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Subject: State aid N 153/2009 – Germany
Amendment of the State aid broadband scheme N266/2008

Sir,

I. SUMMARY

- (1) I am pleased to be able to inform you that the European Commission has assessed the "*Amendment of the State aid broadband scheme N266/2008*" (hereafter: "the measure") and decided not to raise objections as the State aid contained therein is compatible with Article 87(3)(c) of the EC Treaty.

II. PROCEDURE AND CONTEXT

- (2) Following pre-notification discussions, by letter registered on 16 March 2009, the German authorities notified amendments concerning the measure of "*N266/2008 - Broadband in rural areas of Bayern, Germany*", which was endorsed by the Commission under the State aid rules on 05 November 2008.¹

III. AMENDMENTS OF THE EXISTING MEASURE

- (3) The primary objective of the original scheme is to support the extension of adequate broadband coverage in those geographic areas of *Freistaat Bayern*

¹ OJ C12/2009, 17.01.2009, p. 2.

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where no such services are currently available² and where there are no plans for coverage on commercial terms in the near future.

- (4) Based on experience with the scheme since its entering into force and due to the additional federal funding available for broadband support in *Freistaat Bayern* within the framework of the German recovery packages³, the Bavarian authorities notified amendments to the existing aid scheme.
- (5) In particular, the Bavarian authorities notified the following modification plans:

1. Increase of maximum aid amount per single project

- (6) The original measure foresaw maximum aid amounts of €200.000 per single project depending on the outcome of the local selection procedures.
- (7) The Bavarian authorities argue that in most cases the originally foreseen €200.000 would be sufficient to provide incentives for private operators to provide adequate services. However, in case of several municipalities that are situated to a large distance from existing telecommunication infrastructures or typically for municipalities where several districts are not covered with adequate broadband services, larger aid amounts would be necessary in order to overcome the digital divide.
- (8) Therefore the Bavarian authorities propose to increase the maximum aid amount per single project to €500.000 that can be granted under the current scheme. Any project that might require public funding of more than €500.000 would be subject to an individual State aid notification.
- (9) The selected operator will have to provide wholesale access to the subsidised infrastructure to all electronic communications operators on equal and non-discriminatory conditions that will enable to strengthen choice and competition in the areas concerned by the measure⁴.

2. Increase of the total budget

- (10) The original measure estimated the overall budget of the scheme around €20 million: approximately €10 million financed from the budget of *Freistaat Bayern* and additional €10 million was expected from the respective municipalities.
- (11) In light of the financial crisis and taking into account that investments to broadband networks are considered as an important element of the German

² The Bavarian authorities consider inadequate broadband coverage if broadband services offered for residential users do not reach 1 Mbps download speeds – or if a well-defined requirement for certain undertakings are not available (for instance symmetrical broadband access).

³ More details about the German recovery packages are available at <http://www.konjunkturpaket.de/Webs/KP/DE/Homepage/home.html>.

⁴ In line with the original decision, in some rare and exceptional cases, the German authorities consider possible that projects are funded when no wholesale access is provided due to technical restrictions or cost reasons (in case this would make total investment costs considerably more expensive, by at least 50%), but only if aid amount is lower than €200.000.

recovery packages⁵, additional €18.75 million from federal government resources and additional €1 million from *Freistaat Bayern* resources will be available for broadband deployment. Calculating with approximately 30% participation from the municipalities, the Bavarian authorities estimate that the overall aid amount would raise to €42.5 until 31 December 2010.

3. Change of the funding instruments

- (12) The original measure foresaw that the amount of public support for each project will be granted from municipal funding and from resources of *Freistaat Bayern* with the following proportion:

Freistaat Bayern	Municipality	Total
Max. 50 %	Min. 50 %	100 %

- (13) The Bavarian authorities notified a change in the proportions of available public funding: non-municipal public resources can be used up to 70% of the overall public funding per single project. Any aid will be still limited to the identified "*profitability gap*"⁶.

Freistaat Bayern and federal resources	Municipality	Total
Max. 70 %	Min. 30 %	100 %

4. Procedural simplifications

- (14) The original measure foresees a three-step process for justifying the need for public support and for selecting the operator to provide adequate broadband services. According to the original measure, first, the granting authorities have to prove the absence of adequate broadband offers in the area and prove the need for broadband services. Second, by consulting market operators the granting authorities have to prove that there is no commercial interest to provide such services on commercial terms. Third, in case there is no other solution than public support, the municipalities can publish the envisaged support plans on the dedicated website of the Bavarian authorities (www.breitband.bayern.de) together with a publication in the official local bulletins and initiate the selection procedure.
- (15) Based on their experiences with the operation of the scheme and to provide short term stimulus for the local economy, the Bavarian authorities consider that the effectiveness of the scheme could be improved by introducing certain procedural simplifications to the above-described process. To this end, following the assessment of inadequate broadband offers in an area, they plan to launch an integrated open consultation and selection process. This integrated process would on the one hand allow consulting all potentially interested operators on their willingness to provide the services on a

⁵ See also footnote 3.

