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Subject: State aid N 368/2009 Germany
**Amendment of the State aid broadband scheme N 115/2008 - Rural
areas in Germany**

Sir,

I. SUMMARY

- (1) I am pleased to be able to inform you that the European Commission has assessed "*Amendment of the State aid broadband scheme N115/2008*" (hereafter: "the measure") and decided not to raise objections as the State aid contained therein is compatible with Article 107(3)(c) of the Treaty on the Functioning of the European Union.¹

II. PROCEDURE AND CONTEXT

- (2) By letter registered on 22 June 2009, the German authorities notified amendments to the aid scheme "N115/2008 - Broadband in rural areas of Germany", which was endorsed by the Commission under the State aid rules on 2 July 2008.²

¹ With effect from 1 December 2009, Articles 87 and 88 of the EC Treaty have become Articles 107 and 108, respectively, of the TFEU. The two sets of provisions are, in substance, identical. For the purposes of this Decision, references to Articles 107 and 108 of the TFEU should be understood as references to Articles 87 and 88, respectively, of the EC Treaty where appropriate

² OJ C 194, 3.7.2008, p.3. The text of the Decision can be found under the following link http://ec.europa.eu/community_law/state_aids/comp-2008/n115-08.pdf.

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- (3) By letter dated 7 August 2009 the Commission requested further information, which the German authorities provided with letter registered on 14 September 2009. By letters dated 11 November 2009 and 10 December 2009, the German authorities submitted additional information on the case.

III. AMENDMENTS OF THE EXISTING MEASURE

- (4) The primary objective of the original scheme is to support necessary investments to ensure broadband services in rural and remote areas of Germany where there are currently no or insufficient broadband services available and where there are no plans for coverage in the near future ("white areas"). The authorities are aiming to provide reliable, affordable and high-quality broadband services to German citizens.
- (5) The German authorities noted that the existing aid scheme (N115/2008) was not utilized sufficiently and hence the objectives of the measure may not be reached³. In order to stimulate the use of the programme and to incentivise further broadband deployment, the German authorities notified the following amendments to the existing aid scheme. The amendments concern two areas:
- (6) Firstly, the German authorities notify some amendments to the existing funding provisions for broadband deployment, paragraph (11) to (27), which provide for monetary support in the form of grants (aid for broadband deployment, *Erschließungsmaßnahmen*).
- (7) In addition, the German authorities notify the possibility of broadband operators to use ducts infrastructure which has been constructed by the municipality via a combination of federal, regional (*Land*) and municipal funding and is owned by the municipalities (ducts support, *Leerrohrförderung*), paragraph (28) seq.

1. Legal basis

- (8) The amendments are introduced by changes to the programme's legal basis, *Gesetz über die Gemeinschaftsaufgabe Verbesserung der Agrarstruktur und des Küstenschutzes und der GAK Rahmenplan 2010 bis 2013 Grundsätze für die Förderung der integrierten ländlichen Entwicklung, Teil B Breitbandversorgung ländlicher Räume*⁴ (hereafter: "GAK Framework"). Section 2.1 of the GAK Framework deals with the funding of broadband deployment, section 2.2. provides for the possibility of duct support.
- (9) Insofar as the project is co-financed by the European Agricultural Fund for Rural Development (EAFRD) or the European Regional Development Fund (ERDF), the measure should also comply with Council Regulations No. 1698/2005 and No 1080/2006⁵.
- (10) It should be noted that the GAK Framework regulates the conditions under which the municipality can demand federal and State (*Land*) funds for

³ In 2008, an amount of EUR 800 000 has been disbursed under that scheme. For 2008 until September 2009 a figure of EUR 13 million is mentioned, although the majority of the financing is money given to the municipalities for its own planning work, i.e. not money given to broadband operators.

⁴ The former GAK Rahmenplan, as authorised in Decision N 115/2008, covered the period 2008-2011.

⁵ Regulation 1698/2005 OJ L 277, 21.10.2005, p.1, Regulation 1080/2006, OJ L 210, 31.7.2005, p.1.

supporting broadband projects. I.e. the GAK Framework deals with the conditions according to which the municipality can ask for funding of broadband project which it would like to support within its geographic area. However, as the support received by the municipality can only be passed on to the operators once these conditions are respected, the GAK Framework in reality also lays down the conditions under which broadband operators, as the final recipients of the state measure, can receive funding or get access to ducts.

