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Subject: SA.34199 (2012/N) – Italy
Digital Plan – Super-fast broadband

Sir,

I. SUMMARY

- (1) I am pleased to be able to inform you that the European Commission has assessed the measure "Digital Strategy Italy" and decided not to raise objections, as the State aid contained therein is compatible with Article 107(3) (c) Treaty on the Functioning of the European Union (TFEU).

II. PROCEDURE

- (2) Following pre-notification discussions, by letter registered 4 June 2012, the Italian Authorities notified to the Commission pursuant to Article 108(3) of the TFEU their support programme for a nationwide rollout of access to fast and superfast broadband. The Commission requested additional information on 31 July 2012, to which Italy replied by letters of 10 September and 16 November 2012. Small changes were communicated on 13

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December 2012. The Italian authorities have also taken the opportunity to explain the scope of the measure during a number of meetings and informal contacts with the case team.

III. CONTEXT

III.1. Strategic framework for broadband development

- (3) There is widespread consensus on the crucial impact on, and benefits to, economies and societies of ubiquitous broadband connectivity: it supports business efficiencies and growth, preserves and ensures that economies can remain competitive, and enables citizens to enhance their skills and learning and to benefit from online services and offerings, including key public services.
- (4) Broadband connectivity is of strategic importance for European growth and innovation in all sectors of the economy and to social and territorial cohesion. The Europe 2020 Strategy ("EU2020") underlines the importance of broadband deployment as part of the EU's growth strategy for the coming decade and sets ambitious targets for broadband development. One of its flagship initiatives, the Digital Agenda for Europe ('DAE')¹ acknowledges the socio-economic benefits of broadband, highlighting its importance for competitiveness, social inclusion and employment. The achievement of Europe 2020 objective of a smart, sustainable and inclusive growth depend also on the provision of widespread and affordable access to high speed internet infrastructure and services. Meeting the challenge of financing a good quality and affordable broadband infrastructure is a crucial factor for Europe to increase its competitiveness and innovation, provide job opportunities for young people, prevent de-location of economic activity and attract inward investments. Therefore the DAE restates the objective of the EU 2020 Strategy that sets the following targets for broadband development in Europe: to (i) bring basic broadband to all Europeans by 2013 and by 2020, (ii) all Europeans have access to much higher internet speeds of above 30 Mbps and (iii) 50% or more of European households subscribe to internet connections above 100 Mbps.
- (5) In line with the objectives of the DAE, Italy intends to put in place its own national digital strategy which includes various types of interventions. The notified plan is part of a national strategy to develop the digital economy, which provides for several measures to that end such as development of cloud computing, new public services and over-the-top television as to initiate a virtuous mechanism to multiply spill-over effects within the whole national economy. In fact, Italy foresees various initiatives in different areas of interests concerning the development and penetration of advanced Internet technologies.
- (6) Firstly, recognising the importance of a centralised database of broadband infrastructure and services, as also highlighted in the Commission's proposal of revised Broadband Guidelines², Italy will create a database containing all relevant information regarding

¹ Communication from the Commission to the European Parliament, the Council, the Social Committee and the Committee of the Regions, COM (2010) 245 final *A Digital Agenda for Europe*.

² The consultation can be found at

broadband connection services, as well as a national registry of existing infrastructures to optimize future investment plans. Moreover, decision-making actions regarding broadband will be made publicly available in a dedicated website so as to guarantee transparency of action and allow citizens to be informed in a structured and converged manner of the status of the project and any future proposal related to the field under consideration. A coordination body ('Cabina di Regia') has been created within the Italian Ministry of Economic Development (MISE) to coordinate implementation of the various initiatives in favour of broadband deployment³ supported by a dedicated website⁴. Additionally, the Italian authorities envisage the simplification of rules and procedures concerning civil works for broadband deployment and coordination of various types of intervention with legislative action at national and local level.

