



EUROPEAN COMMISSION

Brussels, 20.7.2010

C (2010) 4943 final

PUBLIC VERSION

WORKING LANGUAGE

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

**Subject: State aid N 196/2010 – Estonia
Establishment of a Sustainable Infrastructure Permitting Estonia-wide
Broadband Internet Connection (EstWin project)**

Sir,

I. SUMMARY

- (1) I am pleased to be able to inform you that the European Commission has assessed the measure "*Establishment of a Sustainable Infrastructure Permitting Estonia-wide Broadband Internet Connection (EstWin project)*" (hereafter: "the measure" or "EstWin") and decided not to raise objections as the State aid contained therein is compatible with Article 106 (2) of the TFEU.

II. PROCEDURE

- (2) Following pre-notification discussions, Estonia notified on 20 May 2010 the above mentioned measure to the Commission, pursuant to Article 108 (3) of the TFEU.

III. CONTEXT

- (3) Estonia presents a mixed picture of information society developments. It is strong in the fields of eGovernment and in some of the eBusiness indicators, including enterprises connectivity, but generally weak in fast broadband connections in rural areas and eCommerce.
- (4) Internet connection satisfying at least elementary needs is accessible practically throughout Estonia. Estonian households and enterprises have a broadband penetration rate of 24.6%. 38.9% of the broadband subscriptions have speeds above 2MB/s. But the technology in use lacks the capability to remain in step with the development of services and needs.
- (5) The existing infrastructure in particular in rural areas is not capable for high-speed broadband services. The establishment of next-generation access (NGA) networks and

high-speed broadband services which rely on an optical fibre network is taking up in bigger cities. However, in large parts of Estonia, the establishment of high speed internet connections is not commercially viable for service providers. Because of an estimated low demand, the private operators have so far decided not to invest in these areas in the construction of high speed broadband connections, resulting in a wide "digital divide" between the urban and the peripheral areas.

- (6) Therefore the Estonian Government intends to take State measures for enabling high speed broadband deployment in rural areas. The *Estonian Information Society Strategy 2013* of the Estonian Government contains in point 4.1.1. the action "Expanding Technical Possibilities for Access to Digital Information". The aim to establish a sustainable infrastructure permitting Estonia-wide high speed internet connection is specified more precisely in the objective 4.1.1.1. "Establishment of a Sustainable Infrastructure Permitting Estonia-wide Broadband Internet Connection" – This objective will be implemented by the EstWin project, which has been designed by the Ministry of Economic Affairs and Communications together with the Estonian Association of Information Technology and Telecommunications (ITL) (*Development Vision of Estonia's New Generation Broadband Network and its technical implementation*)¹.

IV. DESCRIPTION OF THE MEASURE

- (7) **Objectives:** Approximately 79% of households are located in towns with more than 10000 inhabitants and in areas with at least one fibre network. These areas cover approximately 40% of the Estonian territory. With 30 residents per km² Estonia is relatively thinly populated. The measure intends to ensure the extension of new generation broadband networks to rural regions and to eliminate the digital gap between the countryside and cities. The objective of EstWin is to achieve a high speed internet backhaul (NGA) network with a data transfer rate of at least 100 Mbit/s, covering the entire territory of Estonia, so that 98% of households, businesses and institutions, which currently are not served and where there are no plans for coverage in the near future (three years), will be located within 1.5 km of the nearest point of connection to the base network.
- (8) The Estonian authorities argue that even with a great effort on regulatory and information measures, it will not be possible to achieve the objective of the wide availability of very high speed internet provision without State aid. Commercial operators often do not have sufficient commercial incentives to upgrade the existing networks, as in particular in less densely populated areas they would not expect to get an adequate return on their investment.
- (9) The Estonian authorities expect that the EstWin Project will help to eliminate the digital division between urban and rural regions, increase social cohesion and contribute to economic growth. The availability of the necessary broadband infrastructure is a key factor for the local communities in attracting businesses, distance working, providing health care services and improving education and public services. It is expected that the creation of a high speed backhaul (i.e. middle-mile) network² in not served areas will reduce the entry barriers (by lowering investment costs) for commercial operators and

¹ ITL, April 2009, <http://www.itl.ee/?op=body&id=89>.