2. Increase of maximum aid amount per single project for broadband deployment

- (11) It should be reiterated that the authorised aid scheme N 115/2009 provides the possibility of broadband operators to receive public funding for broadband deployment.
- (12) The original measure foresaw maximum aid amounts of EUR 200 000 per single project depending on the outcome of the local selection procedures.
- (13) The German authorities argue that experience with the existing scheme showed that a maximum amount EUR 200 000 is often not sufficient to achieve the desired broadband access. Geographic particularities (such as middle mountain structures as well as very remote and lowly populated areas) often demand higher support due to increased costs and there are many municipalities which are situated within large distance from existing telecommunication infrastructures. For these reasons larger aid amounts would be necessary in order to overcome the digital divide.
- (14) The German authorities thus propose to increase the maximum aid amount per single project to EUR 500 000 that can be granted under the current scheme. As confirmed by the German authorities, any project that might require public funding of more than EUR 500 000 would be subject to an individual State aid notification.

3. Longer duration of the programme and budget increase

- (15) The original measure foresaw duration of the scheme until 31 December 2010 with an estimated budget of around EUR 141 million.
- (16) The scheme will be prolonged until 31 December 2013. The budget increases by EUR 8 million to EUR 149 million.

4. Definition of target (white) areas

- (17) In order to align the notified scheme with the German aid scheme on 'Broadband infrastructure development in Germany'⁶, the German authorities define as insufficient broadband coverage if a minimum (download) bandwidth of 2 MBit/s is not available at affordable prices⁷. As stated in decision N

⁶ State aid N 238/2008, as authorised by the Commission on 23 February 2009, OJ C/154/2009. The text can be found under the link http://ec.europa.eu/community_law/state_aids/comp-2008/n238-08.pdf.

⁷ The German authorities argue that many undertakings that only have access of less than 2 Mbps – given the rapidly increasing bandwidth need of the internet services - are not able to sufficiently participate in the economy. See for instance „Breitband für jedermann – Infrastruktur für einen innovativen Standort“,

115/2008, state aid in these areas can only be granted when the market does not provide an affordable offer or will not provide such an offer in the near future.⁸

5. Changes in consultation and award procedure

- (18) The German authorities confirm that in order to ascertain whether there are any investment plans of broadband operators to deploy broadband in the near future, in line with paragraph 42 of the Broadband Guidelines⁹, the municipality will use a planning perspective of three years.
- (19) Equally in line with the German scheme on 'Broadband infrastructure development'¹⁰ it will now be required that the operator with the most economically advantageous offer¹¹ will be awarded the contract. The German authorities confirm that the bidder with the lowest amount of aid requested will be awarded the contract in case of identical technical specifications. In case that other qualitative criteria will be used for the assessment of the offers, the German authorities confirm that paragraph 51 c) and fn. 55 of the Broadband Guidelines will be respected.
- (20) In order to achieve a harmonised description of the tender procedure throughout the text of the legal basis, the German authorities suggest to replace the word 'tender' ('*Ausschreibung*') with the word 'selection procedure' ('*Auswahlverfahren*'). No material change is intended with that suggestion and the German authorities explicitly confirm that this terminology is to be understood in the same manner as the wording in the Commission's Broadband Guidelines, which uses the word tender ('*Ausschreibungsverfahren*').
- (21) The German authorities further confirmed that the provision in the GAK Agreement that 'customer equipment' should not be supported is to be understood that end-users shall not receive state support directly from the granting authorities. Aid shall only be given to the operators selected by open tender procedures on the basis of a gap funding between the operator's expected costs and revenues. This can include the costs of installation and equipment.

6. Wholesale access

- (22) In view of paragraph (51) f) of the Broadband Guidelines, the German authorities amended the GAK Framework Programme. The German authorities confirm that wholesale access should be provided by the selected operator on equal and non-discriminatory terms, as laid down in Section 4.4. of the GAK Framework Programme.¹² The German authorities explain that this access could

WIKConsult of January 2008; available at :
http://www.wik.org/content/breitbandkonzeption%20RLP%20Gesamttext%20Stand%2027_2_081.pdf

⁸ N 115/2008, paragraph 51(a).

⁹ Community Guidelines for the application of State aid rules in relation to rapid deployment of broadband networks, OJ C 235 of 30.9.2009, p. 7.

¹⁰ See above, fn. 6.

¹¹ The new provision is now to be found in section 4.3. of the GAK Rahmenplan 2010-2013.

¹² The earlier exemption from wholesale access for projects which only receive EUR 200 000 funding and for which granting wholesale access is either technically difficult or renders the project more costly, is abolished by deleting section 6.1 of the GAK Framework Programme.

be local loop unbundling, line sharing or bitstream access depending on the technology involved.

7. Internal allocation of State funds

- (23) There will be a shift within the internal allocation of the various State funds. Whereas in the past only 60% of the aid were financed by the federal and state level¹³ with the remaining 40% to be paid by the municipality, in the future the federal and the state level authorities assume 90% of the project's financing. The intention is to enable less financially capable municipalities to equally provide broadband services by facilitated access to federal and state fund. As regards the co-financing from EAFRD and ERDF funds, the precise amounts will be decided by the Commission in separate proceedings on these programmes.