- (7) To facilitate coordination and coherence of the public interventions, agreements and memorandums of understanding will be signed between the central government and the regions. This should ensure that the legal framework designed at central level, of which the present notification is part, will be carried out correctly by the local granting authorities.
- (8) Other measures are designed to address different relevant issues for fast and ultra-fast broadband deployment. Given the demand for mobile services, radio spectrum auction will be carried out to stimulate the provision of connectivity services with wireless technology and favour Internet in mobility. As regards demand-side measures, IT literacy will be promoted as well as quality checks of internet services. They will form part of a national campaign to expand and improve the use of online services. Demand stimulation interventions will also concern data centres for cloud computing, digitisation of public administration, increased security for online transactions and e-commerce.
- (9) It is clear, however, that to achieve the objectives of the DAE, as endorsed by the national broadband strategy, all the previous measures have to be complemented by direct public funding of infrastructure rollout. As acknowledged in national strategies as well as in the DAE, carefully targeted public sector interventions, where the market is not delivering or not delivering effectively, is needed to stimulate investment in the Italian broadband infrastructure and so to bring these projects to life. Therefore Italy designed a nationwide framework scheme that aims to channel public funding in order to achieve the objectives of the DAE in a coherent and systematic way.

III.2. Existing measures

- (10) Besides a substantial number of regional broadband schemes authorised by the Commission between 2006 and 2012⁵, Italy has already in place two national *framework* measures having the objective to bridge the digital divide as far as basic broadband services are

http://ec.europa.eu/competition/consultations/2012_broadband_guidelines/index_en.html

³ Including all existing State aid measures.

⁴ www.agenda-digitale.gov.it

⁵ The list of Commission decisions is available at

http://ec.europa.eu/competition/sectors/telecommunications/broadband_decisions.pdf.

concerned. The Rural Broadband Plan⁶ and the National Broadband Plan⁷ have already been assessed and authorised by the Commission in 2010 and 2012. The two plans are currently being implemented by regional and local authorities with interventions in their territory of competence.

- (11) One of the interventions foreseen in those schemes was the upgrade of the backhaul networks which constitutes a fundamental step to be able to provide not only basic broadband services but also ultra-fast services. The existing plans further include measures to facilitate rollout of the access network in remote regions deprived of broadband connection. However, the Italian authorities are also aware that basic broadband connections are not sufficient in providing innovative services, which businesses and citizens require, such as high definition television, teleworking possibilities, 3D television, e-health, e-government, multiple application usage.
- (12) The information provided by the Italian authorities show that Italy is lagging behind in terms of broadband technologies diffusion and demand for e-services. In particular, an analysis conducted by the MISE has shown that there is a limited diffusion of NGA (Next Generation Access) services, caused by the lack of infrastructure due to the reluctance of private operators to invest in those networks. Also the enquiry by the MISE through a questionnaire sent in October 2010 and whose results were finalised at the beginning of 2012 has revealed that there is little interest in investing in new fibre infrastructures.
- (13) Against this background, the Italian authorities have designed their Strategic Digital Plan, whose funding measures form the object of the present notification.

IV. DESCRIPTION OF THE MEASURE

IV.1. General overview

- (14) **Objective:** the project aims at maximising NGA deployment ubiquitously within the Italian territory in order to link up all households with high speed broadband connectivity by 2020. Technically, it consists of the guarantee of minimum 30 Mbps internet speed across the whole country and the possibility for 50% of the population to switch to internet connection above 100 Mbps speed due to FttH fibre technologies. Given the strategic value in the digital economy of broadband connectivity, it is crucial to develop an extensive and capillary plan in which information and communication technologies can foster economic growth, social development, innovation and ultimately a higher quality of life. In this line, the Italian authorities outline a national legal framework in order to guarantee a widespread access to very high speed broadband, next generation access (NGA). The objective of the measure is to respond to the needs of social cohesion and economic development of the less developed regions of the country. In fact, especially for the first years of implementation, southern regions are expected to be the first beneficiaries of the planned interventions.

⁶ Decision State aid N 646/2009.

⁷ Decision State aid n° SA.33807 (2011/N) – Italy.

