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Subject: State aid N 237/2008 – Germany
Broadband support in Niedersachsen

Sir,

I. SUMMARY

- (1) I am pleased to be able to inform you that the European Commission has assessed the measure "*Broadband support in Niedersachsen*" (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

- (2) By letter registered on 13 May 2008, pursuant to Article 88 (3) of the EC Treaty, the German authorities notified the above mentioned measure to the Commission. By letter registered on 9 July 2008, the Commission requested additional information on the proposed measure. The German authorities submitted the answers to the Commission's request of information by letters registered on 25 July, 20 August and 6 October 2008.

III. DESCRIPTION OF THE MEASURE

- (3) **Objective:** The objective of this measure is to support investments necessary to ensure access to affordable broadband services in those geographic locations of *Niedersachsen* where no such services are currently available and where there are no plans for coverage in the near future. The scheme aims at *inter alia* reducing the "*digital divide*" between rural and urban

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areas¹, promote broadband usage in currently underserved areas and stimulate economic growth and job creation in rural areas of *Niedersachsen*.

- (4) **Legal basis:** The notified measure is based on the "*Richtlinie über die Gewährung von Zuwendungen zur Förderung breitbandiger elektronischer Kommunikation (Breitbandförderung Niedersachsen)*"; the "*Haushaltsgesetze des Landes Niedersachsen*"; the "*Landeshaushaltsordnung (LHO); Verwaltungsvorschriften zu § 44 LHO*"; the "*Allgemeine Nebenbestimmungen zu § 44 LHO*"; the "*Operationelles EFRE-Programm Regionale Wettbewerbsfähigkeit und Beschäftigung 2007-2013 des Landes Niedersachsen*". Like the other German *Länder*², based on the objectives, rules and conditions of the federal level broadband scheme³, the authorities of *Niedersachsen* have designed a broadband measure that also takes into account the local specificities. The directive that stipulates the general rules and conditions for granting aid entitled as "*Richtlinie über die Gewährung von Zuwendungen zur Förderung breitbandiger elektronischer Kommunikation (Breitbandförderung Niedersachsen)*" and will be adopted after the approval by the Commission. The scheme will be implemented by single projects and the support measures will follow the conditions set out in the scheme.
- (5) **Target areas:** The measure concerns geographic locations in *Niedersachsen* where no or not affordable broadband services (apart from expensive satellite or leased line solutions) are available to citizens and businesses and there are no plans of private operators to undertake such investments in the near future.
- (6) **Budget:** The aid takes the form of grants. The total aid amount will be around €16.4 million, out of which €8.3 million will be co-funded by EU structural funds and €8.1 million from the municipalities.
- (7) **Aid intensity and maximum aid amount:** The aid intensity of each single project will depend on the outcome of the local selection procedures. As foreseen in the federal level broadband scheme⁴, the basis of the grant will not be the total cost of the project, but the so-called "*profitability gap*", i.e. the difference in investment costs and profitability threshold between providing broadband services in rural areas compared to urban areas⁵ and the measure will finance this "*profitability gap*". The value of the "*profitability gap*" for each project will be calculated and submitted by the tenderers to the

¹ Relative to urban areas, broadband access in rural regions is more limited because of low density of population and remoteness. According to *13th Report on the Implementation of the Telecommunications Regulatory Package – 2007*, COM(2008), the digital divide between rural and urban areas is currently one of the highest in Germany among the EU Member States.

² See for instance *Baden-Württemberg's "Eckpunkte für die Verwendung öffentlicher Mittel zur flächendeckenden Versorgung des Ländlichen Raums mit Breitbandanschlüssen in Baden-Württemberg"*. The Commission endorsed the broadband measure in the decision of N570/2007 - *Broadband in rural areas of Baden-Württemberg*. OJ C/282/2007, 24.11.2007.

³ Commission decision N115/2008 *Broadband in rural areas of Germany*. OJ C/194/2008 of 31 July 2008.

⁴ For reference, see footnote 3.