Profitability gap		
GAK		Municipality
Max 90%		Min 10%
of which 60% federal funds	of which 40% Land funds	

- (24) According to the German authorities, the modification concerns only the internal allocation between federal, state and municipal funding. It will not affect the methodology for establishing the financing need of the individual project or its maximum financing threshold. The need for aid for the individual project will still be assessed according to the project's profitability gap, which can be financed with 100% up to a maximum amount of EUR 500 000 as explained above.
- (25) The profitability gap is calculated as the difference between investment and operating costs and the expected revenues.

8. Revocation clause

- (26) The revocation clause in section 4.7 of the GAK Framework will be changed. So far the revocation clause, which applies in relation between the municipality and the Land¹⁴, foresaw that in case that the supported infrastructure can no longer be used in line with the stated objective of the support within the five year period (e.g. because the operator gets bankrupt), the municipality had to either pay back any support it received from the programme to the Land or operate the network itself.
- (27) The amended section 4.7 stipulates that such a repayment of the support is only necessary when the 'objective of the support' can no longer be guaranteed within the seven year period. That means that in the case of the bankruptcy of the network operator, the municipality only has to return the money or operate the

¹³ See paragraph 14 of Decision N 115/2008.

¹⁴ See above, paragraph (10). The GAK Framework describes the relation between the State and the municipality.

network itself, as long as the area is not sufficiently covered with broadband access. E.g if other operators have in the meantime also established services in the area, which are considered sufficient, the municipality can ask the Land not to be obliged run the network or repay the support granted to it.

9. Possibility to use ducts infrastructure constructed and owned by the municipality

- (28) The notified scheme provides for a new possibility of broadband providers to use ducts which have been placed by the municipality and are also owned by the latter, section 2.2. of the GAK Framework. According to the German authorities, experience with the deployment of broadband has shown that improved broadband access can often be achieved without any further state support if ducts infrastructure is made available to all potential broadband network operators. Germany therefore expects that the measure will foster broadband deployment in rural areas.
- (29) The German authorities state that this measure primarily aims to encourage further broadband investments. The municipality will, with the combined support of federal and State (*Land*) funds and with some own funding under the GAK Framework, place ducts for broadband purposes. These ducts will be offered to broadband operators for use. The use of these ducts by other network operators (gas, water, electricity) outside the broadband sector is not generally excluded, as long as this is legally and technically possible without compromising the primary intention of broadband deployment. From a practical perspective, the German authorities do not foresee any interest of other network providers such as electricity, water or gas in using these ducts. In some instances, legal and safety reasons might prohibit the use of the same duct by different network operators¹⁵, in other cases the existing network structure is sufficient for the other network operators. In the unlikely event of an excess in demand for use of a duct, priority would be given to broadband operators. The ducts will be multiple-fibre, thus their size and design is such that they allow to feed in cable networks of several operators.

Eligibility criteria

- (30) According to section 2(2) of the GAK Framework the placement of ducts by the municipality can be financed from the federal and State funds, if the following conditions are fulfilled:
- the ducts must be suitable for broadband use
 - they must have neutral user and provider standard (e.g. triple or multiple D 50), which enables several broadband providers to use the same duct at the same time, and

¹⁵ E.g certain safety distances are required between ducts used for gas and ducts used for electronic communication purposes.

- the direct recipient of the GAK support, i.e. the municipality, is either the owner of the ducts infrastructure or has the sole legal right to dispose of it.¹⁶
- (31) Eligible for the support are the planning, construction works and material for the ducts placement. The placement of ducts might concern new areas, in which ducts did not exist (*Erschließung*) or aim at the coverage of missing links between existing duct structures (*Lückenschluss*). A parallel placement of ducts to an existing duct infrastructure will not be supported, neither will the sole modification of existing ducts to make it usable for broadband purposes be able to obtain funds. The placement of ducts will be planned by an expert (*Trassenplaner*).
- (32) The support covers the backhaul part of the network, i.e. the connection from the nearest suitable access possibility to the area which should receive broadband coverage as well as the distribution within that area via main distribution frames (*Hauptverteiler*) and other distribution points, e.g access points such as street cabinets (*Kabelverzweiger*) and wireless base stations (*Mobilfunkstationen*). The last mile, i.e. the connection to the customer as of the street cabinet (*Teilnehmeranschlussleitung ab Kabelverzweiger*), will not be able to receive any duct support. Neither will the support cover the provision of ducts with cables or steering equipment (*Steuereinrichtungen*).
- (33) The German authorities confirm that the above clarification in paragraph (14) that state support exceeding the EUR 500 000 threshold will be notified to the Commission individually also applies to the duct support.