- (15) **Legal basis:** The legal basis for action is represented by article 30 Law Decree n. 98/2011, as modified by Law n. 111/2011 foreseeing the creation of the Strategic Digital Plan. The plan has then been elaborated by the MISE and subject to authorisation by the Commission before its implementation.
- (16) **Rationale for a 'framework scheme':** Italy wishes to put in place a country-wide state aid scheme to cover a number of regional and possibly local projects. Since funding instruments will probably be available mostly at local level for broadband projects and given their number, Italy considers a national framework scheme as appropriate to cover all of these broadband projects under one umbrella, in particular to ease administrative burden on smaller granting authorities and to accelerate broadband investments. In other words, the framework project contains the national legal framework and criteria for the state aid schemes developed by local administrative authorities who will then choose the private operators in charge of constructing infrastructures affecting their territory.
- (17) Coordination between national and local actions will be assured in respect of national and European rules. All local projects will be implemented under the supervision of the MISE who elaborated the Framework Strategic Plan. Local granting authorities will have to respect the general lines of the Framework schemes and will be required to submit their calls for tender to MISE for a consistency-check. The fully state owned company *Infratel*⁸ will contribute to coordinate the technical aspects of the project. In case local authorities intend to deviate from the framework, they will be required to separately notify to the Commission the amendments.
- (18) **Different intervention models.** The Italian authorities envisage three types of intervention models which will determine how local authorities will proceed when granting public funds to private operators.

Model A: Direct Intervention

- (19) The first intervention model is intended for building and rollout of passive infrastructures, such as multi-operator cable ducts and dark fibre. It will include linking the public administration sites as well as the access segment to serve the citizens.
- (20) This model encompasses two phases, each characterized by a specific tender procedure. In the first phase, a third party will be selected to build a new infrastructure which will be completely funded by public resources. When launching the tender, the competent authority will specify the number of lots in which infrastructure will be designed, rolled out and maintained. The tender is open to single undertakings and consortia established within the European Union and foresees several qualitative criteria. In particular, the adoption of new technologies and the presentation of projects with low environmental impact will be preferred. The newly built infrastructures will be owned by the public authority.
- (21) Once infrastructures are completed, a subsequent tender procedure will be conducted in order to select a *concessionaire* that will be in charge of the commercial exploitation of the

⁸ In its role analysed in the context of the measure mentioned in footnote 7.

optical fibres and will have to allow all access seekers to connect to the newly built network at equal and non-discriminatory conditions for its entire life. This condition will apply even in case of changes in the ownership of the infrastructure. Commercial operators will then be able to offer NGA services to final users, bearing the commercial risks of this commercial activity. Duration and operational management of the subsidised infrastructure will have to safeguard public interest and best condition for commercial deployment. The access prices and conditions will be set by the Italian National Regulatory Authority AGCOM. The concessionaire cannot be vertically integrated.

Model B: Public-Private Partnership

- (22) The second Intervention Model is that of a Public-private partnership (for example in the form of a joint venture) with a public partner holding a major participation and supervisory and control powers. The private partner will be chosen through an open tender procedure and it may also be an association of undertakings, so as to allow a higher volume of investments. The private parties interested in taking part to the public-private partnership are required to provide in the framework of the tender process a precise business plan in line with the preliminary project designed in the call for tender. In particular, the bidders have to indicate in their offers (i) the type of network they propose to rollout, when it is not already specified in the call for tender, and the foreseen cost to roll out such network and (ii) the amount they request from the public partner and the level of their own contribution to roll out the network. The partnership will roll out and operate the new infrastructure which will remain in its ownership.

Model C: "Incentive-based" (gap funding)

- (23) The third model follows successful state aid schemes already implemented in several Italian regions: state funds will be granted to a commercial operator selected through a public tender to complete the NGA infrastructure in the under served areas. Bidders will be required to contribute for at least 30% of the total investment and will be required to make clear in their offers: the operational costs, its own infrastructural investments, the expected revenues, the expected penetration (also possible in terms of "homes passed"). The beneficiary will retain ownership of the funded infrastructures.
- (24) All Models above can be used by the Regions implementing the scheme. However, based on the public consultation, the Italian authorities estimate that Model C will most likely be used for the first implementation actions in 5 Southern-Italian Regions (Campania, Basilicata, Molise, Calabria and Sicily) to cover those areas where demand for NGA services is expected to be higher (higher population density, industrial areas, data centres, schools and universities etc.) and commercial investment is not expected in the next 3 years. This intervention is expected to benefit 3,8 million inhabitants with ultra-fast (above 100 Mbit/s) connections.
- (25) **Target areas. Mapping and consultation of stakeholders.** Irrespective of the choice of Models, the Italian MISE conducted an enquiry among commercial telecommunications operators asking them to provide information about their existing coverage and future

investment plans. The mapping exercise was conducted on the basis of the areas covered by each central office at the local exchange. Consultation of the operators is repeated every year to update the infrastructure database in line with developments of the commercial investment plans and public funding interventions.

