



## EUROPEAN COMMISSION

Brussels, 20.11.2012  
C(2012) 8242 final

**PUBLIC VERSION**

**WORKING LANGUAGE**

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**Subject:**        **State aid SA.35000 (2012/N) – Germany**  
                         **NGA Bayern**

Sir,

### **I. SUMMARY**

- (1) I am pleased to inform you that the European Commission has assessed the measure "*Next generation network for commercial and accumulation areas in Bavaria*", as laid down in the "*Richtlinie zur Förderung des Aufbaus von Hochgeschwindigkeitsnetzen in Gewerbe- und Kumulationsgebieten in Bayern*" (hereafter: "the measure") and decided not to raise objections as the State aid contained therein is compatible with Article 107(3)c of the TFEU.

### **II. PROCEDURE**

- (2) Germany notified the measure to the Commission on 18 June 2012 pursuant to Article 108 (3) of the TFEU. The German authorities replied to the Commission's requests for information of 21 June 2012 and 26 July 2012 and email of 21 September 2012 by letters registered on 3 July 2012, 21 August 2012, 14 September 2012 and 1 October 2012 and, after a telephone conference on 8 October 2012 and further comments from the Commission services on 17 October 2012, they submitted additional information on respectively 10, 19 and 26 October 2012.

Seiner Exzellenz Herrn Dr.Guido WESTERWELLE  
Bundesminister des Auswärtigen  
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### III. CONTEXT

- (3) Outside its major metropolitan areas, Bavaria is largely under- or unserved in NGA broadband infrastructure (with bandwidth of at least 50 Mbit/s). Especially in the rural areas of Bavaria, the economic gap of operators to fund NGA broadband access is so significant that no such (market) investments are to be expected in the long term. NGA access is, however, considered essential to preserve economic strength of these regions and their integration into the Bavaria-wide economic structure. According to the German authorities, only the consistent expansion of NGA networks creates the conditions for many middle-sized entrepreneurs in these areas of Bavaria to remain at top level, to secure jobs and to avoid a digital divide between urban and rural areas.

### IV. DESCRIPTION OF THE MEASURE

- (4) **Objective:** Purpose of the measure is to promote the development of NGA broadband networks with download speeds of at least 50 Mbit/s in commercial and "accumulation" areas<sup>1</sup> of the Free State of Bavaria that are currently un- or underserved with such broadband infrastructure. This should strengthen competitiveness of companies located in these areas and increase attractiveness of these areas as business location.
- (5) **Duration:** The measure should enter into force after approval by the Commission and remain in force until 31.12.2017.
- (6) **Legal basis:** the notified measure is based on the Bavarian Budget order ("*Bayerische Haushaltsordnung*") and the directive on the promotion of the development of high speed networks in commercial and accumulation areas in Bavaria ("*Richtlinie zur Förderung des Aufbaus von Hochgeschwindigkeitsnetzen in Gewerbe- und Kumulationsgebieten in Bayern*").
- (7) **Budget and financing instruments:** The overall estimated (maximum) budget of the measure is 2 000 million EUR, funded from the budgets of the Free State of Bavaria and of the Bavarian municipalities.
- (8) **Aid amount and intensity:** Under the measure, municipalities or combinations/associations of municipalities (hereinafter referred to as "municipality"/"municipalities") can provide a grant for covering the "profitability gap"<sup>2</sup> of a (selected) network operator in constructing and operating a broadband infrastructure. Depending on the financial capacity of the municipality and the special need for action<sup>3</sup>, funds from the budget of the Free State of Bavaria are provided to the municipality covering 40, 50, 60 or 80% of this profitability gap, whereby the maximum amount to be funded from the budget of the Free State of Bavaria is 500 000 EUR per municipality.

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<sup>1</sup> An "accumulation" area is defined as an area in which at least 5 entrepreneurs or enterprises (hereinafter "entrepreneurs") are located.

<sup>2</sup> The "profitability gap" is calculated by subtracting the estimated operating revenues from the operating costs, including capital costs. The period to be taken into account is 7 years. The detailed calculations have to be submitted by the applying network operator to the municipality when participating in the tender (see recital (19)).

<sup>3</sup> Municipalities for which there is a special need for action can benefit from funds covering up to 80% of the profitability gap and are listed in an annex to the Directive.

The remainder of the profitability gap is financed by the budget of the municipality concerned. This financial participation of the municipality ensures its interest to keep the grant to the operator concerned limited to what is necessary. The municipality is also entitled to finance the entire grant covering the profitability gap without support from the budget of the Free State of Bavaria, provided that it respects all conditions of the measure.