² Backhaul (or middle mile) networks comprise the intermediate links between backbone (core) networks and access (or last mile) networks.

thereby will encourage them to extend their high speed broadband access network coverage in rural areas. Only if there are sufficient speed capacities available on the backhaul part of the network, providers can connect end users with their respective access technologies and provide enhanced broadband services to them.

- (10) The completed network connections must be available on an unlimited basis to all operators active on the Estonian market in order to ensure free competition in providing services to consumers. The network will offer open wholesale access to electronic communication operators who will be able to add their access infrastructures (i.e. the last mile network segment) and deliver broadband services to end-users.
- (11) About 6000 km of transmission connections and about 1400 network connection locations will have to be built. This objective should be realised by 2015. The realisation has been divided into 2 phases.
 - a) Phase I: 2010 and 2011 – building of 2000 km of transmission connections.
 - b) Phase II: 2012-2015 – building of 4000 km of transmission connections. Phase II is not the subject of this notification.
- (12) **Legal basis:** The notified scheme is based on the 2007-2013 Structural Assistance Act, the European Union Common Agricultural Policy Implementation Act, the Estonian Electronic Communications Act (ESS), the Competition Act, the Estonian Information Society Strategy 2013 and its implementation plans, the Implementation Plan for Developing the Economic Environment and its implementing regulation of the Minister of Economic Affairs on the sub measure Terms and Conditions of Developing Information Society, the Rural Development Plan 2007–2013 and its implementing regulation of the Minister of Agriculture (not yet in force), and the Implementation Plan for Developing the Living Environment and its implementing regulation of the Minister of the Interior (not yet in force).
- (13) **Budget, financing instruments and duration:** The estimated overall costs of rolling out the 2000 km of Phase I are estimated at 390 million EEK (24.93 million Euro), the planned aid amount is 350 million EEK (22.36 million Euro). The aid takes the form of grants. Financial means will be obtained from the *Rural Development Plan 2007-2013*, co-financed by the European Agricultural Fund for Rural Development (EAFRD) (100 million EEK), the *Implementation Plan for Developing the Living Environment*, co-financed by the European Regional Development Fund (ERDF) (200 million EEK), and the *Implementation Plan for Developing the Economic Environment*, also co-financed by ERDF (50 million EEK). The Commission reminds Estonia that the EU legislation applicable to the EAFRD and the ERDF has to be complied with.
- (14) Due to the recourse to several funds, the granting of the aid to beneficiaries is managed and implemented, under the same conditions and rules, through three different institutions, the Ministry of Economic Affairs and Communications, the Ministry of Agriculture and the Ministry of Internal Affairs. The ministries co-operate to avoid cumulation of support measures.
- (15) The scheme will start with the approval by the European Commission and is valid until 31.12.2011.

- (16) **Target areas:** Support will only be granted in areas, in which there is currently no NGA backhaul broadband infrastructure available and where such networks are not likely to be built by private investors and be fully operational in the next three years. Accordingly EstWin will be implemented in rural areas. Towns and urban areas with a population of more than 10 000 inhabitants will be excluded from the scope of the project. Furthermore, all areas already covered with backhaul fibre network capable of providing high speed internet services to end-users will not be covered by the EstWin project. Therefore only “white NGA areas” in the sense of point 68 of the Community Guidelines for the application of State aid rules in relation to rapid deployment of broadband networks³ (the Broadband Guidelines) will be eligible.
- (17) **Detailed mapping and coverage analysis, consultation with stakeholders:** The Estonian authorities conducted a detailed mapping and coverage analysis and a thorough public consultation with all stakeholders affected. In order to map the existing networks, information was collected on all operators' optical fibre networks located outside towns with a population of more than 10 000 inhabitants. In addition information on connection points of networks of all operators was collected.
- (18) A public consultation with major stakeholders, in particular telecommunication companies, served to clearly identify which geographic areas will be covered by the supported network. Information on the measure, including the routes of planned optical fibre lines, has been provided to the private operators. The future plans of operators to invest into the extensions of existing fibre networks were collected. The location of inhabitants, existing networks and future investment plans of operators were mapped.
- (19) The Estonian authorities also consulted the Estonian Competition Authority as the national regulatory authority for telecommunication. Local municipal governments were consulted to establish their priorities for the establishment of high speed broadband connections for administration purposes. The Estonian Competition Authority endorsed the EstWin project by letter of 10 June 2009.
- (20) Network plans and maps of finished networks will be publicly available; the transmission infrastructure will be made public once it has been installed.⁴
- (21) **Project design:** Two main fibre backbone networks connect all bigger cities and towns in Estonia. The EstWin fibre network will link the existing backbone networks with the centres of rural areas. The EstWin network is basically an intermediate (backhaul) network between the backbone and the end-user connection. EstWin will not cover the connections between the backhaul network and the end-users (last mile). A connection between the EstWin network and both national fibre backbone networks should be feasible from any part of the EstWin network. For that purpose there will be connection points with both backbones available.
- (22) Only non profit organisations will be owner of the EstWin network. Support is planned only for the creation of passive infrastructure that must be available for multiple operators

³ OJ C 235 of 30.9.2009, p. 7.