- (26) The following results emerged: main operators would invest only in highly populated areas, mainly big cities and they would offer services not to the totality of households even in those areas, but merely to the more central ones and mostly employing FTTC infrastructure. According to questionnaires, also private forecasts for investment in NGA in the next three years are quite conservative and will be concentrated in high-density areas. The geographical characteristics of the Italian territory constitute an additional obstacle for the profitability of commercial investment. On the basis of the results of the consultation, the Italian authorities identified 1400 out of the 10.400 geographic areas under consideration (central office areas) as NGA grey or black and were therefore excluded from the possibility of public intervention. Hence the all the target areas may be regarded as "white" NGA areas according to the State aid Broadband Guidelines⁹ definition. The targeted "white NGA areas" shall be considered "white" or, for the majority, "grey" areas from basic broadband point of view, as there are no two competing broadband infrastructures (such as cable and xdsl) in place.
- (27) **Infrastructure design:** the access infrastructures forming the subject of the notified scheme include both the "primary network" segment until a flexibility point where different technologies will be able to connect and the "secondary network" segment until the buildings of the final users. The infrastructure going to the building, including, where applicable, the vertical connection, should be made open for access to all operators and all inhabitants of the building. The infrastructure realised with the help of state aid will be open to every technology that operators may wish to use¹⁰ and will allow for unbundling at all network levels.
- (28) **Budget:** The Italian authorities estimate that the total amount to deliver the DAE objectives in Italy will be above 9 billion EUR, which are expected to include (1) re-use of existing infrastructures, (2) private funding (3) public funding (4) medium and long-term credit instruments. As regards the aid measure, the Italian authorities envisage an amount of 2,5 billion EUR; however the exact budget and funding instruments will be more precisely identified in the coming years as they become available. For the first projects to be implemented in southern Regions, the available budget is of 500 million EUR, mostly coming from European structural funds.
- (29) **Aid intensity:** The aid intensity will depend on the outcome of the open tender processes: for Model A the whole infrastructure rollout costs will be borne by the public authorities; for Model B it will depend on the bid by the private operators. For Model C, a maximum aid intensity of 70% is foreseen.

⁹ OJ C 235 of 30.9.2009, p. 7.

¹⁰ Including P2P technologies, GPON technologies, FTTCab, LTE etc.

- (30) **Duration:** The duration of the Italian scheme will start at the date of approval by the European Commission and will be valid until 2020. By 28 February 2015, the Italian authorities will submit to the Commission an evaluation of the scheme in view to obtain a prolongation of the authorisation.
- (31) **Role of AGCOM:** Agcom is the national regulatory authority (NRA) for communications industries, TV and radio sectors, fixed line telecoms and mobiles, plus the airwaves over which wireless devices operate. The regulation of broadband is within Agcom's remit. Due to Agcom's knowledge of the broadband sector, the Italian government intends to involve it to provide technical advice, advising on issues arising in the context of individual broadband projects relying on the National Scheme. Agcom's task include technical advice on wholesale access arrangements and benchmarking pricing exercise; technical advice on specific local projects, dispute resolution between access seeker and the subsidised operator within its statutory role. Agcom has been entrusted by law with the power to define the access pricing system for subsidised networks in addition to their role in SMP regulation¹¹. Agcom has also been consulted on the notified Plan.
- (32) **Beneficiaries:** Direct beneficiaries of the aid will be electronic communications operators building and managing the subsidised network and offering broadband services. Indirect beneficiaries will be electronic communication operators utilising the new network for offering retail services.
- (33) **Transparency and reporting:** in order to ensure a high level of transparency for the use of public funds in the scheme, Italy set up a central website¹², where all information related to the implementing projects will be published. The MISE will prepare a template for local authorities to communicate all relevant information so as to be able to aggregate and compare the data from different projects and to collect information about the existing infrastructure in the targeted areas.
- (34) Successful suppliers of regional and local broadband projects will be required to provide information on the new subsidised infrastructure to the MISE. A geo-referenced website will publish the entirety of information on excavation works and physical objects so as to create a preliminary territorial registry ('catasto') of existing infrastructures. In particular, the data to be placed in the public domain are the following: address, rollout technology, number and size of pipes, length and depth of the excavation, materials used, distance from the centre of the road, fibre availability.
- (35) In addition, at the end of every year, *Infratel* on behalf of the MISE, will gather the information on all implemented schemes and will send a report to the European Commission. The report will particularly focus on aggregating data on the private offers, aid amount and intensity, date when infrastructure becomes operational, chosen technology, products and wholesale access prices, number of access requests e active services providers, number of households served, number of new net subscribers.