⁵ According to the German authorities the "*profitability gap*" derives from the diseconomies of establishing broadband networks in rural and remote areas (for instance, due to low population densities and high fixed costs of network deployment). As a consequence, electronic communication operators do not provide widely available broadband services at affordable prices in such areas.

granting authority in the course of the tender procedure. The German authorities foresee that on average, an aid amount of €50.000 to €200.000 will be necessary to cover this gap. Furthermore, the maximum funding from EU structural funds will be limited to €100.000 per project.

- (8) According to the German authorities, in some cases where several nearby municipalities do not have access to affordable broadband services, it is worth grouping (i.e. "clustering") projects eligible for public funding. This will enable tenderers to offer more efficient solutions, will reduce the overall aid amounts, and will more likely result in a sustainable solution. In these cases, higher aid amounts will be necessary as they are providing access to several municipalities. According to the preliminary estimates of the German authorities, the aid amount in these cases will be maximum €600.000 and aid intensities will be typically in the range of 30-50%.
- (9) **Funding instruments:** The amount of public support for each of the projects will be co-financed by municipal and EU structural funds, namely by the European Regional Development Funds (ERDF)⁶.
- (10) In regions not covered by the Convergence objective⁷, maximum 50% of the aid amount will be co-financed by the ERDF contribution.

ERDF	Municipality	Total
Max. 50 %	Min. 50 %	100 %

- (11) In regions covered by the Convergence objective, maximum 75% of the aid amount will be co-financed by the ERDF contribution.

ERDF	Municipality	Total
Max. 75 %	Min. 25 %	100 %

- (12) The German authorities have confirmed that there is no cumulation possible with other EU funds or with other State aid broadband measures, including the federal level broadband scheme⁸.
- (13) **The selection procedure:** As foreseen in the other German broadband schemes, as a first step, the municipalities will have to prove the need for broadband services as well as the absence or insufficient offer in the area. To this purpose the municipality will carry out a market analysis⁹ and consult

⁶ In line with Council Regulation (EC) No 1083/2006 of 11 July 2006 laying down general provisions on the European Regional Development Fund, the European Social Fund and the Cohesion Fund and repealing Regulation (EC) No 1260/1999 OJ L 210, 31.7.2006; Commission Regulation (EC) No 1828/2006 of 8 December 2006 setting out rules for the implementation of Council Regulation (EC) No 1083/2006 OJ L 371/1, 27.12.2006; Regulation (EC) No 1080/2006 of the European Parliament and of the Council of 5 July 2006 on the European Regional Development Fund and repealing Regulation (EC) No 1783/1999, OJ L 210/1, 31.7.2006.

⁷ The Convergence Objective covers the least developed regions and Member States in accordance with article 5 of Council Regulation (EC) No 1083/2006. For reference see also footnote 6.

⁸ For reference see footnote 3.

⁹ Municipalities are encouraged to use the existing broadband mapping initiatives, such as the "Breitband Atlas" initiated by the Federal Ministry of Economics and Technology (available at: <http://www.zukunft-breitband.de/BBA/Navigation/breitbandatlas.html>) as the initial step to identify the targeted areas.

operators of electronic communication networks, asking them whether they would be ready to provide broadband without public support. As a next step, municipalities will have to confirm if there are other market driven solutions to provide broadband services on their territory. Aid may only be granted if, after such a consultation, there is no sufficient broadband offer provided or expected to be provided by the market in the near future.

