



EUROPEAN COMMISSION

Brussels, 23.05.2012
C(2012) 3425 final

PUBLIC VERSION
WORKING LANGUAGE
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Subject: State aid - SA.33222 (2011/N)
Wielkopolska Broadband Network

Sir,

I. SUMMARY

- (1) I am pleased to be able to inform you that the European Commission has assessed the measure "*Wielkopolska Broadband Network*"(hereafter: "the measure") and decided not to raise objections because the measure is compatible with the internal market, pursuant to Article 107(3)(c) of the Treaty on the Functioning of the European Union (TFEU).

II. PROCEDURE

- (2) Following pre-notification discussions initiated in June 2011, by a letter dated 20/12/2011, pursuant to Article 108(3) of the TFEU, the Polish authorities notified to the Commission a measure for supporting the deployment of an optical fibre backbone and distribution network covering Wielkopolskie Voivodship.

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- (3) The Commission requested additional information on the measure by letters registered on 10/02/2012 and 20/04/2012. The Polish authorities provided the requested information on the measure by letter registered on 21/02/2012 and 27/04/2012 respectively. Several calls, meetings and email exchanges took place over the course of the pre-notification and notification process.

III.CONTEXT

III.1. The target region

- (4) The target area of the project covers the Wielkopolskie Voivodship, with a total population of approx. 3 400 000 inhabitants, located in western part of Poland. Nearly half of the population (46%) lives aside from the cities.
- (5) The population density in this Voivodship (114 persons/km²) is lower than the average in Poland, which makes it difficult to attract investments in the development of broadband networks that are usually more profitable in areas featuring higher density of population and where the potential demand is higher and more accumulated.
- (6) With the notified measure, the Polish authorities aim to decrease the brain drain from such areas with lower wages than the average of the country by creating new professional opportunities for the skilled residents. Broadband Internet will allow people who used to leave their residence due to financial considerations to engage into distance working. Dissemination of broadband access to Internet will be a stimulus for development of modern electronic economy and e-government in the region, and as a consequence it shall favour development of areas of knowledge-based economy.

III.2. The rationale for public intervention

- (7) According to the Polish authorities, the development of broadband infrastructure in Wielkopolska Voivodship faces two key problems: (1) the lack of infrastructure to deliver the services required by the public authorities and by citizens; and (2) the lack of adequate competition reflected in high prices or inadequate services.

Shortage of infrastructures from commercial operators to offer broadband services

- (8) As regards the first concern, similarly to other regions in the European Union, also in the case of Wielkopolskie Voivodship, advanced broadband services and the infrastructure required to support them are available for citizens in more densely populated areas, whereas broadband infrastructure is inadequate or outright lacking in other areas which are not commercially attractive for electronic communication operators. This leaves citizens and businesses in such areas without the possibility of adequate broadband access and services.
- (9) According to the statistics, at the end of 2010, access to fixed broadband services in Poland reached the level of 16% (fixed and mobile access), which is still much below the EU average (26.6%). Poland not only has one of the lowest broadband

penetrations in the EU, but as the table below shows, concurrently the share of an access below 2 Mbit/s is 51% (the EU average is about 14%), which indicates very low quality of broadband connections. The share of 10-30 Mbit/s access is only 12% (the EU average is approximately 40%), and FTTH¹ access in Poland amounts to only 4.5 thousands of optical fibres connections. A visible competition among operators able to provide broadband services using a competing infrastructure exists only in bigger urban areas, where broadband services are also provided by cable operators. The data above concerns in particular the Wielkopolskie Voivodship, which is an average voivodship as regards geographical and demographic factors.

Table 1 – Distribution of broadband services according to different connection speeds

144 kbps <2Mb/s	2<10Mb/s	>10Mb/s
51%	37%	12%

- (10) In the Digital Agenda Scoreboard², Poland is indicated as a country, which despite acceleration in the years 2005-2009 still stays in the tail of the EU-27 with regard to the penetration of broadband Internet.
- (11) Lack of broadband infrastructure in Wielkopolskie Voivodship emerged clearly during the preparation of the inventory of existing infrastructure and of credible investment plans, and further public consultations. According to the Polish authorities, in as many as 4 583 localities out of the 5 488 in total, there is no optical distribution node, and there is no more than one broadband access to Internet offered that would guarantee minimum 2 Mbit/s download speeds to the end-users. As far as the NGA infrastructure is concerned, among 5 488 localities there are only 73 where NGA services are offered or are planned to be offered in the next 3 years, and even there it is usually the case only in small parts of these localities, with the highest density of population.

Lack of adequate competition reflected in high prices or inadequate services.

- (12) As regards the second concern, the Polish authorities argue for a lack of competition as regards wholesale and retail bandwidth services in many areas of Wielkopolskie Voivodship. The prevalent technology of these services providing in Poland is xDSL, and xDSL market share held by the incumbent operator (TP SA) is 64.6 %, without taking into account the indirect share attributable to it due to line rental to other operators.³

¹ Fibre to the Home connections.

² Commission Staff Working Paper SEC (2011)708 of 31 May 2011 available under: http://ec.europa.eu/information_society/digital-agenda/scoreboard/index_en.htm.

³ According to the national regulatory authority, UKE analysis for market 4, TP S.A. posses 89.62% of xDSL connections.. Moreover, market examination conducted by the experts as per order of the Voivodship authorities demonstrated, that TP S.A. does not offer in principle the service of dark optical fibres rental, and the prices of other wholesale TP S.A. products (wholesale Internet access - IP Transit and Ethernet flowability rental) are about 2-fold higher when compared to an offer of alternate operators on areas of developed infrastructural competition. This is reflected in the quality of services for end-users, who on the areas covered with TP S.A. only usually receive an offer not exceeding 2 Mbit/s, while for the same price on the areas of a developed competition, the end-users may be provides with services

- (13) The Voivoideship authorities argue that the incumbent has the largest market share in terms of number of active subscriber lines. This shows a low degree of competition on the target market, where the existence of entry barriers and the dominant position of TP S.A. do not give incentives to use the service of access to network infrastructure at a fixed location. In the middle of 2010, the ULL⁴ penetration rate in Wielkopolskie Voivodship was only about 4%. According to the Polish authorities, due to the lack of level playing field the alternative operators, are not willing to invest in providing retail services via xDSL links based on the ULL service.

The rationale for rolling out a new network

- (14) According to the Polish authorities, the main reason for the low level of accessibility of the broadband services is the physical absence of sufficient fibre-optic broadband distribution infrastructure⁵ and ‘last mile’ infrastructure⁶. The existing infrastructure concentrates in the vicinity of the biggest city in the region (Poznań). Consequently, the Voivodship authorities decided to support the rollout of a new broadband network in Wielkopolska – *Wielkopolska Sieć Szerokopasmowa* (“WSS”), which will lead to the removal of this infrastructure gap.
- (15) The WSS network will be open to third party operators to obtain access for connecting ‘last mile’ infrastructure. Through the construction of a regional broadband network open for all telecommunications operators, devoted to the provision of wholesale services, the Polish central and regional authorities aim to reach objectives of social cohesion and economic growth. The construction of a new broadband infrastructure will allow additional operators of access networks to enter the market, which will have a positive impact on the supply of retail services and competition in the areas covered by the notified project.
- (16) The Polish authorities also reported that the vast majority of operators of access networks were of the opinion that the construction of a new network, having its nodes at the level of municipalities and individual villages will help them to develop, by contributing to an increase in the profitability of investments.
- (17) The Polish authorities claim that the measure is necessary to achieve the objectives of the Digital Agenda for Europe⁷, to avoid widening of the digital divide and to ensure competitive Internet access to the citizens of Central Europe.