Award conditions

- (34) As for the award conditions, the support in the form of ducts placement has to fulfil all the criteria which need to be respected if the broadband deployment was supported by funding (see Decision N 115/2008 as well as the above amendments). I.e., the municipality has to fulfil the following conditions.
- a) *Public consultation and mapping:* The municipality has to demonstrate via a consultation with operators the need for broadband services as well as a missing or insufficient offer in the respective area, whereby operators are consulted on their intentions to provide such access on commercial terms.

In order to take into account that certain technology providers will not be able to use ducts facilities for deploying their broadband projects¹⁷, the German authorities confirmed that the consultation process should ascertain whether these technology providers would in principle be able to provide the desired coverage or not. If providers, in particular satellite providers, which due to their technology cannot use ducts, demonstrate to the municipality that they would be technically able to achieve the broadband coverage in a reliable manner, but that they lack funding, a duct support according to section 2.2. of

¹⁶ The latter formulation should cover the case when the ducts are placed by the municipality in the context of regional or federal street-work constructions, where the municipality is not responsible body (*Bauherr*) for the constructions works.

¹⁷ The German authorities demonstrated that also wireless technologies will be able to profit from ducts access on the backhaul level as they will be able to link the basis station to a duct

the GAK Framework is no longer possible. The municipality will then decide whether it initiates a tender to provide support in the form of funding for broadband deployment (*Erschliessungsmaßnahmen*), in which all technology providers can apply for funding of their profitability gap and in which the most economically advantageous offer will be awarded the contract. If the result of the consultation however is that due to technical restrictions a certain technology is not able to provide the required service level – even with State funding – then the municipality is free to either offer duct support according to section 2.2 or financial support according to section 2.1. of the GAK Framework.

- b) The municipality must *publish* the envisaged plans of ducts placement for the area¹⁸ with an envisaged use for broadband operators of these ducts in the official gazette and on its website. If it turns out that any technology provider will be able to cover the area on commercial terms, no state support (neither in the form of ducts, nor in the form of funding) will be granted.
- c) *Tender/Most economically advantageous offer*: The municipality must carry out an open and transparent selection procedure in line with national and EU procurement rules, which has to be technology neutral. The most economically advantageous offer should win the tender.
- d) The offers will be assessed according to different evaluation criteria, which typically comprise the download and upload speeds, end user prices, technical solution and scope of coverage. As the scheme intends to achieve universal broadband coverage, one of the evaluation criteria will be whether the offer intends to cover the whole area or only parts thereof. In the latter case the bid will be ranked after offers which intend to achieve a wider coverage. Another criterion will be whether the bidder is prepared to pay for the use of the ducts. However, it is nowhere stipulated that such remuneration is obligatory or that it has to cover the respective costs.
- e) *Wholesale access*: The tender will also oblige the operator to provide wholesale access to all electronic communication providers on equal and non-discriminatory conditions. The German authorities further confirm that equal and non-discriminatory access will also be granted on the level of the ducts by the municipalities as the owners of the ducts¹⁹. In addition, an obligation to provide information is introduced. The municipality has to document the placement of the supported ducts and provide the information, where these ducts can be found, to any operator addressing a request to it.
- f) The granting authorities have to regularly monitor the projects in accordance with the national household regulation. Projects co-financed by EU funds will also be regularly scrutinised in accordance with the EAFRD and the ERDF regulation. Given the small aid amounts and the fact that these are one-off projects on a small scale, the German authorities consider it too burdensome for the administration and the operators to introduce a retroactive repayment mechanism.

¹⁸ Section 4.2 of the GAK Framework.

¹⁹ In case of the sale of the duct, this obligation will be passed on to the new owner.

Non cumulation rule

- (35) Support under this scheme cannot be cumulated with any other State aid broadband measures, including, but not limited thereto, any separate broadband measures designed by the German States (*Länder*). If a broadband provider gets access to the duct following the tender, he cannot in addition ask for funding in the form of grants²⁰.

IV. ASSESSMENT OF THE MEASURE

IV.1. Presence of aid

- (36) *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 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 trade between Member States.
- (37) *State resources:* The support for broadband deployment and use of ducts will be financed by state resources, namely from resources of the municipalities, the Land and the federal government as well as from EU funds disbursed by the German authorities.
- (38) *Selective advantage:* As for the grants (*Erschließungsmaßnahmen*) of up to EUR 500 000, the programme will provide selective economic advantage to the electronic communication operators selected via the tender procedure and also for third party electronic communication operators that will be able to offer their services via wholesale access to the subsidized network²¹ There will be also an advantage for the businesses in the targeted areas.
- (39) In relation to the ducts support (*Leerrohrförderung*) the measure will reduce the investment costs and operating costs which the operators normally have to bear themselves.²² Although the competitive tender tends to reduce the amount of financial support required, it will still offer operators the possibility to offer services *prima facie* at lower prices than if they had to bear the costs themselves. The Commission considers that it is not the construction of the ducts, which are owned by the public authorities, which will provide an economic advantage to operators, as long as market compensation is paid for the construction.