- (14) In order to advise municipalities and to facilitate the contacts between municipalities and electronic communication operators, the authorities of *Niedersachsen* will set up a Broadband Competence Centre.
- (15) In case there is no other solution than public support, the municipalities should publish the envisaged support plans in their official gazettes or bulletins and on their websites. The selection procedure will be conducted in a transparent manner and in full compliance with the national procurement rules (*Vergaberecht*). The project will be technology and provider neutral.
- (16) **Award criteria:** The aid will be granted to the bidder with the most economically advantageous offer. For the application of this award criterion, each individual project will be assessed on a pre-defined Scoring Model, which contains a set of sub-criteria organised in three main sections, namely, 1. General Description, 2. Technical planning and 3. Service model¹⁰. All bids will have to reach a minimum required points in each section, and the offer scoring the most points will be considered the most economically advantageous¹¹.
- (17) **Beneficiaries:** The recipients of the aid will be electronic communications operators offering broadband services. Indirect beneficiaries will be third party providers of telecommunication services and business end users in the targeted areas.
- (18) **Pricing:** the retail prices of the broadband services provided by the selected supplier will be established in the course of the selection procedure. However, the retail prices should be similar to those in other, non assisted areas.
- (19) **Technology:** The municipalities will not specify the technology to be used for the deployment of broadband networks in the areas concerned and will conduct the selection procedures on a technology and service provide neutral basis.
- (20) **Wholesale offer:** The tender will oblige the selected operator to provide wholesale access to the subsidised infrastructure to all electronic communications operators on equal and non-discriminatory conditions that

¹⁰ The authorities of *Niedersachsen* are intending to seek future proof solutions for the broadband services subject to the measure by awarding higher points in the course of the tender procedure to operators offering for instance better scale-ability of the network, better fault management or supports value added services.

¹¹ Similarly to the other broadband measures approved under the State aid rules (N115/2008 and N570/2007), in a few exceptional cases, when the call for tenders remains unsuccessful or the aid amount required by the tenderer is significantly higher, the municipalities could initiate the investment themselves. In such cases municipalities will not engage in retail broadband service provision but will grant wholesale access to third party operator(s) in an open, non-discriminatory procedure afterwards.

will enable them to compete with the selected operators, thereby strengthening choice and competition in the areas concerned by the measure.

- (21) **Duration of the measure:** The scheme runs from 2008 (after the approval of the Commission) until 31 December 2015.
- (22) **Monitoring:** each individual project will be examined on a regular basis by the granting authorities in accordance to the National Household Regulation (i.e. *Haushaltsvorschriften*). In parallel, as the projects are also co-financed by the ERDF, they will also be evaluated and monitored in line with the applicable regulations on Structural Funds¹².

IV. ASSESSMENT OF THE MEASURE: PRESENCE OF AID

De minimis aid

- (23) According to the *de minimis* Regulation¹³, state funding of less than €200,000 over a period of 3 years in favour of one company is deemed to have no substantial effect on competition and trade between Member States, and therefore does not constitute state aid. However, in the measure at hand, certain service providers could carry out several local projects and could receive aid in excess of €200.000 over 3 years. Also, the German authorities have not argued that the notified aid falls under the "*de minimis*" Regulation.
- (24) Hence, it is necessary to assess whether the measure entails State aid and whether this aid can be deemed compatible with the EC Treaty.

Presence of aid

- (25) According to Article 87 (1) of the EC Treaty, "*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 common 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 intra-Community trade.

IV.1. State resources

- (26) The measure will be co-financed by resources of the municipalities and by the ERDF. Hence State resources are involved.

¹² For reference, see footnote 6. The monitoring foresees, *inter alia*, the following indicators: number of projects supported, theoretically served areas, expected number of new broadband connections, expected penetration rate, etc. and also includes the auditing on the expenditure of the funds and regular examination whether the network is functional. If the selected operator fails to carry out the service in accordance with the provisions of the contract, the granting authority would be in the position to recover the aid.

¹³ Commission Regulation (EC) No 1998/2006 of 15 December 2006 on the application of Articles 87 and 88 of the Treaty to *de minimis* aid, Official Journal L 379 of 28.12.2006.

IV.2. Economic advantage

- (27) *Selected operators*: The selected operators will receive financial support which will enable them to enter the market and provide broadband services on conditions not otherwise available on the market. The selected operators will also be in ownership of the networks as well as other tangible and intangible assets acquired with State funds (for instance equipment, customer relations) even after the lifetime of the projects and hence enjoy continuing benefits partly funded with State resources after the end of the project. In view of the above, it is clear that an economic advantage will be granted to the selected operators.
- (28) *Third party providers*: In the areas covered by the project, there is no or limited broadband connection and therefore no or limited broadband wholesale offer, preventing market entry of third party service providers which do not have their own infrastructure. Therefore, third party providers of broadband services using wholesale access provided under the measure might also benefit indirectly from the measure at hand.