- (9) **Target areas:** Support will be granted in commercial and accumulation areas in the free state of Bavaria, where currently no comprehensive ("flächendeckend") NGA network is in place or being deployed in the coming three years. An NGA network is defined as "comprehensive" if it ensures download speed of at least 50 Mbit/s for at least 99% of the connections in the area concerned. In case an NGA network with download speed of at least 50 Mbit/s does not cover 99% of the connections in the area, support under the measure can be granted only for the (parts/connections of the) area that are not currently covered and are not planned to be covered with download speed of 25 Mbit/s or more in the next three years<sup>4</sup> ("gap filling"). Accordingly, only so called "NGA white" spots/areas in the sense of paragraph 68 of the Broadband Guidelines<sup>5</sup> will be eligible and this only in areas in which – without State support – no adequate high speed internet services would be available on commercial terms (see recitals (10) to (16)). "Grey/black" NGA areas/spots are not eligible.
- (10) **Detailed mapping and coverage analysis, consultation with stakeholders:** to be eligible for a grant, the municipality must show that the area concerned does not have any broadband infrastructure or that the available infrastructure is not sufficient to meet actual and forecasted demand. The municipality must therefore establish the currently available broadband services. The federal broadband atlas can be used for this purpose. Further the municipality must present a comprehensive assessment of the actual and predicted demand for broadband services at download speeds of at least 50 Mbit/s ("demand survey"). This assessment is to be made on the basis of a consultation of entrepreneurs in the target area (individually and through posting on the central online portal [www.schnelles-internet.bayern.de](http://www.schnelles-internet.bayern.de), hereafter the "central online portal"), inviting them to credibly indicate the download speed<sup>6</sup> they currently benefit of as well as the speed they would need. The results of this survey are to be documented and summarized in a map that must be published on the central online portal at the latest at the start of the market consultation (see recital (11)). Furthermore, the analysis of the actual and expected demand of broadband connections is to be submitted to the licensing authority (the locally competent government of the Free State of Bavaria<sup>7</sup>) at the latest when the tender is published.

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<sup>4</sup> "Step change condition"/"Aufgreifschwelle". E.g. in case an area is covered by an NGA network ensuring download speeds of at least 50 Mbit/s for 97% of the connections, only the 3% of the area not covered with this download speed can benefit from support under the scheme (and this only insofar as this 3% does not already benefit from download speeds of 25 Mbit/s or more).

<sup>5</sup> 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.

<sup>6</sup> This should include the nominal and the real download speed. Users should be explained how to measure these download speeds, e.g. by referring to websites containing the relevant information (such as <http://www.initiative-netzqualitaet.de/startseite>).

<sup>7</sup> I.e. Governments of Unterfranken, Oberfranken, Mittelfranken, Oberpfalz, Niederbayern, Oberbayern or Schwaben.

- (11) Further, the municipality must investigate whether no private investor is interested in investing in the development of a NGA network in the area concerned in the next three years ("market consultation"). This is done by publishing the broadband need, as established on the basis of the mapping/demand survey, on the central online portal, together with the inquiry whether providers of electronic communication networks are able to offer the demanded broadband services in the area concerned at market conditions without third party financing and whether any private investor has planned rolling out a network providing these broadband services within a period of three years. At the same time, the municipality must also investigate whether any network with download speed of 25 Mbit/s is planned in the area concerned within a period of three years.<sup>8</sup> The context of the inquiry (i.e. the envisaged support measure) is also to be mentioned. The results of this market survey are to be submitted to the licencing authority and are to be published on the central online portal.
- (12) In terms of timeframes, the demand survey and market consultation must be open for feedback from all interested stakeholders for at least one month.
- (13) Only if it is demonstrated that the broadband services provided over the existing networks or those contemplated to be in use over the next three years are not sufficient to satisfy the needs of citizens and business users in the area in question, also taking into account possible future upgrades over the next three years, support can be envisaged. In that case, support is to be directed primarily to the satisfaction of established demand for broadband services with download speed of 50 Mbit/s. Provided this demand is satisfied, broadband services with download speed of at least 30 Mbit/s can also be supported for other users in the same area as a side effect.
- (14) No support can be envisaged under this measure if it follows from the demand survey or the market consultation that there are already comprehensive broadband services with download speeds of at least 25 Mbit/s available or contemplated in the area within the next three years. In those situations, the support measure concerned must be individually notified to the Commission for approval. If broadband services with download speeds of at least 25 Mbit/s are available or contemplated in an area, without this area being covered comprehensively by these services, funding under this measure is possible only for those parts/spots of the area in which no broadband services with download speeds of at least 25 Mbit/s are available or contemplated over the next three years (see recital (9)). The municipality's analysis in this respect is to be published on the central online portal.
- (15) For (parts of) areas in which one basic broadband network (i.e. with download speed of at least 2 Mbit/s) is available, but in which there is no comprehensive NGA network present or planned for the next three years (traditional grey area, NGA white area), it is moreover to be established that there are no less distortive ways (including *ex ante* regulation) to meet actual and forecasted demand. The municipality must document this assessment and consult the Bundesnetzagentur (German national regulator) on whether and how the distortive effect of the measure can be reduced by *ex ante* regulation. It must publish this