⁶ The difference in investment costs and profitability threshold between providing broadband services in rural areas compared to urban areas – that is estimated by the tenderers during the selection procedure.

commercial basis. The same way as in the initial scheme, in case an electronic communication operator shows interest to provide adequate broadband coverage on market terms during this consultation, no state aid can be granted. On the other hand, in case there is no such operator, the integrated process would also allow selecting the operator which would undertake the provision of the service on the most advantageous terms.

- (16) In addition, the Bavarian authorities also intend to introduce a change in the means of publication for the integrated consultation and selection procedure. In view of the dedicated online portal of Bavaria, www.breitband.bayern.de which is widely known and used by interested parties, they consider publication of the relevant information in the official local bulletin is no longer necessary to ensure transparency. All the necessary steps and procedures will continue to be published on the dedicated website.

IV. ASSESSMENT OF THE MEASURE

IV.1. Presence of aid

- (17) As explained in the decision concerning the original scheme⁷, the measure will be financed by state resources, namely from resources of the municipalities, the Land and the federal government. It 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 offer their services via wholesale access to the subsidized network. The measure has the potential to distort competition by enabling local undertakings to subscribe to the services offered via the subsidized network instead of more expensive market-based solutions. Insofar as the intervention is liable to affect providers of electronic communications services from other Member States, the measure has an effect on trade.
- (18) Therefore, the Commission considers that the scheme constitutes State aid within the meaning of Article 87 (1) of the EC Treaty.

IV.2. Compatibility

- (19) Although some of the characteristics of the measure will be changed as explained in detail in chapter III, according to the notification of the German authorities, all other aspects of the original scheme as defined in Commission decision of N266/2008⁸ will remain unchanged.
- (20) Concerning the procedural simplifications⁹, the Commission has highlighted in its decisions¹⁰ that market analysis and consultation with existing electronic communication operators are essential pre-requisites for a state aid approval. In particular, the market analysis provides evidence for the necessity of the measure, and supports the proportionality of the state intervention by clearly

⁷ For reference, see footnote 1.

⁸ For reference, see footnote 1.

⁹ See chapter of "4. Procedural simplification".

¹⁰ See for instance Commission decision in cases N14/2008 *Broadband in Scotland — Extending Broadband Reach*, OJ C/150/2008, 17.06.2008, p.3. or N 508 / 2008 - *Provision of Remote Broadband Services in Northern Ireland*, OJ C/18/2009, 21.01.2009, p2.

identifying the targeted areas requiring public support. Consultation with existing operators allows the granting authorities to gather information on the investments plans of the electronic communication operators. Properly conducted market research and consultation with operators provides evidence for the Commission that any potential distortion of competition vis-à-vis existing operators arising due to the aid measure will be limited to the minimum possible. The amendments notified by the German authorities maintain all the necessary elements which provide safeguards that the aid will only target not adequately served areas and would not crowd out investments of existing operators. During the integrated mechanism when granting authorities consult with existing operators, if any operator indicates that it is willing to provide adequate broadband services on market terms, the selection procedure will be cancelled. Furthermore, State aid is granted through an open tender procedure awarded to the offer with the lowest aid amount, therefore aid is kept to the minimum possible. Hence the mere acceleration of the procedure resulting from the new integrated mechanism described in Section (15) above is in line with the European interest to support fast recovery of the European economies¹¹. Under these special circumstances and taking into account the measure is limited in time until 2010, the Commission can agree to the envisaged change in the consultation procedure.

- (21) Concerning the increase of aid per single project and increase in the total budget¹², 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 (*inter alia*, besides the already mentioned market analysis and consultation with market operators, the aid has to be awarded through open and transparent selection procedures selecting the offer with the lowest aid amount; the measure is technology neutral; the selected operator has to provide an open wholesale access to third party operators¹³, minimising of the price distortions and monitoring is ensured).
- (22) The notified changes concerning the proportion of the funding instruments¹⁴ does not affect the State aid assessment – any public funding that constitutes State aid within the meaning of Article 87 of the EC Treaty has to be compatible with the State aid rules.
- (23) Consequently, for the same reasons as explained in the decision of 5 November 2008 concerning the original scheme of N 266/2008, the amended scheme would continue to be considered to be compatible with Article 87(3)(c) of the EC Treaty.

¹¹ See for instance Communication from the Commission to the European Council: A European Economic Recovery Plan. Brussels, 26.11.2008 COM(2008) 800 final.

¹² See Chapters "1. Increase of maximum aid amount per single project" and "2. Increase of the total budget".

¹³ See also footnote 4.

¹⁴ See "3. Change of the funding instruments".

V. DECISION

- (24) On the basis of the foregoing assessment, the Commission has accordingly decided that the "*Amendment of the State aid broadband scheme N266/2008*" is compatible with the EC Treaty.
- (25) The German authorities are reminded that, pursuant to Article 88(3) of the EC Treaty, they are obliged to inform the Commission of any plan to extend or amend the measure.
- (26) 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/index.htm.

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

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Directorate-General for Competition
State Aid Greffe
Rue de Spa 3
B-1049 Brussels
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Yours faithfully,

For the Commission

Neelie KROES
Member of the Commission