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Subject: State aid N 299/2010 – Germany
Prolongation of the Bavarian state aid broadband scheme

Sir,

I. SUMMARY

- (1) I am pleased to be able to inform you that the European Commission has assessed the "*Prolongation of the Bavarian state aid broadband scheme*" (hereafter: "the measure") and decided not to raise objections as the State aid contained therein is compatible with Article 107(3)(c) TFEU.

II. PROCEDURE AND CONTEXT

- (2) The original measure was endorsed under the EU State aid rules¹ by the Commission decision of N266/2008². The amendments of this measure were later approved by the Commission decision of N153/2009³.
- (3) By letter registered on 5 June 2010, the German authorities notified the prolongation and additional changes of the Bavarian State aid broadband

¹ With effect from 1 December 2009, Article 87 of the EC Treaty has become Article 107 of the Treaty on the Functioning of the European Union (TFEU); the two sets of provisions are in substance identical. For the purposes of this Decision references to Article 107 of the TFEU should be understood as references to Articles 87 of the EC Treaty when appropriate.

² Commission decision in case N266/2008 "*Broadband in rural areas of Bayern, Germany*". OJ C12/2009, 17.01.2009, p. 2.

³ Commission decision in case N153/2009 "*Amendment of the State aid broadband scheme N266/2008*". OJ C/284/2009, 25.11.2009, p. 13.

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scheme. By letter registered on 30 June 2010, the Commission requested additional information on the notified measure, for which the German authorities provided answers with letters registered on 24 August 2010 and 14 September 2010.

III. AMENDMENTS OF THE EXISTING MEASURE

- (4) The primary objective of the original measure was to support the extension of adequate basic broadband coverage in those geographic areas of Bavaria, where no such services are currently available⁴ and where there are no plans for coverage on commercial terms in the near future of three years.
- (5) Since the German authorities earmarked additional public funding for broadband support in Bavaria, they notified the prolongation of the existing aid scheme. In particular, the Bavarian authorities notified the following modifications:
- (6) **Increase of the total budget:** The German authorities decided to allocate additional €57 million for broadband support. Out of this funding, approximately €40 million will be provided by the *Land* of Bavaria and approximately €17 million by the local municipalities.
- (7) **Prolongation of the measure:** The German authorities wish to prolong the duration of the Bavarian broadband scheme from 31 December 2010 (as stipulated in Commission decision N153/2009) until 31 December 2011.
- (8) Since the authorization of the N153/2009 broadband scheme under the EU State aid rules the Commission endorsed a new legislation to assess state aid broadband measures: the *Community Guidelines for the application of State aid rules in relation to rapid deployment of broadband networks*⁵ (hereafter: "Broadband Guidelines"). Accordingly, additional clarifications were also necessary from the German authorities to verify that all the provisions of the notified measure are in line with the relevant conditions of the Broadband Guidelines.
- (9) **Subject of the aid:** The German authorities confirmed that only basic broadband networks will receive state aid under the current measure, no NGA networks within the meaning of the Broadband Guidelines⁶ will be supported.
- (10) **Market research and public consultation:** the Bavarian authorities further increased the transparency of the market research and the public consultation process to meet the requirements of the Broadband Guidelines.
- (11) The German authorities have undertaken and continuously update an extensive mapping on the available broadband technologies in the country. The mapping is available on the webpage of the *Breitband Atlas*⁷.

⁴ The Bavarian authorities consider inadequate broadband coverage if broadband services with minimum 2 Mbps download speeds are not available.

⁵ OJ C 235 of 30.9.2009, p. 7.

⁶ The German authorities define NGA networks within the context of the current measure as the following: FTTx solutions capable of providing end user speeds of minimum 40 Mbps or cable networks able to deliver speeds up to and beyond 50 Mbps using the new 'DOCSIS 3.0' cable modem standard.