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<sup>8</sup> This also includes, e.g., LTE mobile services. The mobile service provider must thereby prove that it can indeed reliably offer the required speeds, taking into account amongst others the expected number of users and the shared use.

analysis and any opinion of the Bundesnetzagentur in this respect on the central online portal.

- (16) For (parts of) areas in which more than one basic broadband network is available, but in which there is no NGA network present or planned for the next three years (traditional black area, NGA white area), the municipality must moreover prove that during the market consultation it has contacted each network operator active in the area individually and in writing, explicitly requesting description of expansion plans and resulting download- and upload speeds as well as of investments carried out in the last three years to upgrade the network. Further the municipality must prove that past investments were not sufficient to meet demand and that high entry barriers exist for NGA coverage, taking into account, e.g. geographic particularities or showing that commercial investment without state support is not profitable. The results of this individual consultation are to be published on the central online portal.
- (17) ***Choice of the network operator and obligations imposed on it:*** The network operator is selected by way of an open, transparent and non-discriminatory selection procedure in conformity with European and German public procurement rules. A prior notice regarding the selection procedure must be published on the central online portal. In order to ensure that the results of the demand survey and market consultation are up-to-date, the notice shall be published no more than one month after publication of the results of the market consultation.
- (18) The description of the work in the tendering procedure must be based on established and forecasted demand (see recitals (10) to (16)) and must be technology and provider neutral and hence in principle allow for wired and wireless networks. It must include the selection criteria and their respective weight in the evaluation. The description must moreover be directed to the conclusion of a contract between the municipality and the operator that ensures that all objectives and conditions of the measure and all requirements imposed by the licensing authority are fulfilled. Prior to its conclusion, the contract must be submitted to the Bundesnetzagentur for its opinion. Such opinion is binding on the municipality. The contract must include at least the following obligations on the network operator:
- (i) obligation to establish and maintain the network operation for a period of at least seven years and to grant open access at wholesale level on equal and non-discriminatory terms for at least the same period, as described in recital (23). The contract must include a detailed description how this will be ensured.
  - (ii) obligation to inform third parties, on demand, on all infrastructure (such as ducts, fibre, street cabinets, etc.) built in the context of this measure.
  - (iii) obligation to orient the wholesale price for network access at the average published wholesale prices that prevail in more competitive regions for the same or comparable access services or at the price set or approved by the Bundesnetzagentur for the same or comparable access services. The cost structures on site are thereby to be taken into account.
  - (iv) obligation to submit to the decision of the municipality in case of disputes between the network operator and access seekers on the price, where the price is not regulated. In those circumstances, the municipality must set the price at the level suggested by an independent expert, appointed in consultation with the licensing authority. Also the

Bundesnetzagentur must be consulted with the objective to keep these prices at a reasonable and non-discriminatory level.

(v) obligation to inform the municipality of the wholesale access price, as soon as it is fixed, for publication of this price on the central online portal (see also recital (25)).

(vi) obligation to describe the funded infrastructure on the basis of plans, including a description of the connections and download speeds realized, and to provide this documented description to the municipality at the latest within 6 weeks from commissioning.

(vii) in cases where the grant to cover the profitability gap amounts to 10 million EUR or more, obligation to submit a calculation with a structure comparable to the one provided prior to the project and to provide, on demand of the municipality, any other document necessary to establish the existence or absence of overcompensation.

(viii) obligation to (pro-rata) reimbursement of the grant in case the conditions of the measure have not been respected due to circumstances attributable to the operator or when ordered by the Commission. Upon request, the operator has to provide a bank guarantee to secure this reimbursement.