⁴ This information will be available on the websites of the Ministry of Economic Affairs and Communications - www.mkm.ee – and the Department of State Information Systems – www.riso.ee.

(ducts and dark fibre). The network owner does not install any data communication equipment. It will only provide wholesale service to electronic communications enterprises on equal conditions and on an open, non-discriminatory basis. It will offer access to the passive level of the network (ducts and fibres) to all operators and will give them access to distribution points to connect to the network, like street cabinets. All operators renting the fibres will be able to use equipment space in such cabinets and install their equipment to these terminals of the network. Electronic communication enterprises can decide on their own which technology they will use (for instance adsl, cable, wireless or mobile networks) to provide connections to their end users. They can also decide which data transfer rates the connections they provide will have and which services they will provide with their connections. The wholesale operator (the owner) of the network will not offer retail services.

- (23) The management of the EstWin network and the provision of wholesale services to the service providers will be carried out by a non-profit legal entity. The construction works (civil works, installation of ducts, dark fibre, etc.) will be carried out by private operators selected by that non-profit legal entity by means of an open tender in line with the relevant national and EU procurement rules. The maintenance and support (network monitoring, repairing breakdowns and other such works) of the EstWin network will be carried out by a private company also selected by means of an open tender in line with the relevant national and EU procurement rules. The support is limited to the construction stage; all further maintenance and operating costs will be covered by the beneficiary. The aid is paid only for eligible costs actually incurred.
- (24) The network will be built over time through single sub-projects each covering one specific area, usually a county, and consisting of 30-60 km of new network. Sub-projects will be realised proceeding from the existing fibre network, to ensure that each new section can immediately be operational for high speed internet use. Financing decisions are made separately for each sub-project. Potential beneficiaries must submit a separate application for each sub-project. The support for designing and building a single sub-project may not exceed 8 million EEK (approximately EUR 500 000). Thus the first stage of the EstWin project will consist of a total of approximately 50 sub-projects.
- (25) ***Choice of the network owner:*** Estonia considers the establishment of a high speed internet infrastructure and the provision of access to this network in areas, where private investors are not intending to provide such services in the near future as being in the public interest. Estonia has chosen to entrust non-profit organisations with the task of building this infrastructure and offering its use to operators as a service of general economic interest within the meaning of Article 106(2) TFEU⁵. Several different options were discussed in Estonia when the EstWin project was designed, including the possibility that the owner and manager of the network could be the State. This option was eventually discarded because it would require creating a public structure taking the responsibility for the construction, development and operation of the network, including bearing the risk. According to the current solution the owner of the network and bearer of the related risks is a non-profit entity which has the sole purpose to set up and manage the

⁵ Thereby it distinguishes from the otherwise comparable solution of a network rollout which has been chosen by Lithuania in case N 183/2009, where the network remains in the ownership of the State and its management is carried out by a public entity.

network. Such non-profit organisations may be founded by local groups of citizens or enterprises, or by groups of telecommunication companies having an interest in the completion of a nation wide NGA network.

