible commercial investment plans to build high-speed networks within the next three years, as confirmed in the public consultation.

- (b) *Open tender process*: As described above in paragraph (43), the Italian authorities will run a number of selection procedures in line with the principles of openness, competition and transparency of the national and EU procurement rules. Through such tender procedures, the regional government of Friuli will select the operators which will be granted the rights to use the optical fibre pairs of the ERMES backhaul and the optical fibre connecting the industrial districts of Friuli. This procedure has the effect of maximising the effect of the aid provided while minimising any potential advantage granted for the selected operator. The selection tender procedure will allow to choose the undertaking presenting the *most economically advantageous offer*. The awarding authority will specify in advance the relative weighting of the qualitative criteria chosen. At similar if not identical quality conditions, the bidder with the lowest amount of aid will receive more priority points within the overall assessment of its bid.
- (c) *Technological neutrality*: The ERMES project aims at providing backhaul services to third-party operators. Backhaul (transport) services are technologically neutral in the sense that they can be used by any wireless, mobile or wire-based operator to connect the access network. Therefore any third party operator, regardless of the type of technology used, can benefit from the measure. Hence, the design of the measure under assessment 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. [Concerning the intervention in favour of the industrial districts, due to the objectives to serve business users and the specific level of service and speeds required, the types of technologies that are able to deliver such results are limited, given the current stage of technological development. The choice of the technical requirements and therefore the consequent limitation appear justified on the basis of the public policy objectives that the measure is expected to fulfill, namely to serve the needs of business users.
- (d) *Use of existing infrastructures*: To avoid unnecessary and wasteful duplication of resources, the Italian authorities encourage the use of existing infrastructure wherever possible, as explained in paragraph (44). This condition will not favour the incumbent operator because competing operators can access its infrastructure according to the access obligations established by the NRA.
- (e) *Wholesale access and price benchmarking*: The selected operators will offer wholesale services and access to the public network to other operators in a fair, transparent and non-discriminatory manner. As mentioned above in Section IV.4, the NRA has assessed and approved the technical and economic conditions for the

access obligations, including the benchmarking of the prices to those published or practiced in more competitive areas of the country and of Europe.

- (f) *Monitoring and claw-back mechanism to avoid over-compensation*: the project will be examined on a regular basis and the monitoring mechanisms implemented will ensure that if the beneficiary fails to comply with the rules, the granting authorities will be in the position to recover the aid granted. By ensuring that any extra profit generated through the operation of the networks will be clawed back as explained in paragraph (48), the Italian authorities ensure that the recipient of the aid will not benefit from overcompensation and will minimise *ex post* and retroactively the amount of aid deemed initially to have been necessary.
- (72) Furthermore, for the "grey areas", the Italian authorities demonstrated in addition that the conditions laid down in paragraph 46 of the Broadband Guidelines are fulfilled. In particular, in the targeted areas, the provision of a broadband infrastructure is still a *de facto* monopoly of the incumbent operator. In such areas, the Italian authorities provided evidence that (i) no affordable or adequate services are offered to satisfy the needs of citizens or business users and that (ii) there are no less distortive measures available (including *ex ante* regulation) to reach the same goals:
- (a) the overall market conditions are not adequate, by looking, *inter alia*, into the level of current broadband prices, the type of services offered to end-users (residential and business users) and the conditions attached thereto. The price/quality levels offered on the existing infrastructure are not adequate and services remain expensive despite the fact that prices and access conditions are subject to regulation. Since leased line prices depend on distance, due to the remoteness of the municipalities from the network connection points, prices are considerably higher than in urban and profitable areas.
  - (b) Access conditions are not conducive to effective competition. In fact, the Italian authorities pointed out that the NRA has recently approved a further increase in access prices to the incumbent's infrastructure, which further reduces the margin for the alternative operators to exert competitive pressure, thus fulfilling the requirements of paragraph (46) *b)* of the Broadband Guidelines.
  - (c) The overall entry barriers preclude potential entry of other electronic communication operators. With the ERMES project, the authorities of Friuli intend precisely to contribute to bring down the main barrier to entry in the market, represented by the high cost of infrastructure rollout.
- (73) Hence although a broadband infrastructure is available in the targeted areas, the evidence provided by the Italian authorities suggests that a market failure exists and that the ERMES network will be able to overcome it.