- (19) Tenderers must submit a technical offer (including, inter alia, a description of the ways proposed to ensure effective wholesale access (see recitals (18)(i) and (23)), data on download and upload speed, retail prices and degree of supply reached etc.) as well as a detailed and plausible account of the profitability gap (see also footnote 2).
- (20) The network operator claiming the lowest profitability gap (and thus the lowest funding) is to be selected. If it wishes, the municipality can define additional criteria for evaluation. In that case, it must specify in advance the weighting of the qualitative criteria, whereby the level of profitability gap should be given the most important weight. The selection decision following the tender must be published on the central online portal.
- (21) **Aid intensity:** the aid intensity of a project will depend on the outcome of the local tendering procedure. As in the approved federal broadband regulations<sup>9</sup>, the maximum amount of the grant will not be the total cost of the project, but the profitability gap, which will be calculated for each project and submitted by the tenderers to the municipality concerned in the course of the selection procedure (see also recital (8)).
- (22) **Use of existing infrastructure:** Existing infrastructure of the incumbent can be used via detailed regulatory access rights.<sup>10</sup> To ensure the use of existing infrastructure to the maximum extent possible (and thus also to minimise the profitability gap), the municipality shall publish in the tender notice any known infrastructure that can be used for the project and any work that it may intend to perform itself in that respect. Moreover, in the tender, bidders are explicitly requested to use as much as possible existing infrastructure.

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<sup>9</sup> See, e.g., point 12 of Commission Decision N 238/2008. See also point 24 of Commission Decision N 368/2009.

<sup>10</sup> See e.g. Commission Decision N53/2010 – Germany – Federal framework program on duct support, point 35.

- (23) **Wholesale access:** the network owner must provide effective wholesale access to the subsidized network (including its existing infrastructure used for the project) for a period of at least 7 years. The NGA network architecture that will benefit from the support must thus 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, dark fibre, street cabinets, and bitstream and unbundled access to fibre). If at the end of the 7 year-period, the network operator is designated by the Bundesnetzagentur as having significant market power, the access obligations may be extended as appropriate pursuant to the regulatory framework. Furthermore, full access, without limitation in time, is to be guaranteed to any new passive infrastructure elements. In its offer the network owner must provide details on how it will ensure this effective wholesale access and unbundling.
- (24) The Bundesnetzagentur is consulted on the contract to be concluded between the municipality and the operator, thus including on the proposed conditions for wholesale network access (see recital (18)).
- (25) **Pricing:** The network operator is obliged to base the wholesale price for network access on the average published wholesale price that prevails in more competitive regions for the same or comparable access services or at the price set or approved by the Bundesnetzagentur for the same or comparable access services. In case of conflicts, the municipality sets the price on the basis of the opinion of an independent expert, appointed in consultation with the licensing authority. This opinion is binding on the municipality. Also, prior to setting the price on the basis of the expert opinion the municipality must seek advice on the proposed price from the Bundesnetzagentur with the objective to keep prices at a reasonable and non-discriminatory level (see recital (18)).
- (26) **Beneficiaries:** The recipient of the aid will be the selected operator of the network, through the municipality. Indirect beneficiaries will be electronic communication operators utilising the new network for offering retail services to end users, and business end users.
- (27) **Earmarking term:** The funded broadband infrastructure should be used in accordance with the objective of the funding within a period of seven years from the date of commissioning of the network (earmarking term). The municipality is liable for obligations that it passed on to the network operator in application of the measure, if the latter does not comply with these obligations within this earmarking term.
- (28) **Transparency, Monitoring, Control and Claw-back mechanism:** For all projects benefiting from state funding under the measure, utmost transparency is ensured by publishing each milestone of the procedure on the central online portal [www.schnelles-internet.bayern.de](http://www.schnelles-internet.bayern.de). Also, for every project benefiting of aid under the measure, the following information is published on the central online portal: the aid beneficiary, the aid amount, the area concerned, the technology used, the wholesale access products and prices for these products.
- (29) A broadband "competence centre" is set up to provide information, advice, networking between stakeholders, coordination, project development and controlling. It serves all

stakeholders regarding broadband expansion in Bavaria as a central contact point, informing them by way of neutral, initial advice<sup>11</sup>.