- (12) To clearly identify the "white areas" targeted by the measure, the German authorities (1) will publish a detailed analysis of the existing infrastructures of the targeted areas backed by maps. (2) In case the existing broadband services are deemed not adequate and there is a well-defined need of consumers for better broadband services, the granting authorities will be allowed to use state aid to remedy the market situation. (3) Such plans will be published and will be subject to public consultation. (4) During the public consultation, if an operator raises concern on the plans of the granting authorities (because for instance, it considers that it already provides adequate broadband services or has plausible investments plans in the near future of three years), such concerns will be assessed by the German authorities in accordance with paragraph 42 of the Broadband Guidelines.
- (13) The German authorities will make available all necessary information on the central webpage for broadband development of Bavaria (www.breitband.bayern.de) including the results of the mapping, the target areas, the calls for public consultation, the calls for tenders with the selection criteria⁸ and the results of the selection procedures⁹.
- (14) **Use of existing infrastructure:** the German authorities encourage the use of existing infrastructure. The Federal Government runs a central database, the *Infrastrukturatlas*¹⁰, which contains information on the available infrastructure that could be used, in principle, to develop broadband networks. Information is provided in a voluntary basis by the stakeholders. On the level of Bavaria, when participating in the notified broadband scheme, the municipalities create a detailed profile of the telecommunication infrastructure available in the target area. If this existing infrastructure can be made feasible for broadband uses, the information is published on the Bavarian Broadband Information Portal (i.e. www.breitband.bayern.de) to ensure that all operators have access to this information. Furthermore, several districts of Bavaria started coordinating civil works of operators from different industries.
- (15) **Monitoring and wholesale access:** in line with the requirements of the Broadband Guidelines, the duration of the mandatory wholesale access and the monitoring of the subsidized infrastructures will be prolonged from five years (as stipulated in Commission decision N153/2009) to minimum seven years - without prejudice to any further regulatory obligations of the selected operators.
- (16) All other provisions of the scheme (including the maximum aid amount per project, pricing, technology neutrality) as described in Commission decisions N266/2008 and N153/2009 will remain unchanged.

⁷ Available at: <http://www.zukunft-breitband.de/BBA/Navigation/breitbandatlas.html>.

⁸ Information on the ongoing market researches and public consultation are available at: http://breitband.bayern.de/bb/inhalte/gruppen/common/Markterkundung_Auswahlverfahren.jsp.

⁹ Available at: <http://breitband.bayern.de/bb/inhalte/Anhaenge/foerder-statistik/Breitband-Foerderung-Bescheidliste.pdf>.

¹⁰ Available at: http://www.bundesnetzagentur.de/DE/Sachgebiete/Telekommunikation/Infrastrukturatlas/infrastrukturatlas_node.html.

IV. ASSESSMENT OF THE MEASURE

IV.1. Presence of aid

- (17) As explained in the prior Commission decisions concerning this scheme¹¹, the measure will be financed by state resources, namely from resources of the municipalities and the Land of Bayern. It will provide selective economic advantage to the electronic communication operators selected via the tender procedures and also for third party electronic communication operators that will be able offer their services via wholesale access to the subsidized networks. There will be also an advantage for the business in the targeted areas.
- (18) The measure has the potential to distort competition. At the level of the network operators, support given to one operator may discourage other operators to deploy or expand their own networks in the targeted area on commercial terms. Public funding could also encourage local undertakings to subscribe to the services offered via the subsidized networks instead of more expensive market-based solutions. Insofar as the intervention is liable to affect providers of electronic communications services from other Member States and distorts competition between end users located in Germany and elsewhere in Europe, the measure has an effect on trade. The markets for electronic communication services are open to competition between operators and service providers, which generally engage in activities that are subject to trade between Member States.
- (19) Therefore, the Commission considers that the scheme constitutes State aid within the meaning of Article 107 (1) TFEU.