- (74) For the 8 traditional broadband "black areas" constituting "white NGA areas", the Italian authorities submitted that the conditions laid down in paragraphs 75 and 78 of the Broadband Guidelines are fulfilled. In particular, that:
- (a) the overall market conditions are not adequate: there is no provision of NGA services in any of the areas belonging to the three categories (as evidenced by the public consultation described above in paragraph (38)) and demand for new services cannot be met by existing networks;
  - (b) since no NGA network exists, even in presence of regulation imposed by the NRA, network access cannot be conducive to effective competition in NGA;
  - (c) due to the geographical or competitive situation of the areas in question, there are significant entry barriers precluding potential entry by new NGA network investors;
  - (d) measures and remedies imposed by the national regulatory authority cannot overcome the problems, in the absence of investments plans;
  - (e) existing basic broadband infrastructure operators are not proceeding to invest in upgrading their broadband infrastructures within the next three years to provide higher speeds in response to users' demands.
- (75) Hence although several broadband infrastructures exist, according to the evidence provided by the authorities of Friuli, no operator has plausible commercial plan to upgrade its infrastructure to NGA network in the near future of 3 years. Accordingly, in the 8 traditional broadband "black" municipalities ERMES can be used to obtain backhauling but only by those third party operators that are investing in NGA access infrastructures.
- (76) In the initial phase, the ERMES network will not be open to third parties in those "black areas", but only in the "white" and "grey" ones. In the following stages, to make sure that the above condition are still fulfilled, the Italian authorities committed themselves to monitor the market and the competition conditions in those areas regularly and to submit updated information to the Commission.
- (77) Concerning specifically the FTTH project, in addition to the considerations laid down in paragraph (71) above, to the extent the measure aims to support the deployment of an NGA network in "white NGA areas", where one basic broadband network may already exist (traditional "grey area") further conditions shall be met as laid down in paragraph 73 of the Broadband Guidelines. In this respect, the Italian authorities proved that
- (a) the broadband services provided over the existing networks are not sufficient to satisfy the continuously growing needs of citizens and business users in the area in question and commercial operators do not have sufficient commercial incentives to upgrade the existing networks, as highlighted in the studies and in the public consultation referred to in paragraphs (7) and (37) and following;

- (b) there are no less distortive means (including ex ante regulation) to reach the stated goals.
- (78) For the case in which the network deployed affects traditional broadband non-white areas, also the conditions laid down in paragraph 79 of the Broadband Guidelines have to be fulfilled. In this regard, the Italian authorities proved the following:
- (c) *Effective wholesale access*: under the current scheme and under the supervision of the NRA, the access obligations imposed on the chosen operators include access to both passive and active infrastructure for the whole duration of the contract, as detailed in paragraph (47) 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.
- (d) In the case at hand, the regulatory authority AGCOM has been consulted in setting the conditions for wholesale network access. AGCOM will supervise the compliance of the selected operator with the wholesale access obligations. Proportionality will be further ensured because the NRA will supervise compliance with the agreed access conditions and will be competent to solve possible disputes between the selected operator and access seekers.
- (e) The NGA network architecture that will benefit from State aid includes the use of multi-fibre ducts and the laying of multiple fibres. It 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).

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

- (79) On the basis of the foregoing assessment, the Commission concludes that the compatibility criteria set out in the Broadband Guidelines are met, hence the aid involved in the notified measure is compatible with Article 107(3)(c) TFEU. In view of the duration of the scheme, the Commission would like to draw the Italian authorities' attention to future revisions of the Guidelines, which might make appropriate measures to the scheme necessary.
- (80) The Commission further reminds the Italian authorities that in case of co-financing through Structural Funds of the Union, the rules applicable to these Funds must be respected and in particular the provisions laid down in Council Regulation (EC) No 1083/2006 ("General Regulation on Structural Funds") and Regulation (EC) No 1080/2006 of the European Parliament and of the Council ("ERDF Regulation").

## VII. DECISION

On the basis of the foregoing assessment, the Commission has accordingly decided that the aid measure “*Broadband in Friuli Venezia Giulia (Project Hermes)*” is compatible with Article 107(3)(c) TFEU.

The Italian authorities are reminded that, pursuant to Article 108(3) TFEU, 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:

[http://ec.europa.eu/eu\\_law/state\\_aids/state\\_aids\\_texts\\_en.htm](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](mailto: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