IV. DESCRIPTION OF THE MEASURE

- (18) **Objective:** The goal of the Voivodship authorities is to provide residential customers, business users, government and public administration bodies, with the

of a definitely higher quality (e.g. bit rate higher up to 70%) [*Analysis of services accessibility and telecommunication infrastructure on the area of Wielkopolska*, ITTI consultants team, May 2011].

⁴ Eng. Local Loop Unbundled.

⁵ Backhaul networks are intermediate networks between backbones and access networks.

⁶ Or access network: the last part of the network reaching the end-user premises.

⁷ Communication of the Commission of 26.8.2010 COM (2010) 245 final/2 A Digital Agenda for Europe.

ability to access the electronic communication operator and technological platform of their choice and to have access to the services provided on NGA networks.

- (19) The project is focused on "white NGA areas" (i.e. areas where currently there is no coverage of NGA infrastructure and where private investors do not plan to build such infrastructure in the next three years). According to the Polish authorities, providing access to the subsidised backhaul infrastructure to telecommunications operators will create incentives for investment in infrastructure and services of NGA last mile segments. The second objective of the project is to allow the use of the new network to eliminate the "digital divide" in traditional basic broadband in areas where currently there is no adequate broadband infrastructure. The WSS project will be implemented following approval of the European Commission.
- (20) The operator of WSS can also participate to bid, in line with the public procurement regulations, for provision of connectivity services to the public administration.⁸ This will allow to implement and use commonly available e-services (including in particular e-government, e-education, e-health). Broadband access will allow to level disparities in locations of firms and will contribute to strengthening the role of peripheral areas in the Voivodship.
- (21) **Legal basis** The measure is based on the Law on rules of carrying out the development policy (6 December 2006), Law on the support of development of telecommunication networks and services (7 May 2010), Law on dealing with state aid cases (30 April 2010), and the resolution of Wielkopolskie Voivodship Board no 698/2007 of 14 September 2007 on adoption of the Regional Operational Programme for Wielkopolska for years 2007-2013.⁹
- (22) **Design of the project:** The project will be carried out by Wielkopolska Broadband Network S.A. company (referred to as "WSS S.A."), that received funds in the framework of the Regional Operational Programme for Wielkopolska for the years 2007-2013¹⁰ (conditional contract of financing was concluded in December 2010). WSS S.A. was initially established by the Wielkopolskie Voivodship authorities as a fully owned company¹¹ in order to prepare the notified project, which is of a strategic importance for the Voivodship. On the basis of experts' analysis of various scenarios, the Wielkopolskie Voivodship concluded that the lacking own contribution necessary for financing the project will be obtained by an issue of additional shares offered to private investors.

⁸ This could be carried out through an open tender procedure or a restricted tender procedure.

⁹ The Regional Operational Programme for Wielkopolska for years 2007-2013 was accepted by a decision of European Commission no K(2007) 4205 of 4 September 2007, amended by a decision no K(2008) 6122 of 21 October 2008., further amended by a decision no K(2011) 9787 of 21 December 2011.

¹⁰ The Regional Operational Programme for Wielkopolska was adopted in September 2007 as an instrument comprising activities that would lead to decreasing economic and social discrepancies in the region. Its main objective has been strengthening the growth potential of the Voivodship in the areas of competitiveness and employment.

¹¹ The local government of the Voivodship, in its capacity as a regional authority in order to carry out its responsibilities in the field of telecommunication, set up WSS S.A. as a fully owned company whereby its activity was limited to fulfilling the public task of the Voivodship.

- (23) Private investors were selected in an open selection procedure, according to the rules resulting from TFEU, based on the most economically advantageous offer¹². In December 2010, the Wielkopolskie Voivodship and WSS S.A. concluded the share purchase contract with investors selected.¹³ The investors will gradually take the possession of the majority of shares pack in WSS S.A. in return for an own contribution amounting to approx PLN 60 million. The selection of the Infrastructure Operator of the planned network will be conducted by WSS S.A. when the Wielkopolskie Voivodship still keeps the majority shareholding.
- (24) The implementation of the notified project will proceed according to the following organisational model: WSS S.A. launches a public procurement procedure for the design and construction of the WSS infrastructure and selects – in a separate procedure – a private partner (the Infrastructure Operator), to whom it leases and entrusts the operation of WSS. In this model, the Infrastructure Operator shall pay the rent to the WSS S.A. for leasing the constructed WSS infrastructure and will have the right to retain revenues from managing and operating the network.
- (25) During the term of contract with the Infrastructure Operator WSS S.A. will remain the owner of the network. The Infrastructure Operator shall not provide any services to end-users, but only to provide wholesale services to other telecommunication operators and services for public administration in line with the public procurement regulations. The Infrastructure operator will have an obligation to provide effective wholesale access to third parties during the whole term of the contract with WSS S.A., i.e. for a period not shorter than 7 years.
- (26) The Project envisages development of backbone and distribution infrastructure. The subsidy will cover mostly passive elements, which are indispensable for installation and running of broadband access (such as e.g., ducts, cables, optical fibres, manholes, telecommunications racks, or other locations of telecommunications nodes) as well as active elements, if these are necessary to accomplish the projected goal (mostly in the nodes of backbone network and in the main nodes of distribution network) within the budget available.
- (27) By giving wholesale network access by the Wielkopolskie Voivodship to telecommunication operators wishing to connect to it, the Voivodship authorities aim to encourage private investments in NGA networks (i.e. last mile infrastructure¹⁴) by electronic communication operators so as to accelerate the supply of NGA services to end users. This initiative will ensure that all potential end-users will be able to choose the operator of electronic communications and/or technology platform for broadband access they deem most appropriate to their needs by providing an NGA network that is able to support high-bandwidth, high reliability and affordable connectivity services. Additionally, as a secondary

¹² In line with the regulations concerning the sale of shares in a public entity, this needs to be carried with a buyer offering most advantageous conditions related to the price of shares in particular. Consequently, in the case at hand the main criterion for selection of a private investor was the price of the sold shares.

¹³ Local cable television operators: INEA S.A. and Asta-Net, Małdziński, Ryczek sp. j.

¹⁴ Access network connecting the end-users with the backbone network will assure the connectivity from a communications provider to a customer.

objective, the Voivodship government aims also to reduce the digital divide in those areas in which not even basic broadband services are currently provided.