²⁰ In this regard it should be noted that funding from the European Agricultural and Regional Development fund cannot be cumulated, see e.g. Article 54.5 of Regulation (EC) No 1083/2006 states that: “An expenditure co-financed by the Funds shall not receive assistance from another Community financial instrument.

²¹ See in this regard the Commission's findings in N 115/2008, paragraph (31) and (32) which applies in the same manner to the increased funding.

²² According to the German authorities, up to 70% of broadband deployment costs could be related to civil construction works. Depending on the topographic situation, the costs for the placement of ducts could vary between EUR 20 to 100 per metre. For the deployment of broadband, operators normally place the ducts and the cables.

However, state aid can arise when the public authorities make these facilities available to undertakings (broadband providers). Here it should be in particular noted that the scheme does not stipulate that the operator will pay an adequate remuneration for the use of the ducts. The scheme only specifies that such remuneration should be requested in the tender, but it is not guaranteed that the providers will pay for the use of the duct or that this payment will be adequate. I.e. the provider will have an advantage by being able to use a ducts infrastructure, which normally represents a significant part of his investment costs, without adequate remuneration.

- (40) The Commission considers the use of the ducts also to be selective as this possibility is only granted to certain undertakings falling under the scheme and selected by the tender procedure. In that regard, the Commission draws attention to paragraph (61) of the Broadband Guidelines²³ which regards civil works carried out by the State not to constitute State aid as long if it is not 'industry or sector specific'.
- (41) For the case at hand, the measure is explicitly aimed to encourage broadband deployment and to favour this sector. This is stated by Germany and also reflected in the conditions under which the use of the ducts is opened to operators. Firstly, the municipality has to establish the need of the ducts use especially for 'broadband purposes' and carry out a consultation with the respective electronic communication providers to that end. Only if the broadband coverage need is established, the municipality will receive funding which in turn it can pass on to broadband operators. Secondly, according to the GAK Framework, the support is only open for ducts which are suitable for broadband purposes. Thirdly, only broadband operators succeeding in the tender will have access to the ducts. Regarding the argument of the German authorities that the measure constitutes general infrastructure, the Commission considers that this would be the case of an infrastructure which is needed to provide a service that is considered as falling within the responsibility of the State towards the general public and is limited to meeting the requirements of that service.²⁴ The Commission notes that this infrastructure is not comparable to certain infrastructure e.g. in the transport sector, which is open to all potential users on equal and non-discriminatory conditions and which are normally not provided by the market on commercial terms. The ducts infrastructure is rather made available to market operators who intend to provide telecommunication services. The ducts support in the case at hand can potentially discourage future private investment in similar facilities.
- (42) Selective advantages are also involved for third party electronic communication operators, which will be profit from access to the ducts and which will be able to offer services via wholesale access to the network which was constructed on the basis of the duct support. The measure aims at providing access to broadband. Businesses in the targeted geography will therefore ultimately benefit from the improved service

²³ Community Guidelines for the application of State aid rules in relation to rapid deployment of broadband networks, see fn. 7 above. While the statement is made in the context of Next Generation Access deployment (NGA), the same understanding applies for traditional broadband support.

²⁴ State aid N 284/2005 – Ireland, Regional Broadband Programme, Metropolitan Area Networks, phase II and III.

- (43) *Distortion of competition and effect on trade:* The measure has the potential to distort competition. At the level of network operators, support given to one operator may discourage other competitors to deploy or expand their own networks in the targeted area. Distortion of competition could also arise at the level of business customers of the broadband network: public funding could encourage local undertakings to subscribe to the services offered via the subsidized network instead of more expensive market-based solutions. Insofar as the intervention affects providers of electronic communications services from other Member States and distorts competition between end users located in Germany and elsewhere in Europe, the measure has an effect on trade. The markets for electronic communication services are open to competition between operators and service providers, which generally engage in activities that are subject to trade between Member States.
- (44) *Conclusion:* Therefore, the Commission considers that the amendments to the existing aid scheme as well as the newly introduced measure of giving access to municipal ducts constitutes State aid within the meaning of Article 107 (1) TFEU.

IV.2. Standstill obligation

- (45) The German authorities confirmed that the standstill obligation of Article 108 (3) TFEU has been respected with regard to the notified amendments to the existing scheme as well as with regard to the use of ducts which were funded by means under the GAK Framework Agreement.