IV.3. Selectivity and distortion of competition

- (29) The notified measure supports the supply of certain electronic communication services, namely broadband services. The intervention of the State alters the existing market conditions by allowing the provision of broadband services by the selected telecommunication operators and, potentially, third party providers. A number of undertakings are likely to subscribe to the services provided by the selected suppliers instead of more expensive market-based solutions (for instance satellite or leased lines). Therefore, the fact that a new broadband service becomes available at a lower price than existing ones has the effect of distorting competition.
- (30) In addition, while the German authorities decided to intervene precisely in view of the lack of private initiatives in the targeted areas, it cannot be excluded that market initiatives could become viable in some areas in the longer term. By securing this project, the chosen operators will be capable of establishing their business and developing their customer base, enjoying a first mover advantage over prospective competitors.
- (31) The measure is also selective in that it is addressed to undertakings active only in certain regions or in certain markets for electronic communications services. These selectivity elements also induce a potential distortion of competition¹⁴.

IV.4. Effect on trade

- (32) Insofar as the intervention is liable to affect providers of electronic communications services from other Member States, the measure has an effect on trade. The markets for electronic communications services are open to competition between operators and service providers, which generally engage in activities that are subject to trade between Member States. There may also be an effect on trade between the businesses using the broadband

¹⁴ As regards the sectoral specificity, see for instance Judgement of the Court in case C-143/99 *Adria-Wien Pipeline and Wietersdorfer & Peggauer Aementwerke* [2001] ECR I-8365.

services enabled by the measure and their competitors in other Member States.

IV.5. Conclusion

- (33) In view of the above, the Commission considers that the projects covered by the notified measure will grant an economic advantage to the selected operators and possibly to third party operators. The projects are publicly funded, have a potential of distorting competition and have an effect on trade between Member States. Therefore the Commission considers that the funding covered by the scheme involves State aid within the meaning of Article 87 (1) of the EC Treaty.
- (34) Having established that the project involves aid within the meaning of Article 87(1) of the EC Treaty to the selected service providers, third party providers and businesses, it is necessary to consider whether the measure can be found to be compatible with the common market.

V. ASSESSMENT OF THE MEASURE: COMPATIBILITY

- (35) The Commission notes that the project aims to ensure the widespread availability of broadband services in currently unconnected or underserved rural and remote areas of *Niedersachsen*, Germany with no prospect for coverage on commercial terms in the near and medium term and, as such, does not fall under one of the existing frameworks and guidelines.
- (36) It should be noted that although some of the areas covered by the measure could be eligible to receive regional investment aid under the derogation of Article 87(3)(a) or (c), not all of the targeted locations are assisted areas within the meaning of the Regional Aid Guidelines¹⁵.
- (37) The Commission therefore considers that the assessment of the compatibility of the measure with the common market needs to be based directly on Article 87(3)(c) of the EC Treaty¹⁶ which states that:

“aid to facilitate the development of certain economic activities or of certain economic areas, where such aid does not adversely affect trading conditions to an extent contrary to the common interest”

may be considered to be compatible with the common market.

- (38) In order to be compatible under article 87(3)(c), an aid must pursue an objective of common interest in a necessary and proportionate way. In particular, the measure shall be assessed with respect to the following questions:

¹⁵ See "Guidelines on national regional aid for 2007-2013", OJ C 54, 4.3.2006 and Commission decision in case N 459 / 2006 – "German regional aid map 2007-2013" OJ C 295, 5.12.2006.

¹⁶ This approach was also followed by the Commission in other cases, see for instance: State aid decisions for cases N 442/2007 "Aid in favour of broadband in remote areas of Veneto", Italy of 23.10.2007 or N 570/2007 "Broadband in rural areas of Baden-Württemberg", Germany of 23.10.2007 or N 14/2008 "Broadband in Scotland – Extending broadband reach", United Kingdom of 30.04.2008. The public versions of all broadband decisions are available at the following website: http://ec.europa.eu/comm/competition/state_aid/register/ii/.