- (28) The Polish authorities contend that a market failure is present in Wielkopolskie Voivodship as regards the provision of NGA services and, in some areas, also of basic broadband services and therefore, they consider State intervention is necessary to correct it. Therefore, the Polish authorities have requested an authorisation for the project following State aid rules and the *Community Guidelines for the application of State aid rules in relation to rapid deployment of broadband networks*¹⁵ (hereafter: the "Broadband Guidelines").
- (29) **Budget and funding instruments:** The total budget of the project amounts to approx. PLN 410 500 000 (approx. EUR 100 122 000) gross. A significant part of funding will come from ERDF - approx. PLN 284 000 000, the remaining sum will come from WSS S.A., particularly from shareholders contributions (i.e. Wielkopolskie Voivodship approx. PLN 8 000 000, and private investors approx. PLN 60 000 000).
- (30) **Aid amount and intensity:** Aid intensities and aid amounts to the chosen infrastructure operator will ultimately depend on the outcome of the open tender procedure. Nevertheless, given the ownership of constructed broadband infrastructure will remain with the WSS S.A. as well as the contractual arrangements between the WSS S.A. (see paragraph (22) and following) and the selected infrastructure operator, the actual aid amount will be lower than the amounts mentioned in the paragraphs above related to the project budget. With respect to WSS S.A., the aid amount is equal the subsidy from the Regional Operational Programme for Wielkopolska (approx. 284 000 000 PLN), while public aid amounts to 85% of the whole project amount (excluding VAT). Additionally, it should be taken into consideration, that the Wielkopolskie Voivodship contributed or planned to contribute approx. 8 000 000 PLN to shares reimbursement, which also comes from public means.
- (31) **Mapping and coverage analysis:** As confirmed by the Polish authorities, the analysis of the status of existing infrastructure and investment plans for the next 3 years were performed during a detailed inventory, prepared by independent experts selected by the Wielkopolskie Voivodship in an open tender.
- (32) The inventory covered both the distribution infrastructure and the access infrastructure (basic and NGA). With regard to the basic broadband infrastructure, the inventory covered infrastructure that allows to provide basic broadband access to Internet with bandwidth of at least 2 Mbit/s. The inventory was based primarily on surveys addressed to all telecommunications entrepreneurs registered in the Regulatory Authority's registry, and also on surveys filled in by local authorities and publicly available data. The inventory was conducted in the second half of 2008, and next it was updated in 2009, 2010 and 2011. Additionally, several meetings with operators were organized, where all issues related to the carrying out of the project were discussed, including the results of the inventory. In August 2011

¹⁵ OJ C 235 of 30.9.2009, p. 7.

the inventory was the last time updated by experts on the basis of the data obtained from the National Regulatory Authority and TP S.A.

- (33) As illustrated in paragraph (9) above, the broadband access availability in the Wielkopolskie Voivodships is very limited. Furthermore the investment plans of operators in the next 3 years, especially as regards the development of NGA infrastructure, mostly concern the urban and densely populated areas of the country.
- (34) According to the Polish authorities, the incumbent operator, TP S.A., possesses over 90% contribution in optical distribution nodes on the area of Wielkopolskie Voivodship. At the same time, the Polish authorities found that TP S.A. planned to provide access to its infrastructure to other operators in only 20 out of 5 488 localities in the Voivodship (none of these localities belongs to category 1 or 2 in the table presented below). Consequently, the availability of backbone-distribution infrastructure for other operators is very low. The potential use of TP S.A. resources by WSS S.A. in the areas where the network is planned would require modernisation and development of that infrastructure in order to fulfil the requirements of WSS network, which are essential to achieve the objectives of the project. Such investments are not planned by TP S.A. in localities covered by the project.
- (35) **Public consultation:** The Voivodship authorities undertook the final public consultation between 6 September 2011 and 6 October 2011 in order to verify the results of its mapping, planned classification of areas eligible for intervention (with the projected location of the network nodes) and to obtain information from interested parties on their plans concerning NGA and fibre investments as well as their views on the project. In the consultations notice, all the parties interested were directly encouraged to present investment plans and possible discrepancies in inventory outcomes.
- (36) During the public consultation submissions were made by 14 parties (including 8 telecommunication operators), out of which 11 parties suggested the need of additional nodes and unequivocally supported the necessity of implementing the project. Another three operators reported they possessed infrastructure in the areas covered with the project, which - after additional investment in their modernisation or development - could be used during the project. None of the parties contributing in the consultations questioned the inclusion of particular localities to the categories determined in the table presented in paragraph (42), which illustrates the existing resources and planned investments. The consultations did not reveal any credible investment plans not considered previously by the Polish authorities with the final version of the table.
- (37) An additional meeting was performed with incumbent operator (TP S.A.) due to the scale of its infrastructure on the Wielkopolskie Voivodship, with a contribution of national regulatory authority and JASPERS¹⁶ representatives. TP S.A. provided a written statement that was not going to counteract carrying out the WSS project.

¹⁶ Joint Assistance to Support Projects in European Regions - assists the 12 Central and Eastern EU Member States and Croatia in the preparation of major projects to be submitted for grant financing under the Structural and Cohesion Funds

Based on these statements, the regulatory authority concluded, that there are no obstacles to notify the project to the Commission in a form presented in the public consultations. As confirmed by the Polish authorities, during the public consultations no comments were raised that would object to the planned WSS project, on the contrary - opinions supporting the necessity of project were gathered.

- (38) **Opinion of the National Regulatory Authority:** The project was subject to ongoing consultations with the National Regulatory Authority (UKE). A positive opinion on the notified project was issued by UKE in the letter dated 9 June 2011. The opinion states inter alia that “*the assessment of the principles included in the project that form the basis for the selection and classification of areas covered with the project, rules for the selection of shareholders and infrastructure operators, as well as subsequent operation of the WSS, allow to express the opinion that they are specified in such a way, that the project interferes with free competition in telecommunications markets to the lowest possible extent, and that the interference on the rules described in justifiable*”.
- (39) **Conditional access to WSS:** The Polish authorities designed a conditional system of access to the WSS in order to meet the objectives of the scheme and at the same time to minimize the potential distortion of competition on existing operators.
- (40) The primary objective of the Voivodship authorities is to ensure an access to the subsidised infrastructure to the telecommunications operators in order to create incentives for them to invest in the NGA last mile segment.¹⁷ The second objective of the project is to allow the use of new network to eliminate the "digital divide" in traditional basic broadband access in areas where no adequate broadband infrastructure exists.
- (41) In order to minimise the potential distortion of competition, the Polish authorities will not allow third party operators to connect to the WSS with basic broadband infrastructures when WSS node is situated in the locality where according to the table below the sufficient competition is available at the level of such network or where at least two competing basic broadband infrastructure¹⁸ are already in place. The Polish authorities argue that such limitations in the use of the WSS network will reduce any potential distortion of competition as regards basic broadband services providers, but at the same time will incentivize NGA network roll-out by contracting an optic fibre backhaul network in the Voivodship.
- (42) On the basis of the above described mapping exercise, the list of targeted areas was finalised and the type of access to WSS per type of area was identified according to the following table¹⁹.

¹⁷ According to paragraph 53 of the Broadband Guidelines, NGA networks are wired access networks which consist wholly or in part of optical elements and which are capable of delivering broadband access services with enhanced characteristics (such as higher bandwidth) when compared to those provided over existing copper networks, i.e. in the current case 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.

¹⁸ Guaranteed at least min. 2 Mb/s to end-user.

¹⁹ In line with the method already applied in decision N 407/2009 Optical fibre Catalonia (Xarxa Oberta) C(2010)5696 of 11.8.2010, decision SA.31687 (N436/2010) Broadband in Friuli Venezia Giulia (Project

Table 2. Conditional access to nodes of the Wielkopolska Broadband Network (WSS):

-	Total number of localities in category/ number of localities with planned WSS nodes ²⁰	Infrastructure in place (including dark fibre)	Basic broadband retail offers ²¹	NGA infrastructures or plans for the near future	Conditional access to WSS
1	1854 / 63	None	No	No	All operators can connect to WSS, because no infrastructure is available
2	3489 / 480 ²²	Not more than one	Not more than one	No	All operators can connect to WSS because the target areas are deemed to be problematic grey area ²³

Ermes) C(2011)3498 of 23.5.2011 and decisions SA.33438 (2011/N), SA.33440 (2011/N), SA.33441 (2011/N), SA.33439 (2011/N), SA 30851 (2011/N) Broadband Network for Eastern Poland of 10.11.2011.