IV.3. Compatibility

- (46) The Commission has assessed the notified amendments to the existing scheme as well as the measure of ducts support according to Article 107 (3) c) TFEU in conjunction with its Broadband Guidelines.
- (47) The Broadband Guidelines foresee in paragraph (34) to (36) that the compatibility of an aid measure should be assessed according to the following balancing test.
- (a) is the aid measure aimed at a well-defined objective of common interest, i.e. does the proposed aid address a market failure or other objective ?
 - (b) is the aid well designed to deliver the objective of common interest? In particular:
 - (i) is State aid an appropriate policy instrument, i.e. are there other, better-placed instruments?
 - (ii) is there an incentive effect, i.e. does the aid change the behaviour of undertakings?
 - (iii) is the aid measure proportional, i.e. could the same change in behaviour be obtained with less aid?
 - (c) are the distortions of competition and the effect on trade limited, so that the overall balance is positive?

The individual steps of the balancing test in the field of broadband are set out in further detail in Sections 2.3.2 and 2.3.3 of the Guidelines.

Objective of common interest

- (48) The scheme is in line with the Union's policy to bring broadband to all Europeans²⁵. The Commission encourages Member States to put comprehensive national broadband strategies in place²⁶ and to mobilize all relevant policy instruments to bridge the "broadband gap"²⁷. By improving broadband access for citizens and businesses in areas of Germany where these services are not satisfactorily available, the measure helps achieving greater cohesion and is therefore in line with the common interest.
- (49) In addition, in the context of the financial and economic crisis affecting severely the European economies, it was further recognised by the Commission²⁸ that broadband investments can be considered as "smart investments" that are able to provide short term (employment) benefits and long term (economic) advantages for the EU economies. Hence by accelerating broadband deployment, the current measure is also in line with the European interest to support fast recovery of the European economies.²⁹

Market failure and cohesion considerations, paragraphs (37) to (42) of the Guidelines

- (50) The economics of broadband provision are such that the market will not always find it profitable to invest in it. Due to economics of density, broadband networks are generally more profitable to roll-out where potential demand is higher and concentrated, i.e. in densely populated areas. Because of high fixed costs of investment, unit costs increase strongly as population densities drop. Remoteness, such as larger distances from existing telecommunication infrastructures could also significantly increase the investment costs necessary to roll out adequate broadband networks. As a result, broadband networks tend to profitably cover only part of the population.
- (51) Typically, the underserved regions are rural areas with a low population density so that commercial providers have no economic incentives to invest in electronic communications networks to provide adequate broadband services. This leads to a "*digital divide*" between the areas which have access to adequate broadband services and those that have not.
- (52) However, availability of adequate broadband services would be beneficial from a wider economic perspective, for instance due to the positive spill-over effects on the local economies (such as increased economic activity, job creation and retention). The availability of such services would also improve access to an essential means of communication services to all actors in society, thereby improving social and regional cohesion.

²⁵ As outlined, *inter alia*, in the Commission Communication *i2010 – A European Information Society for growth and employment*, COM (2005) 229 of 1 June 2005.

²⁶ Commission Communication COM(2004) 369 of 12.05.2004, "Connecting Europe at High Speed – National Broadband Strategies".

²⁷ See Commission Communication on *Bridging the broadband gap*, COM (2006) 129 of 20.03.2006.

²⁸ Brussels European Council, 19/20 March 2009 Presidency Conclusions.

²⁹ Communication from the Commission to the European Council: *A European Economic Recovery Plan*, Brussels, 26.11.2008.

- (53) As stated in paragraph (39) of the Broadband Guidelines, State aid in the broadband sector may remedy a market failure, i.e. a situation in which private investment is less than what is optimal from the viewpoint of society as a whole. Likewise, State aid might be as a tool to achieve equity considerations, i.e. to improve access to an essential means of communication, thereby improving social and territorial cohesion. For so-called white areas, i.e. areas in which no broadband infrastructure exists or is likely to be developed in the near future, the Commission accepts that State aid follows genuine cohesion and economic development objectives, as laid down in paragraphs (41) and (42) of the Broadband Guidelines.
- (54) According to the proposed measures, State aid will only be granted to areas which have no adequate broadband connections of minimum 2 MBit/s download speed. The authorities will also establish in the respective consultations with operators for the ducts infrastructure and the funding measures that no plans by investors exist to cover these areas in the near future. According to the German authorities, many of the inadequate broadband connections are located in rural, often remote areas, where no investor is prepared to invest. As the notified measures aim at overcoming these difficulties, the Commission finds that the German authorities pursue genuine cohesion and economic development objectives.