- (1) Is the aid measure aimed at a well-defined objective of common interest (i.e. does the proposed aid address a market failure or other objective)?
- (2) Is the aid well designed to deliver the objective of common interest? In particular:
 - (a) Is the aid measure an appropriate instrument?
 - (b) Is there an incentive effect, i.e. does the aid change the behaviour of firms?
 - (c) Is the aid measure proportional, i.e. could the same change in behaviour be obtained with less aid?
- (3) Are the distortions of competition and the effect on trade limited, so that the overall balance is positive?

V.1. The support of broadband rollout is in line with the common interest

Community policy

- (39) Analogously to similar public funding measures in support of broadband assessed by the Commission in the past¹⁷, the scheme is clearly in line with Community policies to bring broadband to all Europeans¹⁸. The Commission encourages Member States to put comprehensive national broadband strategies in place¹⁹ and to mobilize all relevant policy instruments to bridge the "*broadband gap*"²⁰. By improving broadband access for citizens and businesses in areas of *Niedersachsen* where these services are not satisfactorily available, the measure helps achieving greater cohesion and is therefore in line with the common interest.

Market failure and cohesion considerations

- (40) Lack of broadband coverage is due, among other factors, to some of the typical economic problems associated with networks industries. In particular, 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, costs increase significantly as population densities drop. Remoteness also plays a role, requiring bridging longer distances in the backhaul and in the last mile. In addition, although equipment costs have fallen as volumes increase, they remain a significant cost and major barrier to roll-out.
- (41) Typically these underserved areas are rural areas and have a low population density²¹ so that commercial providers have no economic incentive to invest in electronic communications networks to provide broadband services. This

¹⁷ See footnote 16.

¹⁸ As outlined, *inter alia*, in the Commission Communication *i2010 – A European Information Society for growth and employment*, COM (2005) 229 of 1 June 2005.

¹⁹ Commission Communication COM(2004) 369 of 12.05.2004, "*Connecting Europe at High Speed – National Broadband Strategies*".

²⁰ See Commission Communication on *Bridging the broadband gap*, COM (2006) 129 of 20.03.2006.

²¹ For instance, according to the German authorities, the average population density in rural areas is 40 inhabitants/km² compared to the average 231 inhabitants/km² in urban areas.

leads to a "*digital divide*" between the areas which have access to affordable broadband services and those that have not. The gap between the broadband coverage in rural areas and the national average is particularly significant in Germany²².

- (42) However, it would be beneficial for the communities concerned if broadband services were available to citizens and businesses. Regional economic development benefits resulting from greater and wider spread broadband deployment include job creation and retention, improved education and health systems. For rural and remote communities, broadband is a crucial element to avoid economic and social exclusion and to provide the opportunity to participate in the knowledge based economy.
- (43) Hence, by providing financial support for the establishment of infrastructure to provide basic wholesale and retail broadband services in such areas of Germany, the authorities pursue genuine cohesion and economic development objectives.

V.2. Well-designed aid

(a) Aid is the appropriate instrument

- (44) The measure at hand is part of an overall strategy of the German authorities to ensure affordable broadband services for all citizens and undertakings in Germany, including *inter alia* regulatory measures and radio spectrum policies. Although instruments like *ex ante* regulation has facilitated broadband deployment in urban and more densely populated areas, it is unlikely to lead to sufficient investments for the provision of broadband services to underserved areas as it presupposes the existence of broadband access infrastructure.
- (45) The measure also foresees (i) a thorough market analysis (ii) consultations with existing electronic communication operators whether they would be willing to provide affordable broadband services in those areas on commercial terms and (iii) encouraging the deployment of broadband services via other market driven solutions²³.
- (46) However, in some situations there is no alternative to granting public funding to overcome the lack of broadband connectivity. In view of these considerations, the Commission concludes that, in the case at hand, public funding for the provision of broadband services is an appropriate instrument to achieve the set objectives.