²⁰ These figures represent the number of localities within each category that the Voivodship authorities have indicated as planned targeted areas. The final path of the network and the exact identification of the localities will be determined by the tender process (e.g. orders for network designing and construction, for existing telecommunication infrastructure obtaining, for Infrastructure Operator selection). This may entail that certain nodes may be shifted from one locality to another or may be added/deleted, according to the technical and economic optimisation of the proposal of the winning bidder. In any case, the conditional access delineated in the table will apply, which is the reason why the Voivodship authorities have pursued a classification of all the localities of the Voivodship, including the currently non-targeted ones.

²¹ In relation to data about the existing and planned wireless access infrastructure, only technologies ensuring at least 2 Mbps for the end user were considered.

²² As a result of TP S.A. investment plans, it was decided that some localities despite their inclusion in category 2 – will be treated as non-problematic basic grey areas. These are localities that TP S.A. notified as subject to construction (under agreement with the Regulatory Authority) of access networks providing broadband access for a considerable number of citizens on a considerable area, as a result of which the TP S.A. distribution infrastructure will be significantly upgraded. Consequently, it will be allowed to locate a WSS node in such a locality only for the purpose of connecting NGA ‘last mile’ infrastructure.

²³ This category includes areas where there is only one optical access node, however, the backhaul network is not open for third party operators. Additionally, no high bandwidth services (NGA) are provided in this area and no other access nodes are planned to be constructed in the area within the next 3 years.

3	0/0	Only one	TP S.A. + LLU ²⁴	No	Only 'NGA last mile' infrastructures can connect to WSS
4	0/0	More than one	Only one	No	Only 'NGA last mile' infrastructures can connect to WSS
5	0/0	More than one	TP S.A. + LLU	No	Only 'NGA last mile' infrastructures can connect to WSS
6	72/0	More than one	More than one	No	Only 'NGA last mile' infrastructures can connect to WSS
7	73/30	One or more	One or more	Yes	Nodes located in such locality can be used as technical nodes only ²⁵ unless the following two conditions are met: a) the closest existing or planned (in next 3 years) optical distribution node available for use in a "last mile" NGA network is located not closer than approx. 4 km from the planned location of the node, and b) no NGA services are provided in the area (and no reliable plans in the next 3 years). In this case 'NGA last mile' infrastructures can connect to WSS.

- (43) **Open tender process:** The Polish authorities confirmed that there will be an open tender procedure to select the beneficiary (Infrastructure Operator) and that the fundamental principles of openness, competition and transparency of the national and EU procurement rules will be respected. The Polish authorities confirmed also that private investors were selected in an open procedure according to above rules.
- (44) **Award criteria:** The contract will be awarded to the applicant presenting the most economically advantageous offer. In this regard, the award criteria are predetermined by the Voivodship authorities: an amount of public aid applied²⁶ (weight at least 65 %), level of private partner's capital expenditures (weight 0-

²⁴ LLU: Local loop unbundling allows telecommunications operators to use connections of other operators from the telephone exchange's central office to the customer's premises.

²⁵ Category 7 singles out white NGA areas from a larger locality where there is already (or is planned) one or more optical distribution nodes available for use in a "last mile" NGA network. Consequently, public intervention is only allowed in those parts of a given locality where NGA services are currently not provided and are not planned in the near future (next 3 years) and at the same time the closest existing or planned (in next 3 years) optical distribution node available for use in a "last mile" NGA network is located not closer than approx. 4 km from the planned location of the WSS node. Without the public intervention, these areas would not benefit from the access to the NGA services, despite being included in a larger locality with one or more optical distribution node available for use in a "last mile" NGA network.

²⁶ The amount of public aid is determined by rent amount which Infrastructure Operator shall pay to WSS S.A. – the higher rent, the lower public aid amount is.

15%), other economic and quality criteria ²⁷ (weight 0-20%). The award criteria will be defined in detail by WSS S.A. before the final bids are requested, in conformity with the principles of the public procurement legislation.

- (45) **Use of existing infrastructure:** The Wielkopolska Voivodship encourages use of the entire existing infrastructure within the project (e.g. roads, ducts, etc.) in order to limit the aid necessary for the measure as well as to avoid duplication of infrastructures. It will be possible to hold a separate open tender procedure for purchasing or leasing of existing telecommunications infrastructure, or alternatively, during the procedure for design and construction of WSS infrastructure, the contractors will be allowed to procure existing infrastructure if it is economically reasonable.
- (46) **Technology:** The main goal of the project is to develop backbone and distribution network for NGA networks. At the current stage of development of telecommunications technologies there is no transmission medium for backbone and distribution networks that would allow to provide NGA services other than optical fibre links. Therefore, the project envisages construction of the network using fibre-optics links, whereas for every other equipment, choice of technology will be based pursuant to technical plans, and in public procurement procedures no technology will be excluded a priori. Consequently, the services provided on the wholesale market will be such as to enable the interconnection to the backhaul network of any possible technology, which operators wish to use for their access infrastructure.
- (47) **Wholesale access:** The key objective of the WSS project is to provide bandwidth to any third operator wishing to connect its last mile infrastructure according to the modalities highlighted above. Hence, the wholesale access will be provided on non-discriminatory and open access terms. Wholesale services will include active access by means of the provision of transmission services as well as passive access by providing access to dark fibre renting services. The Polish authorities also confirmed that duct access will be available on the planned network. As mentioned above, the obligation to provide effective wholesale access to third parties applies during the whole term of the contract with WSS S.A., i.e. for a period not shorter than 7 years.
- (48) The winning bidder for the network exploitation as Infrastructure Operator will not be allowed to provide retail services in order to avoid any concern of possible anticompetitive exploitation (i.e. by giving preferential treatment to its retail branch with regard to the use of the network) of the advantages created by the management of the network.
- (49) **Duration of the measure:** The contract lifetime between the WSS S.A. and the Infrastructure Operator will be ultimately determined in the course of respective tender procedures but will range between 7 and 20 years.
- (50) **Monitoring:** The compliance of the selected Infrastructure Operator with the contract obligations will be monitored on a regular basis by the Polish authorities,

²⁷ E.g., efficiency of the use of WSS infrastructure, costs of using the infrastructure, license duration period in excess of the 7 year minimum, quality level of offered services, fees and their accessibility, methodology for monitoring project performance, maintenance conditions.

directly or through WSS S.A., together with national regulatory authority. The monitoring will be performed during the whole term of the contract with the Infrastructure Operator. The details of the mechanism will be described in the contract between Voivodship authorities and WSS S.A. and in the contract between WSS S.A. and Infrastructure Operator.