IV.2. Compatibility

- (20) The Commission has assessed the compatibility of the notified measure with the internal market in the light of the Broadband Guidelines¹², which contain a detailed interpretation of Article 107(3)(c) TFEU in this area of State aid law. As regards the applicable substantive provisions, the Commission has essentially analysed the measures in the light of the criteria developed in paragraphs 31 to 51 of the Broadband Guidelines. In order to be compatible under Article 107(3)(c) of the TFEU, the aid must pursue an objective of common interest in a necessary and proportionate way.
- (21) The objective of the measure is to extend basic broadband coverage to areas where no such adequate coverage currently exists and there are no plans of private investors to roll out such infrastructures in the near future of three years. Hence the objective of the measure is in line with the Digital Agenda¹³ which calls Member States to use public financing in line with EU competition and State aid rules in order to meet the coverage, speed and take-up targets defined in Europe 2020 Strategy¹⁴. Therefore the measure at stake pursues well

¹¹ Commission decisions N266/2008 and N153/2009. For reference, see footnote 2 and 3.

¹² See footnote 5.

¹³ A Digital Agenda for Europe. COM/2010/0245 f/2.

¹⁴ The Europe 2020 Strategy has underlined the importance of broadband deployment to promote social inclusion and competitiveness in the EU. It restated the objective to bring basic broadband to all Europeans by 2013 and seeks to ensure that, by 2020, (i) all Europeans have access to much higher

defined EU policy objectives also in line with Section 3.1 of the Broadband Guidelines

- (22) The Commission's analysis confirms that the measure is well designed to deliver those common interest objectives.
- (23) First, it is an appropriate instrument because in the targeted areas of Bavaria, Germany, the provision of adequate broadband services remains unprofitable for commercial operators in the near future of three years that will be proved by a detailed mapping and coverage analysis and verified by an open, transparent public consultation for each aid project granted under the notified scheme. Hence the measure targets only "*white areas*" within the meaning of paragraphs 41 and 42 of the Broadband Guidelines and there are no valid alternatives to public funding to overcome those obstacles. The maximum aid amount per single project will be EUR 500.000 that can be granted under the current scheme¹⁵.
- (24) Second, since the measure targets "*white areas*", the broadband network investment concerned would not have been undertaken within the same timeframe without any State aid. Furthermore, the Commission considers that the aid should provide a direct and appropriate investment incentive for the selected operator due to the use of a public tender process to select the beneficiaries.
- (25) Third, the measure at stake is considered proportionate because, amongst other features, the following can be identified:
- a) A detailed mapping and coverage analysis verified by an open, transparent public consultation will be conducted by the granting authorities in order to clearly indentify the targeted "*white areas*". All information related to the aid projects (including the mapping, the call for public consultation, the call for tenders) will be published on the dedicated broadband portal of Bavaria: www.breitband.bayern.de.
 - b) Open tender process: the aid will be awarded on the basis of an open tender in accordance with the principles of the EU and national procurement rules. The call for tenders and the results of the tender procedures will be published on the dedicated webpage of Bavaria: www.breitband.bayern.de.
 - c) Within the context of an open tender, the granting authorities will select the most economically advantageous offers among those presented by the operators. In line with paragraph 51 c) of the Broadband Guidelines, for the purpose of determining the most economically advantageous offer, the awarding authority will specify in advance the relative weighting, which it will grant to each of the qualitative criteria chosen (see fn. 55 of the Broadband Guidelines). In case of identical technical specifications, the lowest bid will be awarded the contract.

internet speeds of above 30 Mbps and (ii) 50% or more of European households subscribe to internet connections above 100 Mbps.

¹⁵ Support under this scheme cannot be cumulated with any other German State aid broadband measures.