- (26) The entrustment of the beneficiaries will take place in a large number of independent award decisions for each single sub-project taken by the three Ministries administering the three sub-measures. Each individual sub-project is checked to ensure that it corresponds to the selection criteria and that all required conditions are fulfilled. The responsibility for the operation of the service of general economic interest will be entrusted to the non-profit entity by an official act in the form of the financial award decision on the respective sub-project.
- (27) The entrustment act will specify the precise nature and the duration of the public service obligation, the territory concerned, the parameters for calculating, controlling and reviewing the compensation, and the arrangements for avoiding and repaying any overcompensation.
- (28) The grant application procedure conducted by the three Ministries in charge of implementing EstWin consists of two stages: a pre-application and a so called full application. The pre-application consists in the selection of eligible beneficiaries and projects subject to availability of funds. The definite approval of the grant follows in stage two, after the expected costs have been eventually established, following a tender procedure for the construction work.
- (29) The initial application process may be on a continuous basis or may be conducted by rounds. The granting authority publishes the commencing of the pre-application process, indicating the aims of grants and the total volume of financing. In case of the continuous application process the pre-application may be submitted until the financial means are exhausted. In the pre-application process by rounds there will be a 25 working days deadline for submitting pre-applications, following the publication. The potential beneficiaries propose to construct a certain local network of their choice as sub-project; chosen among the network parts which were identified in the mapping exercise as necessary to complete the NGA coverage of Estonia. The pre-application shall at least contain the following information: description of the project aim and the expected results, the amount of aid requested, the expense budget, a description of social or economic benefits expected from the project, the estimated number of potential users, and a description of the procurements foreseen for the implementation of the project.
- (30) Then the granting authority assesses the eligibility of the applications and the applicants and decides on the granting of the support in principle. Evaluation criteria for pre-applications are the overall necessity of the planned project and the importance of the expected results for achieving the goals of EstWin, the innovativeness of the planned project, the expected social and economic benefits, the estimated number of potential users of the planned project, and the overall efficiency of the planned project. In the application process by rounds the granting authority evaluates these criteria and prepares a ranking. If several pre-applications for the same project receive an equal rating, the pre-application with the lowest grant request will be chosen. Pre-applications submitted during the continuous application process are evaluated by simply verifying their conformity with the criteria mentioned in paragraphs 22-24 above. If in such cases

applications concern the same network section of EstWin, they are processed on a first come basis.

- (31) Having been accepted in the prequalification process, beneficiaries may carry out the public tender for infrastructure building. The best offers resulting from the tender will be submitted in the second round, as full application. A full application must provide for the implementation of the objectives, and must stay within the limits, of the planned budget of the respective pre-application. On that basis the Ministry will finally award the financial support. The grants are paid only upon the production of proof of the construction costs incurred.
- (32) The universal nature of the service and universal connectivity will be established in the entrusting act. The potential beneficiary will be obliged to provide wholesale service and access under equal conditions.
- (33) **Aid intensity:** The costs for constructing the network may be supported by up to 100%.
- (34) **Technology:** The chosen network topology ensures the technological neutrality of the measure. The NGA architecture will support effective and full unbundling. Several alternative platforms will be able to use the new network as a backhaul connection and allow all types of network access that operators may seek to offer their services to end users. End-users will have the opportunity to choose the retail operator, the services and the last mile technology according to their needs. Estonia expects that the planned project will make it economically feasible for the commercial operators to invest in the last mile solutions and to provide retail services to the end users in rural areas⁶.
- (35) **Use of existing infrastructure:** The existing infrastructure of operators will not be duplicated. The EstWin network will not be built in areas with existing fibre network. Bidders are encouraged to have recourse to the existing infrastructure as their projects will proceed from the existing fibre network to which the operators intending to use the new network section will have access.
- (36) **Wholesale access:** The network owning beneficiaries must provide all service providers with wholesale optical fibre rental service under equal conditions for at least 7 years. This period can be prolonged if the owner of the infrastructure has significant market power in the market concerned. The EstWin network is a passive network, consisting of dark fibre, equipment installation spaces in street lockers, and electrical supply for the equipment. The whole network will be constructed with sufficient capacity ensuring that even in the most remote connection points there are available at least 5 physically separate pass-through connections to main backbone for different service providers so that at least 5 operators can provide their services in parallel. The cables will have at least 24 fibres each.
- (37) The technical layout foresees a multiple fibre architecture, allowing full independence between access seekers. All operators who rent EstWin network fibres may act completely independently and autonomously from each other. EstWin will also use systems that allow installing additional cables without incurring excessive expenses. Thus the EstWin network provides for sufficient capacity for all interested parties.

⁶ When applying for support for a NGA network segment, applicants have to demonstrate the interest of at least two internet operators to utilize this infrastructure.