- (30) Before any aid can be granted, the municipality must submit documents to the licencing authority establishing that the conditions for the grant are fulfilled (this includes, inter alia, the financing plan; the results of the market survey; the results of the selection procedure; a credible account of the profitability gap; if applicable, the confirmation of the Bundesnetzagentur that the demand can probably not be covered by ex ante regulation (see recitals (15)-(16)), information on the outcome of the project (such as the amount of connections and download speed reached) and, for projects with a profitability gap of 10 million EUR or more (see recitals (31) to (33)), documents allowing to verify the presence or absence of over-compensation of the network operator resulting from the subsidised network and of any reimbursement (claw-back) to be made as a result).<sup>12</sup> The licensing authority can moreover require any other documents regarding the planned project. The licensing authority only pays out (its part of) the grant to the municipality upon submission of documentary evidence (report and numerical evidence) of use of the funds in compliance with the measure.
- (31) The licensing authority (the Free State of Bavaria) and the Bavarian Supreme Court of Auditors ("Bayerische Oberste Rechnungshof") moreover have the right to verify that all conditions regarding the grant are respected, by inspecting books, records and other documents and request information of the municipality or, in case the profitability gap exceeds 10 million EUR, also directly of the network operator. In case the municipality finances the aid entirely by itself, it is subject to control of the Landratsamt (district office), which has legal authority and can object against any unlawful decision/order of a municipality and order cancellation or amendment of such decision/order, including in the context of the measure. To that effect, the Landratsamt has the power to acquaint itself with all matters of the municipality. In particular, it may visit all the municipality's offices and facilities, inspect its management and financing and demand reports and files.
- (32) For projects with a profitability gap of more than EUR 10 million, the municipality must verify with the network operator upon expiry of the earmarking term of 7 years, whether the demand for broadband services in the target area exceeds the demand that the network operator estimated in its offer to tender.
- (33) If the actual demand for services of the network operator exceeds the originally assumed level by more than 30% (turnover) and there has been no equivalent retail price reduction, then the network operator must refund the profit made on the turnover exceeding this 30%. The municipality verifies the claw-back mechanism under supervision of the licensing authority.
- (34) **Public consultation:** the German authorities consulted relevant stakeholders about the measure. Also the Bundesnetzagentur was consulted on the draft as a whole and on certain aspects of the measure throughout the drafting process. Moreover, as the measure is a framework programme, a consultation will take place in each geographic area for

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<sup>11</sup> It does not provide specific advice. E.g. the development of specific Broadband expansion plans for specific municipalities does not fall within its remit.

<sup>12</sup> The municipality must also provide this documentation to the granting authority when it finances the entire amount of the aid without financial intervention of the licensing authority.



which the public support is envisaged under the framework in order to establish demand and investment plans of the operators within a three year planning perspective. Results are published on the central online portal (see recitals (10) to (16)).

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

- (35) 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 support measure to be qualified as State aid, it has to be granted out of State resources, confer a selective economic advantage to undertakings, and it has to be capable to distort competition and affect trade between Member States.
- (36) The measure is financed by the Free State of Bavaria and/or its municipalities. Hence, State resources are involved.
- (37) The scheme results in a selective economic advantage for both the electronic network operators selected in the tendering procedure and for third parties who gain wholesale access to the subsidised network and can consequently offer their services on conditions not otherwise available on the market.
- (38) Finally, the measure is liable to distort competition. At network operator level, state support may deter other operators in the region from setting up or developing their own networks under commercial conditions. The state support may also encourage local undertakings to take advantage of services offered in the subsidised network rather than more expensive market solutions. In so far as the intervention is (at least potentially) 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. Therefore this support is also likely to affect trade between Member States.
- (39) 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 in the notification.

## VI. COMPATIBILITY ASSESSMENT

- (40) The Commission has assessed the compatibility of the scheme according to Article 107(3)(c) of the TFEU and in the light of the *Community Guidelines for the application of State aid rules in relation to rapid deployment of broadband networks*<sup>13</sup> (the "Broadband Guidelines") which contain a detailed interpretation of Article 107(3)(c) of the TFEU for this kind of state aid.
- (41) When assessing whether an aid measure can be deemed compatible with the internal market, the Commission balances the positive impact of the aid measure in reaching an

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<sup>13</sup> OJ C 235, 30.9.2009, p.7.

objective of common interest against its potential negative side effects, such as distortions of trade and competition.

- (42) In applying this balancing test, the Commission will assess the following questions:
- 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:
    1. Is the aid measure an appropriate instrument, *i.e.* are there other, better placed instruments?
    2. Is there an incentive effect, *i.e.* does the aid change the behaviour of firms?
    3. 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?