- (51) **Claw-back mechanisms:** The Polish authorities envisage claw-back mechanisms within WSS project, to avoid any overcompensation to the Infrastructure Operator as well as to WSS S.A. (private investors – WSS S.A. shareholders).
- (52) With respect to the Infrastructure Operator the mechanism will be established in the contract with WSS S.A. and the amount to claw-back will be dependent on the EBITDA index²⁸ and will comprise the whole lifetime of the project. According to the Polish authorities, the methodology will allow to take into account not only the infrastructure operator's revenues but also whether the costs really faced are lower than those estimated in the business plan. The Polish authorities envisaged the following mechanism: if at the end of the accounting year, the EBITDA of the Infrastructure Operator exceeds the reference EBITDA (based on average EBITDAs for the companies from the telecommunications listed on the Warsaw Stock Exchange), part of the EBITDA in excess of the threshold difference must be clawed back – the surplus will be divided pro rata to the level of state aid.
- (53) Additionally, the second claw-back mechanism will be established, which will concern payment for WSS S.A. shareholders, including all payments in a period of project lifetime²⁹ and irrespective of their basis. WSS S.A. revenues will be disbursed in a following manner:
- (a) to defray the costs of WSS S.A. activity,
 - (b) to defray replacement outlays, according to rules established a priori and not more than the limit determined a priori (according to plans not more than 15% of initial investment),
 - (c) on payments for all shareholders, but not more than the amount of capital contributed by them (approx. 68 PLN millions) increased by a minimum rate of return specified for 10-years Treasury Bonds (currently 5.75%),
 - (d) each amount exceeding the expenditures from points (a) - (c) will be subject to the claw-back mechanism i.e. will be divided between WSS S.A. shareholders, and the Voivodship authorities proportionally to the shareholder contribution in relation to the subsidy amount.
- (54) **Price Benchmarking:** As confirmed by the Polish authorities, the wholesale access prices will be based on average (regulated) wholesale prices for comparable services in more competitive areas, or, in the absence of such published prices, on prices specified or approved by the national regulatory authority.
- (55) The contract concluded between the WSS S.A. and the Infrastructure Operator will specify rules to calculate fees for access to WSS by the Infrastructure Operator.

²⁸ Earnings before interest, tax, depreciation and amortization - a widely used financial indicator in the telecommunication industry.

²⁹ Period specified in a tender for IO.

These rules should lead to application of fees (e.g. for dark fibre lease), which would allow access network operators to make their retail offer comparable with a retail offer available for end-users in areas featuring effective infrastructure-based competition.

- (56) Furthermore, the national regulatory authority has been already consulted on the rules for calculating the fees of the infrastructure operator. Detailed consultations will be held again at the stage when documentation is prepared for tenders, which will lead to the selection of the Infrastructure Operator. Additionally, during the term of validity of the contract, the fees charged by the Infrastructure Operator will be approved, monitored and verified by the NRA, which will be able to resolve potential disputes between the Infrastructure Operator and third operators with regard to the level of the fees and eventually may determine the conditions of access to the WSS network.

V. ASSESSMENT OF THE MEASURE: PRESENCE OF AID

- (57) According to Article 107 (1) TFEU, “any aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods shall, in so far as it affects trade between Member States, be incompatible with the internal market”. It follows that in order for a measure to qualify 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.

State resources

- (58) As described in paragraph (29), the measure is financed by resources of the Polish authorities and EU funds, which are allocated under the control of the authorities to the beneficiaries with an element of discretion. Hence, state resources are involved.
- (59) In State aid broadband cases, aid amounts and aid intensities are usually known only *ex post*, i.e. after the tender process ("gap funding"): the Commission requests aid to be granted through an open tender procedure, which guarantees that it will be the minimum necessary. Hence also for this case it is not crucial to quantify the aid amount in advance.

Economic advantage

- (60) *Selected co- investors and infrastructure operator*: In order to bridge the financing gap of the project, the Voivodships selected private co-investors (local cable television companies) and concluded with them a contract whereby in return for their contribution they will gradually take over the majority of shares in WSS S.A. The infrastructure operator will be selected operator for managing the WSS network that will be entitled to provide the wholesale communications services on the private market.

- (61) The funding of the rollout of a broadband network in areas in which a private operator would not otherwise invest, implies that the Polish authorities will have to cover the additional costs needed to invest in such non profitable areas. Therefore, the selected co-investors and the operator will receive financial support which will enable them to provide broadband services at conditions not otherwise available on the market. The aid will allow the operator to offer services *prima facie* at lower prices than if it had had to bear all costs itself and thus attract more customers than under normal market conditions. In view of the above, an economic advantage will be granted to the selected co-investors and the operator.
- (62) *Third party providers*: The WSS will provide third party operators wholesale broadband services with access to a future-proof backhaul infrastructure. This way, third party operators will be granted an economic advantage since they will have access to wholesale capacity made available by State funding, as they will be customers of the selected electronic communication operators. By using such capacity, they can sell advanced broadband services to end customers.
- (63) *End users*: The measure aims at improving the provision of existing broadband services to residential and business users in Wielkopolska. Undertakings in the targeted areas will therefore ultimately benefit from the provision of the new and improved services.

Distortion of competition

- (64) The intervention of the State alters existing market conditions by allowing the provision of enhanced wholesale broadband services by the selected electronic communication operator and third party providers that would not be available under normal market conditions. The measure will alter the conditions of competition between wholesale operators who are likely to use the services offered by the WSS in the targeted areas and wholesale operators elsewhere in Poland and the EU.
- (65) The scheme is also selective in that it is addressed to undertakings active only in a specific region and in certain markets for electronic communications services. These selectivity elements also induce a potential distortion of competition³⁰.
- (66) Therefore, the fact that an improved broadband service and additional (wholesale) capacity becomes available has the effect of distorting competition.

Effect on trade

- (67) 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. Moreover, the measure has the potential to distort competition between business users located in Poland and those located elsewhere in the European Union.

Conclusion

³⁰ Judgement C-143/99, *Adria Wien Pipeline*, Slg. 2001, I-8365.

- (68) The Commission therefore concludes that in so far as state funds are used to finance the deployment of a backhaul network for wholesale provision of services on the private market, the notified measure "*Wielkopolska Broadband Network*" constitutes State aid within the meaning of Article 107 (1) TFEU as moreover confirmed by the notifying Member State during the notification contacts. Having established that the project involves aid within the meaning of Article 107(1) TFEU to the selected investors and service provider, third party providers and undertakings, it is necessary to consider whether the measure can be found to be compatible with the internal market.

VI. ASSESSMENT OF THE MEASURE: COMPATIBILITY

- (69) The Commission has assessed the compatibility of the scheme according to Article 107 (3) (c) TFEU and in the light of the *Community Guidelines for the application of State aid rules in relation to rapid deployment of broadband networks*³¹. The Broadband Guidelines 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 measure in the light of the criteria developed in particular in paragraphs 31-79 of the Broadband Guidelines.

VI.1.1. The balancing test and its application to aid for the broadband network deployment

- (70) As described in paragraphs 34 and 35 of the Broadband Guidelines, in order to assess whether a measure is compatible under article 107 (3)(c), the Commission balances positive and negative effects of the aid according to the criteria set out in the Guidelines. In applying the balancing test, the Commission will assess the following questions:
- (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?

³¹ OJ C 235 of 30.9.2009, p. 7.