- (38) The operation of the EstWin network will be supervised by the Competition Authority, which is also the national regulatory authority. It has approved the general access conditions of the project. It will monitor the competitive conditions on the market and impose, where appropriate, the necessary remedies.
- (39) **Pricing:** The objective of EstWin is to enable access to retail broadband services in the targeted areas at a price similar to urban areas; hence wholesale access prices will be based on average prices that prevail in urban areas that do not benefit from State funding. The Competition Authority as national regulatory authority will ensure that wholesale access pricing in the subsidized network is reasonable. For that purpose the Competition Authority will collect information for wholesale NGA access prices. The network owner has an obligation to prove that the price charged for a wholesale access is reasonable and non-discriminatory. The benchmarking concept will be part of the entrustment conditions.
- (40) **Beneficiaries:** The direct recipient of the aid will be the wholesale operators (owners and managers) of the network. Indirect beneficiaries will be electronic communication operators utilising the new network for offering retail services to end users and business end users.
- (41) **Claw-back mechanism to avoid over-compensation:** The direct beneficiaries of the aid for the construction of the network will be non-profit entities. Therefore the entrustment act will require them to refund any potential surplus generated through the operation of the network. On the basis of the 2007-2013 Structural Assistance Act, conditions regarding auditing and control of the annual accounts and review of the compensation and the recoupment are set in the regulations implementing the sub-measures and in the entrustment act.

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

- (42) According to Article 107 (1) TFEU, “*any aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods shall, in so far as it affects trade between Member States, be incompatible with the internal market*”. It follows that in order to be qualified as State aid, the following cumulative conditions have to be met: 1) the measure has to be granted out of State resources, 2) it has to confer an economic advantage to undertakings, 3) the advantage has to be selective and distort or threaten to distort competition, 4) the measure has to affect trade between Member States.
- (43) The measure is financed by EU funds administered by Estonia according to its priorities and own Estonian financial resources. Hence, State resources are involved. The subsidy awards are imputable to the State.
- (44) The financial support will enable non-profit legal entities owning and managing the network to provide wholesale broadband services on conditions not otherwise available on the market. Electronic communication operators will be able to provide retail high speed broadband services to end users by utilising the new infrastructure at conditions that would not be available under normal market conditions without State support. Furthermore, the measure aims at improving the provision of existing broadband services to business users and residential users. Whereas residential users are not subject to State aid rules, businesses in the targeted areas will therefore ultimately benefit from the improved broadband services and coverage in comparison with what would be provided

on a purely commercial basis. Therefore, the measure allows a selected number of undertakings to be relieved by means of State resources of a part of the costs they would normally have to bear for the deployment of or the access to an NGA network. In principle, it confers a direct economic advantage to these undertakings.

- (45) Finally, the support from the state strengthens the position of a selected number of beneficiaries of a specific sector in relation to their competitors and has the potential of distorting competition. The principle beneficiaries are active in deploying and operating broadband networks, a market which is, at least potentially, subject to trade between Member States. Therefore this support is also likely to affect trade between Member States and to constitute State aid.
- (46) However, Estonia considers that the deployment and operation of a high speed fibre network in rural areas not served by high speed internet under market conditions should be regarded as a service of general economic interest within the meaning of Article 106(2) TFEU.
- (47) According to the case-law of the Court, State funding for the provision of a service of general economic interest may fall outside the scope of Article 107(1) TFEU provided that four main conditions are met which are commonly referred to as the *Altmark* criteria.⁷ The four conditions are: (a) the beneficiary of a State funding mechanism for a service of general economic interest must be formally entrusted with the provision and discharge of this service, the obligations of which must be clearly defined; (b) the parameters for calculating the compensation must be established beforehand in an objective and transparent manner, to avoid it conferring an economic advantage which may favour the recipient undertaking over competing undertakings; (c) the compensation cannot exceed what is necessary to cover all or part of the costs incurred in the discharge of the service, taking into account a reasonable profit for discharging those obligations; and (d) where the beneficiary is not chosen pursuant to a public procurement procedure, the level of compensation granted must be determined on the basis of an analysis of the costs which a typical undertaking, well run, would have incurred in discharging those obligations, taking into account the relevant receipts and a reasonable profit.
- (48) In principle, public service compensation may be granted to an undertaking entrusted with the construction and operation of a broadband network. According to paragraph 24 of the Community Guidelines for the application of State aid rules in relation to rapid deployment of broadband networks⁸ (the Broadband Guidelines) this may be the case where it can be demonstrated that private investors may not be in a position to provide in the near future (a period of three years) adequate broadband coverage to all citizens or users leaving thus a significant part of the population unconnected. Consequently, a publicly funded network set up in white areas for all potential users, business or private, may be financed by way of public service compensation. However, a number of conditions have to be fulfilled, in particular those set out in paragraphs 25 to 29 of these guidelines.