#### **6.1 The aim of the aid is in line with Community policy**

- (43) In its Europe 2020 strategy<sup>14</sup> the Commission defined the Flagship Initiative "A Digital Agenda for Europe", which has the "aim to deliver sustainable economic and social benefits from a Digital Single Market based on fast and ultra fast internet and interoperable applications, with broadband access for all by 2013, access for all to much higher internet speeds (30 Mbps or above) by 2020, and 50% or more of European households subscribing to internet connections above 100 Mbps." In pursuing this aim, "at EU level, the Commission will work ...to facilitate the use of the EU's structural funds in pursuit of this agenda", and "at national level, Member States will need ... to draw up operational high speed internet strategies, and target public funding, including structural funds, on areas not fully served by private investments." Key Action 8 of the Digital Agenda calls Member States "to use public financing in line with EU competition and State aid rules" in order to meet the coverage, speed and take-up targets.
- (44) A well targeted State intervention in the broadband field contributes to bridge the '*digital divide*' that sets apart areas or regions within a country where affordable and competitive broadband services are on offer and areas where such services are not. The notified measure addresses a market failure as it targets only so called "NGA white" spots/areas in the sense of paragraph 68 of the Broadband Guidelines (see recital (9)), where very high speed broadband is currently not available and where there are no plans by private investors to roll out such infrastructure in the near future. By promoting the development of NGA networks with download speeds of at least 50 Mbit/s in such areas, the measure will contribute greatly to achieve the objectives of the Digital Agenda.

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<sup>14</sup> EUROPE 2020 - A strategy for smart, sustainable and inclusive growth, COM(2010) 2020, 3.3.2010, page 12.

## 6.2 Well-designed aid

### *Aid is the appropriate instrument*

- (45) When broadband coverage is considered insufficient, state intervention may be necessary. A first question to be asked is whether state aid is an appropriate policy instrument to address the problem or whether there are alternative, better-placed instruments. Alternative instruments, such as demand side measures could consist of grants or tax incentives to end users. However, in the situation currently under assessment, the efforts from alternative instruments, including *ex ante* regulation do not solve the problems related to the lack of supply (non-existence of infrastructure) of high speed broadband in the targeted areas and would fail to deliver the wider economic benefits of a widespread next generation broadband network. The German authorities see no alternative but to grant public aid to the deployment of NGA broadband networks in the targeted areas of the Free State of Bavaria. Furthermore, for traditional grey/black areas, it is to be established that there are no less distortive ways (including *ex ante* regulation) to meet actual and forecasted demand before any aid can be granted (see recitals (15)-(16)).
- (46) The Commission also recognizes that without further public intervention, it would seem impossible to prevent the emergence of a new "*digital divide*" between urban and more rural areas, which could lead to the economic and social exclusion of the local citizens and 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*

- (47) 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 be undertaken within the same timeframe without any State aid. The scheme ensures that aid can only be provided if it is established that in the targeted areas no comparable investment would take place without public funding within three years (see recitals (11) to (16)). Hence the investment would not be made within the same timeframe without the aid, which thus produces a change in the investment decisions of the operators.

### *Proportionality*

- (48) Germany has designed the measure in such a way as to minimise the State aid involved and potential distortions of competition arising from the measure. In this respect, the Commission notes the following positive elements in the design of the measure (paragraph 51 of the Broadband Guidelines):
- (a) *Detailed mapping and coverage analysis, consultation with stakeholders:* as described in recitals (10) to (16), municipalities must prove their thorough analysis of the existing broadband infrastructures (as well as investment plans for the next three years and past investments in broadband infrastructure) in order to identify the areas where public intervention is necessary. This analysis and its results must be based on a public consultation involving all stakeholders and are published on a central online portal, ensuring a high degree of transparency. Therefore it will be ensured that public funds will be used only in (NGA white) areas/spots where it is necessary because no

interest for commercial NGA deployment is present. This will limit the possibility of crowding out private investments and distorting competition vis-à-vis existing operators to a minimum.

- (b) *Open tender process*: as described in recitals (17) to (20), the network operator is selected by way of an open, transparent and non-discriminatory selection procedure in full compliance with German and European public procurement rules. All notices regarding selection procedures under the measure are moreover published on a central online portal, thus allowing all potential bidders to be easily aware of all on-going projects.
- (c) *Most economically advantageous offer*: On the basis of predefined and published technical specifications, the network operator requesting the lowest aid amount is in principle to be selected (see recital (20)).
- (d) *Technology neutrality*: The tender documents must be technology and provider neutral, leaving it to commercial operators to come up with the most appropriate technological solutions (see recital (18)).
- (e) *Use of existing infrastructure*: as explained in recital (22), the municipality will encourage bidders to have recourse to existing infrastructure by publishing in the tender notice any known infrastructure that can be used for the project and any work that it may intend to perform itself. Unnecessary and wasteful duplication of resources should in this way be avoided and the profitability gap (and hence the funding) should thus be minimised.
- (f) *Wholesale access*: the selected operator must ensure full and effective unbundling and provide full open access to the subsidised network (including but not limited to access to ducts, dark fibre, street cabinets, and bit-stream and unbundled access to fibre) on equal and non-discriminatory terms for at least 7 years (see recitals (18) and (23)-(24)). If at the end of the 7 years period, the operator of the infrastructure in question is designated as having significant market power in the market concerned, the access obligation may be extended. Furthermore, full access, without limitation in time, is always to be guaranteed to any new passive infrastructure elements.
- (g) *price benchmarking*: Access wholesale prices are to be based on the average wholesale prices which prevail in other, more competitive, parts of the country for the same or comparable access services or on the price set or approved by the Bundesnetzagentur for the same or comparable access services. In case of disputes between the network operator and access seekers and where the price is not regulated, the municipality sets the price at the level suggested by an independent expert appointed in consultation with the licensing authority. Also the Bundesnetzagentur must be consulted with the objective to keep these prices at a reasonable and non-discriminatory level (see recitals (18)(18) and (25)).
- (h) *Monitoring and clawback provision*: All milestones of the project are documented and published on a central online portal. Moreover, before any aid can be granted under the measure, the municipality must in principle submit documents to the licensing authority establishing that the conditions for the grant are fulfilled. The licensing authority, the Bavarian Supreme Court of Auditors and, in case the municipality finances the aid alone, the Landratsamt, have moreover the right to