Aid is the appropriate instrument

- (55) As set out in paragraphs (47) and (48) of the Broadband Guidelines, in the situation currently under assessment, limited private investments have taken place in the targeted areas despite the attempts of the German authorities to stimulate broadband deployment by other means, in particular regulatory measures³⁰. The measure at hand is part of an overall strategy of the German authorities (*Breitbandstrategie*) to provide universal basic broadband services for all citizens and undertakings. Although regulatory measures have facilitated broadband deployment in urban and more populated densely areas, so far such measures have not solved the identified absence of adequate broadband networks in particular in rural areas. Without further public intervention, reducing the "digital divide" between rural and urban areas does not seem possible, which could lead to the economic and social exclusion of the local citizens and undertakings.
- (56) Hence in the current situation, State aid is an appropriate instrument to achieve the set objectives.

The aid provides the right incentives to operators

- (57) According to paragraph (50) of the Broadband Guidelines it needs to be examined whether the broadband network investment concerned would not have been undertaken within the same timeframe without any State aid (incentive effect). According to the results of the public consultation and market research referred to above in paragraph (19, 34 a)³¹, in the targeted areas no investment

³⁰ Broadband Strategy of the Federal Government, *Breitbandstrategie der Bundesregierung*, February 2009, p.5. Available at <http://www.bmwi.de/Dateien/BBA/PDF/breitbandstrategie-derbundesregierung,property=pdf,bereich=bmwi,sprache=de,rwb=true.pdf>.

³¹ See also Decision N 115/2008, paragraph 10.

would take place without public funding, hence the aid produces a change in the investment decisions of the operators. Moreover, as explained in paragraph (19, 34 c)), the recipients of the aid will be selected by public tender. Tenderers will submit investment plans indicating the amount of aid that they consider to be necessary to carry out the investment given the anticipated investment and operating costs and revenues. Therefore, the aid should provide a direct and appropriate investment incentive for the selected operators.

Could the changes be achieved with less aid?

- (58) The system contains elements in the form of the tender procedure with its requirement to choose the most economically advantageous offer as well as the requirement to use existing infrastructure where possible that only that amount will be granted which is necessary to achieve the desired objective.

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

- (59) As set out in paragraph (51) of the Broadband Guidelines, in assessing the proportional character of the notified measures in "white" areas a number of necessary conditions has to be met in order to minimise the State aid involved and the potential distortions of competition. In this respect, the Commission notes, inter alia, the following positive elements in the design of the measures (covering both the grants and the ducts support):

- (a) *Detailed mapping and coverage analysis, consultation with stakeholders:* The municipalities will carry out – for both the funding part and the provision of ducts – under the current scheme a detailed mapping and consultation with stakeholders.
- (b) *Targeted (white) areas:* The Commission accepts that in relation to the areas targeted by the scheme the notified scheme aligns itself with other German broadband schemes, for which the Commission already accepted that areas should be subject to support for which there currently is no coverage with a minimum download bandwidth of 2 MBit/s³² and there will not be such a coverage in the next three years.
- (c) *Open tender process:* The German authorities will select the undertakings for the construction and the maintenance of the network in full compliance with national and EU public procurement rules. Open tender procedures are considered to be effective means to minimise the aid necessary for the measure.
- (d) *Most economically advantageous offers:* Within the context of an open tender, the German authorities will select the most economically advantageous offers among those presented by the operators. In line with paragraph 51 c) of the Broadband Guidelines, for the purpose of determining the most economically advantageous offer, the awarding authority will specify in advance the relative weighting, which it will grant to each of the qualitative criteria chosen (see fn. 55 of the Broadband

³² N 238/2008 http://ec.europa.eu/community_law/state_aids/comp-2008/n238-08.pdf, N 243/2009 – Germany, Niedersachsen, http://ec.europa.eu/community_law/state_aids/comp-2009/n243-09.pdf.

Guidelines). In case of identical technical specifications, the lowest bid will be awarded the contract.

- (e) *Technology neutrality*: The current measure 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 broadband services to end users during the tender.

With regard to the ducts support the scheme seeks to ensure that other providers, which cannot use ducts for their broadband project due to the technology applied, but who are able to meet the objective criteria put up by the municipalities for the coverage of the area, will not be excluded from state support. In such a situation, duct support will no longer be available and the municipality can decide whether to offer broadband deployment support in the form of funding. In the respective tender for the support in the form of funding any technology provider can apply and potentially win the tender, if it constitutes the most economically advantageous offer.

- (f) *Use of existing infrastructures*: The German authorities confirm the use of existing infrastructure where possible. In particular the ducts support relies on existing infrastructure in order to either extend this infrastructure or bridge gaps between existing ducts infrastructures.
- (g) *Open wholesale access*: The chosen operator of the new network will provide open wholesale access to all interested parties in an open, transparent, non-discriminatory manner for at least seven years.