⁷ Case C-280/00, *Altmark Trans GmbH and Regierungspräsidium Magdeburg v Nahverkehrsgesellschaft Altmark GmbH* [2003] ECR I-7747.

⁸ OJ C 235 of 30.9.2009, p. 7.

- (49) With regard to the definition of the scope of a mission of a service of general economic interest for the purposes of ensuring widespread deployment of a broadband infrastructure, paragraph 25 of the Broadband Guidelines requires Member States to describe the reasons why they consider that the service in question, because of its specific nature, deserves to be characterised as a service of general economic interest and to be distinguished from other economic activities.
- (50) Estonia described the reasons why the roll out of a NGA network in rural areas not served by private investment needs to be financed by the State in the general economic interest. With a mapping exercise based on a consultation of stakeholders and the national regulatory authority it has established which areas will not be served by high speed internet infrastructure on market terms within the next three years. It has also set out why it considers important to avoid a digital divide between urban and non served rural areas. Estonia considers that the availability of a high speed broadband infrastructure is a key factor for the local communities in attracting businesses, distance working, providing health care services and improving education and public services. The authorities expect that the EstWin Project will increase social cohesion and contribute to economic growth. And indeed, a general access to high speed broadband services answers today a general and basic need and represents a specific general interest to be distinguished from other economic activities.⁹
- (51) The economics of broadband provision are such that the market will not always find it profitable to invest in it. Due to economics of density, broadband networks are generally more profitable to roll-out where potential demand is higher and concentrated, i.e. in densely populated areas. Because of high fixed costs of investment, unit costs increase strongly as population densities drop. As a result, broadband networks tend to profitably cover only part of the population. Remoteness, such as larger distances from existing telecommunication infrastructures could also significantly increase the investment costs necessary to roll out adequate broadband networks.
- (52) Typically, these underserved regions are rural areas with a low population density so that commercial providers have no economic incentives to invest in electronic communications networks to provide adequate broadband services. This leads to a "*digital divide*" between the areas which have access to adequate broadband services and those that have not.
- (53) The importance of full high speed internet coverage of the territories of Member States and the need to encourage joint initiatives of stakeholders has been explicitly identified by the European Council of March 2009 (in point 17 of its conclusions): "the European Council recalled the fundamental role of telecommunications and broadband development in terms of European investment, job creation and overall economic recovery. Taking account of the risks taken by the investing undertakings, efficient investment and innovation in new and enhanced infrastructure should be promoted. To this end, various cooperative arrangements between investors and access seeking parties to diversify the risk of investment should be permitted, whilst ensuring that the competitive structure of the whole market and the principle of non-discrimination are maintained."

⁹ Cf. also case N 382/2004 – France, infrastructure haut débit sur le territoire de la région Limousin (DORSAL), at 44.

- (54) Furthermore, the Commission defined in its Europe 2020 strategy of 3 March 2010¹⁰ 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." The Communication continues to state: "To support the EU's economic growth potential and the sustainability of our social models..., budgetary consolidation programmes should prioritise 'growth-enhancing items' such as education and skills, R&D and innovation and investment in networks, e.g. high-speed internet, energy and transport interconnections – i.e. the key thematic areas of the Europe 2020 strategy."
- (55) As a consequence it is in the declared general economic interest that a Member State employs public funds in order to enable that areas currently and in the near future not served by high speed internet will get connected soon. The Estonian plan to target public funding to the rollout of high speed internet in rural areas does fit into the flagship initiative.
- (56) Estonia has furthermore demonstrated the necessity of its intervention. In none of the identified white NGA areas, even if there should already be one or several traditional network providers present, operators do have plans to invest in NGA networks during the coming three years. In addition, the technology in use is not capable to be upgraded to a performance level which Estonia aims at for the future and which can only be offered by optical fibre cables.
- (57) Furthermore, according to paragraph 25 of the Broadband Guidelines member States should ensure that the mission of the service of general economic interest satisfies certain minimum criteria and demonstrate that those criteria are indeed satisfied in the particular case. The criteria are specified in paragraph 26 of the Broadband Guidelines: the presence of an act of the public authority entrusting the operators with the mission, and the universal and compulsory nature of that mission. The broadband infrastructure to be deployed should provide universal connectivity to all users in a given area, residential and business users alike. Moreover, the provider of the network to be deployed must not be able to refuse access to the infrastructure on a discretionary and/or discriminatory basis.
- (58) Estonia fulfils these criteria. The financing award by the granting Ministries constitutes an act of entrustment which describes in detail the obligations imposed on the public service provider; the entrusting act and the EstWin implementing rules establish in particular the universal nature of the service. The subsidised defined network section will ensure universal connectivity to the NGA network in the sense that all residential and business