- d) The measure is technological neutral: bidders are entitled to propose the provision of broadband services using whatever technology they deem most suitable.
- e) The measure ensures the use of existing infrastructure to the extent possible to avoid unnecessary and wasteful duplication of resources and to limit the aid amount necessary for the projects¹⁶.
- f) There will be a requirement to provide a wholesale access on the subsidized broadband network that will enable third party operators to compete with the selected service provider thereby strengthening choice and competition in the areas concerned by the measure. In line with the provisions of the Broadband Guidelines, the German authorities will require that wholesale access will be in place for a minimum period of seven years without prejudice to any further regulatory obligations of the selected operators. The German authorities point out that German regulatory law allows for the need driven creation of open wholesale access, if competitors demand this, also for operators without significant market power. These operators are first given the chance to reach an agreement with their competitors. For the situation that the parties fail to reach an agreement within a reasonable time period, the German authorities confirm that wholesale access prices will be fixed (by the municipality) according to the prices fixed by the regulator for comparable situations. The national regulator (*Bundesnetzagentur*) will take into account the cost structure of the participating operators in the framework of an efficient offer of services (*Kostenstruktur im Rahmen der effizienten Leistungsbereitstellung*). The criteria for the wholesale pricing will be stipulated in the tender documents, see 51 g) of the Broadband Guidelines.
- g) Benchmarking pricing exercise: The German authorities confirmed that retail prices of the broadband services of the supplier will be established in the course of the selection procedure. The German authorities are aiming to provide retail broadband services in the target areas at prices similar to not supported areas.
- h) Monitoring and claw-back mechanism to avoid over-compensation: The project will be examined on a regular basis by the granting authority for a period of seven years and the monitoring mechanisms implemented will ensure that if the beneficiary fails to comply with the rules, the granting authorities will be in the position to recover the aid granted. Regarding the requirement of a claw-back mechanism contained in paragraph 51 h) of the Broadband Guidelines, the Commission notes that the notified scheme provides for only very small aid amounts (i.e. maximum 500.000 euros per project and the support under this scheme cannot be cumulated with any other German State aid broadband measures) and intends to support one off projects based on simple procurement principles for which a clawback mechanism would present disproportionate administrative burden. For that reason the Commission accepts that no such claw-back mechanism is required for the current scheme. Furthermore, the German authorities

¹⁶ The *Infrastrukturatlas* (see paragraph (14)) will provide information to all bidders on the existing infrastructures that could be potentially used in their bids (e.g. free ducts, spare fibre capacity). Furthermore, third party operators can rely, via regulation on the DT Telekom infrastructure to make their bid.

confirmed projects will not be allowed to be artificially divided in order to achieve that the aid amount per project would fall below 500.000 euros.

- (26) On balance, the Commission concludes that the overall effect of the measure is deemed to be positive. The measure is in line with the objectives of Article 107(3)(c) TFEU as it facilitates the development of certain economic activities (broadband services) in remote and rural areas. The intervention is designed in a way that does not distort competition or adversely affect trading conditions to an extent contrary to the common interest.

IV.3. Conclusion

- (27) On the basis of the foregoing assessment, the Commission's analysis confirms that the compatibility criteria set out in the Broadband Guidelines are met.

V. DECISION

- (28) In the view of the above, the Commission finds that the aid granted on the basis of the measure in question is compatible with the internal market in accordance with Article 107(3)(c) TFEU and has accordingly decided not to raise objections to the notified measure.
- (29) The Commission reminds the Federal Republic of Germany to submit annual reports on the application of the aid measure and to inform the Commission pursuant to Article 108(3) TFEU on all plans to approve a new or to modify this aid measure.
- (30) If this letter contains confidential information which should not be disclosed to third parties, please inform the Commission within fifteen working days of the date of receipt. If the Commission does not receive a reasoned request by that deadline, you will be deemed to agree to the disclosure to third parties and to the publication of the full text of the letter in the authentic language on the internet site:

http://ec.europa.eu/community_law/state_aids/state_aids_texts_en.htm.

- (31) 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 Joseph II. 70. 03/225
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Yours faithfully,

For the Commission

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Vice-President of the Commission