The German authorities point out that German regulatory law allows for the need driven creation of open wholesale access, if competitors demand this, also for operators without significant market power. These operators are first given the chance to reach an agreement with their competitors. For the situation that the parties fail to reach an agreement within a reasonable time period, the German authorities confirm that wholesale access prices will be fixed (by the municipality) according to the prices fixed by the regulator for comparable situations.. The national regulator (*Bundesnetzagentur*) will take into account the cost structure of the participating operators in the framework of an efficient offer of services (*Kostenstruktur im Rahmen der effizienten Leistungsbereitstellung*). The criteria for the wholesale pricing will be stipulated in the tender documents, see 51 g) of the Broadband Guidelines.

Ducts ownership will remain with the municipality. The German authorities confirm that the municipality will grant access to the ducts under equal and non discriminatory conditions.

- (h) *Price benchmarking*: The German authorities confirmed that retail prices of the broadband services of the supplier will be established in the course of the selection procedure. The German authorities are aiming to provide retail broadband services in the target areas at prices similar to not supported areas.

- (i) *Claw-back mechanism to avoid over-compensation:* The project will be examined on a regular basis by the granting authority 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. Regarding the requirement of a claw-back mechanism contained in section 51 h) of the Guidelines, the Commission notes that the notified scheme provides for only very small aid amounts and intends to support one off projects based on simple procurement principles for which a clawback mechanism would present too much of an administrative burden. For that reason the Commission accepts that no such claw-back mechanism is required for the current scheme.
- (60) *Budget and aid amount, duration:* Concerning the increase of aid per single project and limited increase in the total budget³³, the German authorities provided sufficient justification why such changes would be needed to cover especially difficult areas. Furthermore, the Commission notes that all the necessary safeguards ensuring that the measure will remedy well-defined market failures in a necessary and proportionate way and limit any potential distortion of competition to the minimum possible will remain unchanged or are adapted to the Commission's Broadband Guidelines. Likewise finds the Commission a prolongation of the scheme until 2013 acceptable.
- (61) *Internal allocation between State funds and revocation clause:* The notified changes concerning the proportion of the funding instruments³⁴ constitute an internal allocation between State organs. It does not affect the State aid assessment in relation to funding granted to the operator – any public funding that constitutes State aid within the meaning of Article 107 TFEU has to be compatible with the State aid rules. Likewise does the amendment of the revocation clause only concern the internal relationship between the municipalities and the Federal State without any impact on the assessment of aid granted to broadband operators.

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

- (62) The Commission concludes that the notified measure will offset a geographical and commercial handicap and is objectively justified to address the lack of broadband services in rural areas. The measure is in line with the objectives of Article 107(3)(c) TFEU as it facilitates the development of certain economic activities (broadband services) in certain remote and rural areas.
- (63) In view of the characteristics of the project and of the safeguards applied by the German authorities (see paragraph (59) of this decision), the overall impact on competition is deemed to be positive. Any distortion of competition is limited, as the investment is carried out in areas where no comparable infrastructure exists yet and where market research does not indicate that private investment will enter in the foreseeable future. In this regard it should also be noted that the

³³ See paragraph 16.

³⁴ See Paragraph 23.

funding per project and the overall budget are limited and that the cumulation rule further limits the amount of aid.

- (64) On the positive side, the Commission in particular notes that for the ducts support wholesale access will not only be granted on the level of the employed technology (e.g. the cable), but also on the level of the ducts infrastructure. As the municipality is required to give access to its ducts, several broadband operators can install their own cables thereby engaging in infrastructure competition instead of relying on another operator's network for developing and offering services. This is further enhanced by the stipulated documentation and information obligations on behalf of the municipalities and the use of ducts, whose standards allows for multiple and simultaneous use of ducts by different providers. This measure could therefore enhance competition in the broadband market.
- (65) In the Commission's view, the intervention is designed in a way that it does not distort competition or adversely affect trading conditions to an extent contrary to the common interest.
- (66) 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 conjunction with the Broadband Guidelines. In view of the duration of the scheme, the Commission would like to draw Germany's attention to future revisions of the Guidelines, which might make appropriate measures to the scheme necessary.

DECISION

- (67) On the basis of the foregoing assessment, the Commission has accordingly decided that the "Amendment of the State aid broadband scheme N115/2008" is compatible with the Internal market.
- (68) The German 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.
- (69) 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/community_law/state_aids/state_aids_texts_en.htm

Your request should be sent by encrypted e-mail to stateaidgreffe@ec.europa.eu or, alternatively, by registered letter or fax to:

European Commission
Directorate-General for Competition
State Aid Greffe
Rue de Spa 3
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Yours faithfully,

For the Commission

Joaquín ALMUNIA
Vice-President of the Commission