¹⁰ EUROPE 2020 - A strategy for smart, sustainable and inclusive growth, COM(2010) 2020, page 12.

users in the respective area are offered the possibility to connect to the NGA network, according to their choice of technology.¹¹

- (59) Furthermore, in line with paragraph 27 of the Broadband Guidelines, the publicly funded network will be available for all interested operators which will have open, non-discriminatory access to the passive infrastructure which would provide access seekers with all possible forms of network access and allow effective competition at the retail level, ensuring the provision of competitive and affordable services to end-users. The entrustment and the aid would only cover the deployment of a network and the provision of the related wholesale access services, without including retail communication services. Wholesale prices on the subsidized network will be monitored by the National Regulatory Authority with the objective to have retail access prices similar to non-subsidised areas. Price benchmarking is an important safeguard to ensure that the aid granted will serve to replicate market conditions like those prevailing in other competitive broadband markets.
- (60) Estonia also established beforehand the parameters for calculating the compensation, in an objective and transparent manner. It specified that only the effective costs of constructing will be supported. To avoid that the compensation could exceed what is necessary to cover all or part of the costs incurred in the discharge of the service, and to avoid, following paragraph 29 of the Broadband Guidelines, that the service provider obtains an undue advantage by retaining ownership of the network that was financed with public funds, Estonia put in place a review and claw back mechanism. The risk of overcompensation is furthermore reduced by the fact that only non-profit organisations may benefit from the funding.
- (61) Finally, to fulfil the *Altmark* criteria, in principle the service compensation should be granted through an open, transparent, and non-discriminatory tender requiring all candidate operators to define in a transparent manner the profitable and non-profitable areas, estimate the expected revenues and request the corresponding amount of compensation that they consider strictly necessary. However, the selection procedure foreseen by Estonia provides for the possibility to award the compensation on simple application outside a tender procedure. Anyway, when there is a tender, it is only between non profit organisations. It is therefore not a public tender according to EU rules. Also no other mechanism is in place to assure that the service is provided at the least cost to the community.
- (62) Therefore, not all *Altmark* conditions are fulfilled. The Commission concludes that the notified measure, although it finances the provision of services of general economic interest, constitutes State aid within the meaning of Article 107 (1) TFEU, which is moreover confirmed by the notifying Member State in the notification. Hence, it is necessary to assess whether the measure can be found to be compatible with the internal market.

VI. COMPATIBILITY ASSESSMENT

- (63) As the deployment and operation of a high speed fibre network in Estonia's rural areas not served by high speed internet under market conditions is organised as a service of general

¹¹ For the characteristics of universal connectivity in a high speed network cf. case N 382/2004 – France, infrastructure haut débit sur le territoire de la région Limousin (DORSAL), at 37.

economic interest, its compatibility with the internal market will be assessed under Article 106(2) TFEU.