VI.1.2. Objective of the measure

The aid is in line with the policy of the Union

- (71) The Commission defined in its Europe 2020 strategy of 3 March 2010³² 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."
- (72) The notified WSS project has as its main target "white NGA areas"³³, i.e. areas where no NGA broadband coverage is currently available and where there are no plans by private investors to roll out such infrastructure in the near future of three years. By granting access to the backhaul of the WSS to third party NGA operators, the measure facilitates and encourages investments in NGA (last mile) networks, in line with the objectives of the Broadband Guidelines. As a secondary objective, the Polish authorities also intend to allow the use of the backhaul of the WSS to bridge the traditional digital divide (i.e. as regards basic broadband) wherever necessary. This concerns specifically traditional "white areas" where no broadband infrastructure is present or problematic "grey areas", in which the presence of one infrastructure does not exclude the existence of a market failure or cohesion problem.
- (73) By extending NGA broadband coverage to areas where private operators have no commercial interest to invest in the near future, the Polish authorities pursue genuine cohesion and economic development objectives which is in line with the Digital Agenda and Sections 2.3.2. and 3.1 of the Broadband Guidelines.

Aid is the appropriate instrument

- (74) In the situation currently under assessment, due to the economics of NGA networks, the problem of the lack of supply of high speed broadband networks cannot be solved by measures involving demand stimulation or regulatory interventions.
- (75) Demand-side measures in favour of broadband (such as vouchers, tax breaks, awareness-raising measures or demand aggregation) could be an instrument of public intervention. However, these measures do not solve the illustrated problems on the supply side. As regards regulation, despite its crucial role in ensuring competition and supply in the market for electronic communications, evidence shows that in the Wielkopolska region regulation has not fully been able to ensure effective competition in some of the markets for electronic communications and has not led to sufficient investments to bridge the digital divide affecting certain areas. Regulation is, indeed, a necessary, but not a sufficient instrument for the development of broadband services as alternative providers need to combine the use

³² EUROPE 2020 - A strategy for smart, sustainable and inclusive growth, COM(2010) 2020, page 12.

³³ See section 3.3 of the Broadband Guidelines.

of wholesale products from the incumbent with own network investments which may not be profitable in areas where demand is low.

- (76) In order to ensure the supply of high-speed broadband services to all its citizens, the Polish authorities see no alternative but to grant public aid to the construction of a backhaul network for the provision of NGA services.
- (77) The Commission can agree that, in line with paragraphs 47 and 48 of the Broadband Guidelines, without further public intervention, avoiding the emergence of a new "*digital divide*" between different areas of the country seems not possible, which could lead to the economic exclusion of the local undertakings. Hence in the current situation, State aid is an appropriate instrument to achieve the set objectives.

The aid provides the right incentives to operators

- (78) As set out in paragraph 50 of the Broadband Guidelines, regarding the incentive effect of the measure, it needs to be examined whether the broadband network investment concerned would not have been undertaken without any State aid. According to the results of the public consultation and market research referred to above in paragraph (35) and following, in the targeted areas no NGA network investment would take place without public funding, hence the aid produces a change in the investment decisions of the operators. Moreover, by granting access to the WSS to third party NGA operators, the measure facilitates and encourages investments in NGA (last mile) networks. Therefore, the aid shall provide a direct and appropriate investment incentive for the selected operator and for third party beneficiaries.

VI.1.3. Design of the measure and the need to limit distortions of competition

- (79) The Polish authorities have designed the measure in such a way as to minimise the State aid involved and potential distortions of competition arising from the measure.

Pro-competitive nature of the project

- (80) The wholesale provision of services is not aimed to develop an access network but only a transport "*backhaul*" network. Use of the transport network is a necessary input for retail telecommunication operators to provide (high speed and very high speed) access services to the end users. The operator of the new network will connect municipalities of Wielkopolska region and offer access to wholesale products (such as ducts, dark fibre or active access products) on a commercial basis. Construction of backhaul networks is generally a measure that fosters competition and investment and, for NGA networks, encourages third party operators to rollout last mile infrastructures capable of supplying advanced connectivity services to end-users. Backhaul networks have the potential to stimulate competition on all access technologies, while leaving the bulk of the investments to connect end-users to private operators.
- (81) However, backhaul networks are "hybrid networks" in the sense that they are able to sustain both basic and NGA types of networks: it is the (investment) choice of the

telecommunication operators what type of 'last mile' infrastructure they wish to connect to the backhaul network. In particular, operators could decide to use ADSL or wireless solutions (i.e. basic broadband infrastructures), but they could also opt for rolling out, for example, an FTTH architecture (i.e. an NGA infrastructure).

- (82) Hence from competition point of view, the possible distortion resulting from the deployment of subsidised backhaul networks shall be assessed on two levels: (1) the level of basic broadband networks and (2) the level of NGA networks, in line with the distinction made in the Broadband Guidelines.
- (83) With respect to (1), the measure could cause distortions of competition in those localities in which market forces seem to work adequately to provide basic broadband services to citizens. In these areas, public intervention would not be justified, since it would not address a market failure (as competitive broadband providers exist), it would not bring any significant benefits for the targeted areas (as citizens would receive the same level of services), state aid would not have any incentive effect and it could crowd out private investments. By contrast, in localities where a market failure exists with regards to basic broadband, the provision of subsidised backhaul services has a pro-competitive character.
- (84) As regards point (2), i.e. concerning NGA networks, according to the information submitted by the Polish authorities, almost the whole of area of the Wielkopolska region (except larger cities and densely populated areas) has to be considered a "white NGA area": even where the incumbent's backhaul infrastructure is present, the access infrastructure is not yet upgraded nor will it be in the next three years (in the target areas no "credible investment plans" have been reported in the public consultation).

The system of conditional market access to WSS

- (85) To alleviate these different concerns, the Polish authorities have proposed a system of conditional market access to SSPW, depending on the existing market situation in the various municipalities, as explained above in Table 2.³⁴

1. "NGA white" and traditional "white areas"

- (86) As showed in Table 1 above, there are 63 targeted localities in which there is no backhaul infrastructure at all (Category 1). These areas are "white" also from the perspective of basic broadband, hence there is no need to impose restrictions on the type of last mile infrastructures allowed to use the WSS, provided that the conditions indicated in paragraph 51 of the Broadband Guidelines are respected (see below in paragraph (102) and following).

³⁴ In line with Commission precedents in N 407/2009 Optical fibre Catalonia (Xarxa Oberta), decision C(2010)5696 of 11.08.2010, SA.31687(N436/2010) Broadband in Friuli Venezia Giulia (Project Ermes), decision C(2011)3498 of 23.05.2011 and SA.33438 (2011/N), SA.33440 (2011/N), SA.33441 (2011/N), SA.33439 (2011/N), SA 30851 (2011/N) Broadband network project in Eastern Poland

2. "NGA white" and traditional "grey areas"

- (87) Category 2 comprises 480 targeted localities which are only served by the incumbent, not only in the backhaul but also in the access segment. These areas are "grey" from the perspective of basic broadband, but the Polish authorities demonstrated that the conditions laid down in paragraph 46 of the Broadband Guidelines are fulfilled.
- (88) In target areas the provision of a broadband infrastructure is still a *de facto* monopoly only provided by TP S.A. The Polish authorities provided evidence that (i) no adequate services are offered to satisfy the needs of citizens or business users and that (ii) there are no less distortive measures available (including ex ante regulation) to reach the same goals.
- (89) For the purpose of establishing the above, the Polish authorities provided evidence that:
- (a) in areas included in this category the backhaul network is not open for third party operators. Furthermore, no other access nodes are planned to be constructed in the area within the next 3 years.
 - (b) the overall market conditions are not adequate, by looking, *inter alia*, at the low accessibility of broadband services and the type of services offered to end-users as described in section III.2.
 - (c) the overall barriers preclude potential entry of other electronic communication operators.
 - (d) any measures taken or remedies imposed by the competent national regulatory or competition authority with regard to the existing network operator have not been able to overcome such problems. For instance, according to the Polish authorities, even if regulation may have been successful in establishing a competing offer of broadband services, the geographical remoteness and demand characteristics in the areas of Category 2 still prevent the achievement of supply conditions similar to those prevailing in urban areas.
- (90) Hence although a basic broadband infrastructure is present in the target areas, the evidence provided by the Polish authorities suggests that a market failure exists. Accordingly, there is no need to impose restrictions on the type of last mile infrastructures allowed to use the WSS in the localities belonging to category 2, provided that the conditions indicated in paragraph 51 of the Broadband Guidelines are respected (see below in paragraph (102) and following).
- (91) For all other targeted localities, the Polish authorities will allow third operators to connect to WSS only if they deploy NGA capable 'last mile' infrastructures³⁵. Those