(b) The aid provides the right incentives to operators

- (47) The measure will enable municipalities to ensure that operators requesting funding will indicate the amount of public funding they consider necessary to carry out the required investment on the basis of the anticipated total

²² In Germany, 12% of the population in rural areas did not have access to DSL broadband services at the end of 2007. IDATE, Broadband Coverage in Europe, 2008 (data as at 31 December 2007), *forthcoming*.

²³ See also para (13).

investment, operating costs revenues and the verified "*profitability gap*"²⁴. The objective of the German authorities in this regard is that the public funding granted provides a direct and appropriate investment incentive limited to the amount required by the selected operators with the most economically advantageous offers to provide broadband services.

(c) Proportionality

- (48) The German authorities have designed the scheme in a way which minimises the State aid involved and potential distortions of competition. In this respect, the Commission notes, the following positive elements in the overall design of the notified measure:
- (a) *Market analysis and consultation of operators*: Before any aid is granted, municipalities have to carry out a market analysis to identify the targeted areas. Municipalities also have to confirm if there are other means than State aid to provide broadband services on their territory – for example by providing access to empty ducts. The municipalities also have to consult operators of electronic communications networks, whether they would be ready to provide broadband services without public support. A subsidy may only be granted if, after such a consultations, there is no broadband offer provided by the market or expected to be provided in the near future at affordable prices²⁵.
 - (b) *Transparency and open selection of projects*: Each municipality shall publish the envisaged measure in its official gazette or bulletin and on its website. The selection of projects shall be conducted in a transparent manner and in full compliance with the national procurement rules (*Vergaberecht*). On the basis of the pre-defined technical specifications, the electronic communication operator requesting with the most economic advantageous offer shall be selected.
 - (c) *Technology neutrality*: The scheme is technologically neutral, i.e. it does not favour a priori any given technology.
 - (d) *Wholesale access*: The selected operators will have to grant wholesale network access to all electronic communications operators on equal and non-discriminatory conditions that will enable third party operators to compete with the selected operators, thereby strengthening choice and competition in the areas concerned by the measure.
 - (e) *Minimising price distortion*: The selected operators will have to offer retail services at prices that are comparable to the average prices in other not supported areas. The German authorities expect that in light of the wholesale access provisions and the increased competition between service providers, retail prices will follow the likely decrease of the market prices in the medium term.

²⁴ See also para (7).

²⁵ See also para (13).

- (f) *Monitoring*: the projects will be examined on a regular basis by the granting authorities in accordance with the "National Household Regulation" and the applicable regulations on structural funds²⁶.

V.3. The distortions of competition and the effect on trade are limited, so that the overall impact of the measure is positive

- (49) 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 broadband services due to the insufficient density of potential and actual subscribers to make delivering broadband services economically viable on a purely market-driven basis. In view of the characteristics of the project and of the safeguards applied by the German authorities, the overall impact on competition is deemed to be positive. On the effect on trade, the Commission does not identify negative spill-overs for other Member States.
- (50) On balance, the Commission concludes that the overall effect of the measure is deemed to be positive. The measure is clearly in line with the objectives of Article 87(3)(c) EC Treaty as it facilitates the development of certain economic activities (retail and, indirectly, wholesale broadband services) in certain remote and rural areas. The intervention is designed in a way that does not distort competition or affect trading conditions to an extent contrary to the common interest.

V.4. Conclusion

- (51) In the light of the above, the Commission has come to the conclusion that the aid involved in the notified measure is compatible with Article 87(3)(c) of the EC Treaty.

VI. DECISION

On the basis of the foregoing assessment, the Commission has accordingly decided that the aid measure "*Broadband support in Niedersachsen*" is compatible with Article 87(3)(c) of the EC Treaty.

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.

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/comm/competition/state_aid/register/ii/.

²⁶ See also para (22) and footnote 6.

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
B-1049 Brussels
Fax No: +32 2 2961242

Yours faithfully,

For the Commission

Neelie KROES
Member of the Commission