- (64) According to paragraph 30 of the Broadband Guidelines, in this case, State aid in the form of public service compensation could be regarded as compatible with the internal market and exempt from the requirement of notification laid down in Article 108(3) TFEU if it meets the conditions set out in the Commission Decision of 28 November 2005 on the application of Article 86(2) of the EC Treaty to State aid in the form of public service compensation granted to certain undertakings entrusted with the operation of services of general economic interest.¹² However, to fall under this exemption from notification, Article 2(1)a of the decision stipulates that the aid scheme would need to limit the granting of the public service compensation to undertakings with an average annual turnover of less than Euro 100 million. The Estonian EstWin project does not specify such limitation. Therefore it is not exempted from notification and has to be assessed under the Community framework for State aid in the form of public service compensation (the framework).¹³
- (65) According to paragraph 8 of the framework, such State aid may be declared compatible with the Treaty under Article 106(2) TFEU if it is necessary to enable the operation of services of general economic interest and does not affect the development of trade to such an extent as would be contrary to the interests of the Union. As analysed in paragraphs 51-56 above, Estonia has identified and justified a public service mission for the roll out of the NGA network in non served parts of the country.
- (66) According to paragraph 12 of the framework, the undertakings in question must have been entrusted with the responsibility for operation of the service of general economic interest by the State by way of an official act, the form of which may be determined by each Member State. The act must specify in particular:
- the precise nature and the duration of the public service obligations;
 - the undertakings and territory concerned;
 - the parameters for calculating, controlling and reviewing the compensation;
 - the arrangements for avoiding and repaying any over-compensation.
- (67) These parameters have been fulfilled. The beneficiaries are entrusted by an official government decision describing the precise nature and the minimum duration of the public service obligation, and the precise network segment concerned. The subsidised networks have been identified by a detailed mapping and coverage analysis and consultation with stakeholders: the Estonian authorities have undertaken an analysis of the existing broadband infrastructures in order to clearly identify the areas where state intervention is necessary. By consulting existing operators and modifying the plans of the measure in order to avoid duplication of existing infrastructure and by consulting with other relevant stakeholders (such as the National Regulatory Authority, the National Competition Council), the Estonian authorities ensured that public funds are used only in

¹² OJ L 312 of 29.11.2005, p. 67.

¹³ See paragraph 2 of the framework, OJ C 297 of 29.11.2005, p. 4, and footnote 39 of the broadband guidelines.

areas where it is necessary, limiting the possibility of crowding out private investments and distortion of competition to the minimum possible.

- (68) The parameters for calculating, controlling and reviewing the compensation have been established and will be part of the entrustment. Only the construction costs may be supported, which have to be established by a tender and will be verified once the investment is made. The actual costs of operating the network have to be borne by the network owner. In line with paragraph 14 of the framework the amount of compensation thereby cannot exceed what is necessary to cover the costs incurred in discharging the public service obligations.
- (69) The calculation of costs follows criteria which have previously been defined. The costs taken into consideration will be limited to the costs linked with investments concerning infrastructure. This is more restrictive than paragraph 16 of the framework which would also allow including all the costs incurred in the operation of the service of general economic interest. In addition Estonia imposes to select the undertakings for the construction and the maintenance of the network in compliance with national and EU public procurement rules. Open tender procedures are an effective means to minimise the aid necessary for the measure.
- (70) The arrangements for avoiding and repaying any over-compensation are in place. The revenue earned from the service of general economic interest derives from offering wholesale access to telecommunication operators. This revenue should cover the costs to operate and maintain the network. A reasonable profit, as addressed in paragraph 18 of the framework, is not an issue as only non-profit entities are providing the service.
- (71) Where an undertaking is entrusted with the realisation of several sub-projects, Estonia will impose on this undertaking in the entrustment act, in line with paragraph 19 of the framework, that the undertaking's internal accounts make it possible to ensure that there is no over-compensation at the level of each service of general economic interest.
- (72) In line with paragraph 20 of the framework, Estonia will check regularly to ensure that there has been no over-compensation. Any surplus generated by the network owners through the operation of the network will be returned to the State. Thereby Estonia will ensure that the recipient of the aid will not benefit from over-compensation and will minimise *ex post* the amount of aid deemed initially to have been necessary.
- (73) The Commission concludes that the notified measure will offset a geographical and commercial handicap in the rural areas of Estonia and will enhance the competitive supply of high speed broadband services across the area. The design of the project ensures that any distortion of competition caused by the state intervention is kept to the minimum possible.

VII. DECISION

- (74) The Commission has accordingly decided that the aid measure "*Establishment of a Sustainable Infrastructure Permitting Estonia-wide Broadband Internet Connection*" is compatible with Article 106 (2) TFEU.
- (75) Estonia is reminded that, pursuant to Article 108(3) TFEU, it is obliged to inform the Commission of any plan to extend or amend the measure.

- (76) If this letter contains confidential information which should not be disclosed to third parties, please inform the Commission within fifteen working days of the date of receipt. If the Commission does not receive a reasoned request by that deadline, you will be deemed to agree to the disclosure to third parties and to the publication of the full text of the letter in the authentic language on the internet site: http://ec.europa.eu/eu_law/state_aids/state_aids_texts_en.htm
- (77) 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 Registry
Rue Joseph II. 70.
B-1049 Brussels
Fax No: +32 2 2961242

Yours faithfully,
Joaquin ALMUNIA
Vice-President of the Commission