³⁵ For the definition of "NGA last mile" see footnote 9

localities can be considered 'NGA white areas' where there are no existing NGA infrastructures, no NGA services are currently offered to end users and there are no plans for investment in NGA in the near future of three years. However, in terms of basic broadband networks, on the basis of the available data sufficient competition seems to exist (i.e. traditional "black" areas or unproblematic "grey" areas).

- (92) In particular, as far as Category 3 is concerned, the data show the presence of only one infrastructure at the wholesale level, but there are operators alternative to the incumbent active on the retail market offering basic broadband services. This fact suggests that, although the area is "grey" (for traditional broadband), it is not problematic as Category 2 above. In presence of the mentioned factors and lacking evidence supporting the existence of a market failure, the conditions of paragraph 46 of the Broadband Guidelines cannot be considered fulfilled and the areas in question can be considered sufficiently competitive from the point of view of basic broadband.
- (93) With respect to the conditions laid down in paragraph 73 of the Broadband Guidelines concerning "white NGA areas" which are "grey" from the perspective of basic broadband, the Polish authorities proved that (a) the broadband services provided over the existing networks are not sufficient to satisfy the continuously growing needs of citizens and business users in the areas in question and commercial operators do not have sufficient commercial incentives to upgrade the existing networks and (b) there are no less distortive means (including ex ante regulation) to reach the stated goals of the scheme.
- (94) Accordingly, in the municipalities belonging to category 3, WSS can be used to obtain backhauling only by those third party operators that are investing in *NGA last mile infrastructures* but not by operators wishing to obtain backhaul services from WSS for their *basic broadband* infrastructures (for instance, adsl, basic cable, wireless or mobile solutions). As confirmed by the Polish authorities, at this stage, there are no nodes planned in the localities of category 3.

3. "NGA white" and traditional "black areas"

- (95) As regards Category 4, there appear to be more than one wholesale infrastructure, i.e. backhaul and other (possibly "pure") passive infrastructures, although only the incumbent is offering broadband services at retail level. Even if at this stage it is not known whether such "other" infrastructures are available for access by third party operators and adequate to the provision of retail broadband services by alternative providers, there is not sufficient proof to exclude it either³⁶. At this stage, the Polish authorities have not identified localities belonging to this category targeted by the measure.

³⁶ This would be the case if for example only dark fibre is present but not available for access by retail broadband operators and/or the cost of using existing infrastructures is too high in comparison with other competitive areas. At this stage this has not been demonstrated by the Polish authorities, that are not in possession of such information.

- (96) In Category 5 there are localities in which not only there appear to be several wholesale infrastructures, but also a competitive retail market due to the presence of ULL operators. In absence of evidence to the contrary, these areas as well as those of Category 4 could be considered sufficiently competitive from the point of view of traditional broadband and therefore, in line with paragraph 43 of the Broadband Guidelines, State aid cannot be allowed. At this stage, the Polish authorities have not identified localities belonging to this category targeted by the measure.
- (97) Category 6 comprises localities in which there are at least two backhaul infrastructures (besides "other" passive infrastructures) and a competitive retail market not only with the presence ULL operators accessing the network of the incumbent but with also an alternative cable infrastructure. These localities constitute black areas from the point of view of traditional broadband. As confirmed by the Polish authorities, at this stage, there are no nodes planned in this category of areas.
- (98) Category 7 features particular conditions, since it only includes white NGA "spots" constituting parts of larger areas marked as NGA grey or NGA black. In category 7 localities, the operators will not be allowed to obtain backhaul services from WSS for their basic broadband infrastructures. However, in such "white spots", access to WSS for use in a "last mile" NGA network will be possible if the following two conditions are met: a) in a given part of the locality the NGA services are currently not provided and they are not planned in the next 3 years b) at the same time the closest existing or planned (in the next 3 years) optical distribution node available for use in a "last mile" NGA network is located not closer than approx. 4 km from the planned location of the WSS node. Without the public intervention, these areas, despite being included in a larger locality with one or more optical distribution node, would not benefit from the access to the NGA services in the near future. The Polish authorities are planning a node in 30 localities in this category.
- (99) No localities belonging to the categories 4 and 5 have been identified and no nodes are planned within the category 6 localities. As regards the category 7 areas, the Polish authorities contend that these are "white NGA areas" and hence submitted information to prove that the conditions laid down in paragraphs 75 and 78 of the Broadband Guidelines are fulfilled (as some of these areas are traditional "black areas" or unproblematic "grey"). In particular, the Polish authorities demonstrated (as described in detail in section III.2 of the current decision) that:
- (a) the overall market conditions are not adequate: there is no provision of NGA services in any of the areas belonging to these categories (as evidenced by the public consultation conducted by the Polish authorities), and demand for new services cannot be met by existing networks;
 - (b) since no NGA network exists, even in presence of regulation imposed by the NRA, network access cannot be conducive to effective competition in NGA;

- (c) due to the geographical or competitive situation of the areas in question, there are significant entry barriers precluding potential entry by new NGA network investors;
 - (d) measures and remedies imposed by the national regulatory authority cannot overcome the problems, in the absence of investments plans;
 - (e) as shown in the framework of the public consultation (where no operator has objected to the project³⁷), existing basic broadband infrastructure operators are not proceeding to invest in upgrading their broadband infrastructures within the next three years to provide higher speeds in response to users' demands.
- (100) Hence although several broadband infrastructures exists in the municipalities belonging to category 4 to 7, according to the evidence provided by the Polish authorities, no operator has plausible commercial plan to upgrade its infrastructure to NGA network in the near future of 3 years. Concerning basic broadband services, based on the data provided by the Polish authorities, it seems that these areas are served by at least 2 competing infrastructures or ULL operators, hence there is no evidence that these services are not offered at competitive conditions.
- (101) Accordingly, in the municipalities belonging to categories 4-7, SSPW can be used to obtain backhauling only by those third party operators that are investing in *NGA last mile infrastructures* (as described in footnote 9) but not by operators wishing to obtain backhaul services from SSPW for their *basic broadband* infrastructures (for instance, adsl, basic cable, wireless or mobile solutions).