verify that all conditions of the measure are respected. For projects with funding of more than EUR 10 million, the municipality moreover verifies, upon expiry of the earmarking term (7 years) whether the demand for Broadband services in the target area concerned exceeds the demand as estimated at the time of the tender submission. If the actual demand exceeds this estimation by more than 30% and there has been no equivalent retail price reduction, then this surplus generated through the operation of the subsidized network must be reimbursed. The municipality verifies the clawback mechanism in principle under supervision of the licensing authority. To that effect, the network operator must submit to the municipality, upon expiry of the earmarking term, a calculation with a similar structure to the calculation used in its tender offer (see recitals (32) to (33) and (18)).

*Special conditions for NGA deployment*

- (49) Germany will respect the conditions of paragraph 73 of the Broadband Guidelines for NGA white areas, where one basic broadband network already exists (traditional grey area). Indeed, support for broadband deployment/upgrading is only envisaged where existing services and services envisaged to be provided over the next 3 years are not capable to meet current and forecasted demand for enhanced services, as documented by the demand survey and market consultation, and where there are no less distortive means, such as ex ante regulation, to meet the current and forecasted demand (see recitals (10) to (15)).
- (50) Concerning NGA white areas which are black in terms of traditional basic broadband provision, the measure moreover respects paragraphs 77, 78 and 75 of the Broadband Guidelines. According to **paragraph 77**, in traditional black areas, existing network operators should in principle have the incentives to upgrade their current traditional broadband networks to very fast NGA networks without state funding. In accordance with **paragraph 78** of the Broadband guidelines, the measure therefore allows state funding in such areas only in case municipalities show, in a transparent way, that existing basic broadband operators do not plan to invest in NGA networks in the coming three years. For this purpose, the municipality must conduct a proper consultation of all stakeholders and ask about their investment plans for the next three years. Existing operators will be contacted individually in writing to establish their investment plans. The replies will be documented. Also the need/demand for the services concerned will be established and support can be granted only if no investments that would cover this documented need are planned over the next three years (see recitals (10) to (16)). Furthermore, for traditional black areas, the municipality must also establish that the past investments carried out by the existing operators to upgrade the network within the last three years have not been sufficient to meet the demand. Existing operators will be contacted in writing about the modernisation measures undertaken by them in the last three years. That way the municipality will ascertain that the statement of the operator not to upgrade in the future is credible and does not contradict its past investment behaviour. The results of this (individual) consultation are equally published on the central online portal (see also recital (16)).
- (51) For traditional black areas, the conditions of **paragraph 75** of the Guidelines also have to be fulfilled. The conditions, which were originally conceived for NGA support in grey

NGA areas, in which an NGA infrastructure already exists, need partial adaptation for a situation in which there is a complete lack of such NGA infrastructure and the support takes place in black basic broadband areas<sup>15</sup>:

- (52) Demand for new services: the measure requires the municipality to carry out a survey to establish that the documented need of users and businesses in that area justifies a NGA investment (see recitals (10) to (16)).
- (53) The non-availability of effective network access: ex ante regulation can normally not overcome the lack of NGA investment. However, the question arises whether a NGA upgrade could be achieved by access to existing infrastructure. For traditional grey and black areas, the measure provides that the municipality must establish that there are no less distortive ways (including ex ante regulation) to meet actual and forecasted demand for NGA services. The municipality must document this assessment and consult the Bundesnetzagentur on whether and how the distortive effect of the measure can be reduced by ex ante regulation. This analysis and opinion are moreover published on the central online portal (see recital (15)).
- (54) Entry barriers: within the market consultation, the municipality must also document that high entry barriers exist for NGA coverage. The authority can in particular demonstrate the existence of geographic particularities which preclude potential entry by NGA network investors. The authority could also provide a calculation which demonstrates that a commercial investment without State support is not profitable (see also recital (16)).
- (55) Ex post monitoring: Germany further agreed to a detailed ex post monitoring on all cases supported under the measure on a two-yearly basis, including at least information (for each project under the measure) on selected bids, aid amount and intensity, date when the network is put into use, technology chosen, wholesale access products and prices, number of access seekers and service providers on the network, the number of houses passed and the take-up rates.
- (56) For projects envisaged in NGA white, but traditional grey or black areas, it will moreover be warranted that the conditions of **paragraph 79** of the Broadband Guidelines are complied with: It will thus be ensured that for a period of at least seven years the selected network operator will offer effective and full access (including access to ducts, dark fibre, street cabinets, and bitstream and unbundled access to fibre) to the subsidized network; access to new passive infrastructure elements must be granted without limitation in time; and the Bundesnetzagentur will be consulted on each project (see recitals (23)-(24)).
- (57) Regarding the involvement of the Bundesnetzagentur in accordance with paragraph 79, second dash, the Bundesnetzagentur has moreover been consulted on the measure and had no objections. Further, the Bundesnetzagentur will continue to regulate ex ante or monitor very closely the competitive conditions of the overall broadband market and impose, where necessary, regulatory remedies. It should be noted that this does not only apply to firms with significant market power, but that the German telecommunications law also

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<sup>15</sup> See also State aid SA.32309 (2011/N) – Germany – Amendment of the Federal framework programme on duct support (case N 53/2010), recital 35 et seq.

foresees possibilities for the German regulator to intervene for companies without such significant market power.

- (58) In addition, the Bundesnetzagentur will be informed in advance about the contract essentials of the chosen operator and the municipality and thus has a possibility to react on subjects of open access. It is also consulted on the wholesale access prices in case of conflicts. These wholesale access prices are moreover published on the central online portal as soon as they are determined (see recital (18)). Finally, the Bundesnetzagentur must also be consulted on whether and how distortive effects of the aid can be reduced by ex ante regulation (see recital (15)).

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

- (59) The Commission concludes that the notified measure will offset a geographical and commercial handicap and is objectively justified to address the lack of availability of high speed broadband services in the targeted areas.
- (60) In view of the characteristics of the project and of the safeguards applied, the overall impact on competition is deemed to be positive. The provision of NGA services by upgrading/deploying infrastructure has a pro-competitive impact, as it allows several network operators to use the subsidized infrastructure and compete. Where a broadband network already exists, the "step change" condition of the measure (see recital (9)) ensures that as a result of the public intervention (i) the selected bidder makes significant new investments in the existing broadband networks and (ii) the subsidized infrastructure brings about significant new capabilities in terms of broadband service availability and capacity. This "step change" condition also ensures that public intervention does not crowd out comparable private investments, as the subsidized network must provide significantly better broadband quality and availability (faster, reliable download speeds) than existing operators are able to provide in a near future of three years (see recital (11)).
- (61) The increase in network capacity is expected to stimulate market entry by service providers and the provision of a larger variety of services. Access of competing operators is ensured by requiring open access to the subsidised network on equal and non-discriminatory terms for at least 7 years. On the effect on trade, there does not appear to be any significant negative spill-over for other Member States. Accordingly, the measure is designed in a way that does not distort competition or adversely affect trading conditions to an extent contrary to the common interest measure and is in line with the objectives of Article 107(3)(c) TFEU.

### **6.4 Conclusion**

- (62) The Commission concludes that the measure notified by Germany meets the compatibility criteria set out in the Broadband Guidelines and is thus compatible with Article 107(3)(c) TFEU.

## VII. DECISION

- (63) The Commission has accordingly decided that the aid measure "*Next generation network for commercial and accumulation areas in Bavaria*" is compatible with the TFEU, in accordance with Article 107 (3)(c) TFEU.
- (64) The Commission would remind Germany of the requirement to submit to it annual reports on the application of the aid measure and to inform it pursuant to Article 108(3) TFEU of all plans to amend/extend this measure. In view of the duration of the measure, the Commission also draws Germany's attention to any future revisions of the Broadband Guidelines, which might make appropriate changes to the measure necessary.
- (65) 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/competition/elojade/isef/index.cfm>.
- (66) 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  
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Rue Joseph II. 70.  
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Yours faithfully,  
For the Commission

*Joaquín ALMUNIA*  
Vice-President