The other proportionality conditions of the Broadband Guidelines

- (102) As set out in paragraphs 51 and 79 of the Broadband Guidelines, in assessing the proportional character of the notified measure in "white NGA areas" (in the current case, for all target areas from category 1 to category 7) a number of conditions has to be met in order to minimise the State aid involved and the potential distortions of competition.
- (103) ***Market research and consultation:*** As set out in detail in paragraph (31) and following, the Polish authorities have undertaken an analysis of the existing broadband infrastructure in order to identify the areas where State intervention is necessary. A public consultation has been conducted as described above in paragraph (35) and following. All the relevant stakeholders have had the opportunity to submit their views and the regulatory authority's opinion has been gathered. This way, the Polish authorities ensure that public funds are used only in areas where there are no plausible private investment plans to build commercially based high speed or very high-speed (NGA) networks in the next three years.

³⁷ See point 104.

- (104) As confirmed by the Polish authorities, no operator has objected to the project. Comments from operators as regards the mapping and the areas eligible for intervention have been taken into account by the Polish authorities.
- (105) In addition, according to paragraph 67 of the Broadband Guidelines, at present, some advanced basic broadband networks (for instance ADSL 2+) can, up to a certain point, also support some of the types of broadband services that in the near future are likely to be offered over NGA networks (such as basic triple play services). However, and without prejudice to the imposition of ex-ante regulation, it should be noted that novel products or services which are not substitutable from both demand and supply side perspectives may emerge and will require broadband speeds in excess of the upper physical limits of basic broadband infrastructure. Hence, such conditional access will ensure that distortion of competition to existing basic broadband infrastructures will be minimised in line with the provisions of the Broadband Guidelines³⁸.
- (106) Furthermore, in the context of the public consultation, no operator has put forward the existence of NGA investment plans for the near future³⁹ for the target localities belonging to categories 1 to 7. Thus, the Commission considers that the system of conditional access above delineated allows to exploit the pro-competitive aspects of the present measure while minimising the negative impact on competition and investment.
- (107) ***Open tender procedure:*** To minimise the amount of aid involved, the Polish authorities run a selection procedure in line with the principles of openness, competition and transparency of the national and EU procurement rules, to select the undertaking for the construction and the management of the network. Details of the procedure and its outcome are described above in paragraph (43). This procedure has the effect of maximising the effect of the aid provided while minimising any potential advantage granted for the selected operator. The Polish authorities designed the selection procedure so as to choose the most economically advantageous offer among those presented by the operators, as detailed above in paragraph (44). The authorities specified in advance the relative weighting, which it will give to the key criteria chosen for the selection procedure. The system is designed in such a way as to ensure that the applicant with the lowest amount of aid requested receives more priority points within the overall assessment of the bid, in line with the provision of the Broadband Guidelines and in line with the principles of the public procurement legislation.
- (108) The measure prevents a distortion of competition which could arise from a conflict of interest if the selected network operator provided access to wholesale capacity at the upstream level while at the same time competing downstream on the retail

³⁸ See also Commission decision in case N157/2006 - South Yorkshire Digital Region Broadband Project. JOCE C/80/2007.

³⁹ No evidence within the meaning of paragraph 42 of the Broadband Guidelines has been presented by operators (such as a business plan, detailed calendar deployment plan as well as proof of adequate financing) to demonstrate the credible and plausible character of any planned NGA investment in the target areas.

market. By being excluded from entering the downstream market, the operator will have no strategic incentive to deny certain retail companies access to its wholesale capacity.

- (109) **Technological neutrality:** At the current state of technological development, as acknowledged in paragraph 53 of the Broadband Guidelines, only optical fibre can provide the backhaul capacity necessary to provide NGA retail services. On the other hand, as regards the provision of retail broadband services to end users, the design of the measure under assessment does not favour any particular technology or network platform, leaving it to commercial operators to come up with the most appropriate technological solutions to provide retail broadband services to end users. Therefore any third party operator, regardless of the type of technology used, can benefit from the measure in line with the conditions detailed in Table 2.
- (110) **Use of existing infrastructures:** The Polish authorities have designed the measure with the objective to minimize the impact of the new network on the market and on the investment plans of existing electronic communication operators. Wherever possible, the new network will use existing infrastructure, whether owned or leased. This way, the Polish authorities avoid the unnecessary and wasteful duplication of existing networks and minimise the overall costs of the project. In particular, as mentioned in paragraph (45), it will be possible to hold a separate open tender for purchasing existing telecommunications infrastructure, or it will be alternatively possible that during the procedure for design and construction of WSS infrastructure, the contractors will be allowed to procure existing infrastructure if it is economically reasonable. In case where the existing infrastructure used belongs to the incumbent, this could be accessible by competitors (through access to ducts) in line with application of the regulatory framework. Furthermore, the Voivodship authorities together with the National Regulatory Authority, will assess whether third parties can obtain adequate access to the incumbent's infrastructure and hence are able to compete in the tender procedure on a level playing field.
- (111) **Wholesale access:** The selected operator will offer wholesale services and access to the subsidised network to other operators in an open, transparent and non-discriminatory manner for at least seven years. This will represent in fact the core business model of the winning bidder, given that the operator of the infrastructure will not be allowed to provide retail services. The access obligations will be supervised by the Polish NRA (UKE).
- (112) **Price benchmarking:** A price benchmarking mechanism is incorporated in the funding agreement. In line with the provision of the Broadband Guidelines, the price for wholesale access will be based on average prices for comparable services in more competitive areas and whenever a reference offer is not available, wholesale prices and access conditions will be approved by UKE, as detailed in paragraphs (54) and the following.
- (113) **Monitoring and claw-back mechanism to avoid over-compensation:** The project will be examined on a regular basis 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. By ensuring that any extra profit generated through the operation and private ownership of the networks will be clawed back as explained in paragraphs (51) and the following, the Polish authorities ensure that recipients of the aid will not benefit from overcompensation and will minimise *ex post* and retroactively the amount of aid deemed initially to have been necessary.

(114) ***Additional conditions for NGA networks:*** concerning the conditions laid down in paragraph 79 of the Broadband Guidelines for the authorisation of aid measures to NGA networks, the Polish authorities proved the following:

(a) *Effective wholesale access:* under the current scheme the access obligations imposed on the chosen operator include effective access to both passive (such as ducts, dark fibre) and active infrastructure, as detailed in paragraph (47), without prejudice to any similar regulatory obligations that may be imposed by the NRA in the specific market concerned in order to foster effective competition.

(b) *Role of the NRA:* In the case at hand, the Polish regulatory authority UKE has been consulted on the project and has provided its positive opinion on its design. In the phases of implementation of the SSPW project, UKE will have the competence to supervise compliance with the agreed access conditions and will approve access tariffs whenever necessary.

(c) *Effective and full unbundling:* The NGA network architecture that will benefit from State aid will support effective and full unbundling and satisfy all different types of network access that operators may seek (including access to ducts, fibre and bitstream) and supports both "point-to-point" and "point-to-multipoint" topologies.

VI.1.4. Conclusion

(115) The Commission concludes that the SSPW project meets the compatibility criteria set out in the Broadband Guidelines, hence the aid involved in the notified measure is compatible with Article 107(3)(c) TFEU.

(116) In view of the duration of the scheme, the Commission would like to draw the Polish authorities' attention to future revisions of the Broadband Guidelines, which might make appropriate amendments to the scheme necessary.

VII. DECISION

On the basis of the foregoing assessment, the Commission has accordingly decided that the measure "Wielkopolska *broadband network*" is compatible with Article 107(3)(c) TFEU.

The Polish authorities are reminded that, pursuant to Article 108(3) TFEU, 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:

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Yours faithfully,

For the Commission

Joaquín ALMUNIA
Vice-President