¹¹ Art. 30 paragraph 2 of law decree 6 July 2011, n. 98.

¹² On the website of the MISE: www.sviluppoeconomico.gov.it.

- (36) **Evaluation of the scheme:** the Italian authorities recognise that the novelty of certain elements of the scheme and the actual impact of the individual local implementations of the framework need to be carefully assessed. Since the first actions are already foreseen for the regions mentioned above in paragraph (24), Italy committed itself to carry out the scheme for a period of two years, at the end of which an evaluation will be carried out and submitted to the Commission in view to obtain a prolongation of the authorisation until the end of the foreseen duration of the scheme. The evaluation will be undertaken by an independent expert and will be completed and submitted to the Commission no later than 28 February 2015. The evaluation will assess a number of key issues: (1) the overall effectiveness of the state aid measure in light of the objectives of the project (including comparison of different intervention models); (2) the impact of the present NGA state aid intervention on competition (including the assessment of the wholesale access conditions).

IV.2. Specific conditions for granting aid under the Italian Framework scheme

- (37) **Detailed mapping and coverage analysis:** Local public authorities which intend to rely on State aid to deliver their broadband objectives will have to identify the geographic areas subject to public intervention in line with the central database maintained at national level, as updated during the annual consultations with the operators.
- (38) **Tender process:** Irrespective of the Model chosen, the aid will be allocated on the basis of an open public tender in line with the principles of Italian and European public procurement rules¹³. The tenders will be organised at regional level and will take into account the local specifications, while at the same time respecting the conditions enshrined in the framework scheme. Any operator wishing to participate in the tender and which owns infrastructure in the target area will have to provide all relevant information to other bidders so as this information can be taken into account in their bids. Details might vary for the various intervention models, however, all the procedures will be conducted in a transparent manner and guided by the principle of equal treatment. .
- (39) In all three models, with the specifications highlighted above in the respective descriptions in paragraphs (18) to (24), the award criterion will be **the most economically advantageous offer**. In all cases, the selection criteria will be defined in advance. For all models, regional and local authorities will ensure they obtain the most superfast coverage for the aid that is available. Besides the requested aid amount, the award criteria will include: for Model A (1) use of innovative technologies (including speeds, architecture, etc.) (2) environmental impact (3) expansion of coverage beyond the requirements; for Model B, in addition, the following elements will be considered (1) amount of co-financing (2) corporate governance (3) previous experience in wholesale provision of services; for Model C (1) expansion of coverage beyond the minimum numbers of areas indicated in the tender documents, (2) co-financing offered, (3) Percentage of population covered, (4) technical assistance and maintenance, (5) communication and transparency mechanism.

¹³ Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts. OJ L 134, 30.4.2004, p. 114–240.

- (40) **Technology neutrality:** The Italian authorities intend to fund infrastructures which are able to support different technologies that operators may choose to use to support ultra-fast connections.
- (41) **Use of existing infrastructure:** The Plan foresees the re-use of existing infrastructure which is in public ownership (sewage, public lighting, multi-service tunnels) or in private ownership, for which rights of use will have to be requested.
- (42) **Wholesale access:** Effective wholesale access for at least 7 years is a fundamental condition to grant aid under this Framework scheme, irrespective of the Model chosen. Access has to be granted at different levels: ducts, dark fibre, unbundling of the local loop and, where relevant, of the subloop, bitstream, virtual unbundling or other equivalent access products available on the chosen technology. The obligations extend also to the parts of the network which use existing infrastructures, i.e. infrastructures which were not built from scratch with public support. For the newly built network elements, they have to be designed in such a way that allows for effective access and unbundling to be granted, for example, as regards duct space, number of fibres, room in the cabinets or in other network elements. Access to the passive infrastructure elements will be granted unlimited in time.
- (43) **Proportionality analysis.** An element of proportionality may be used by the Regions implementing the scheme as regards the network architecture. For the (relatively) more densely populated areas constituting the "priority target areas", the architecture of the subsidised network will be sized to accommodate all types of technologies and access¹⁴, because they are already areas in which there is some form of infrastructure competition (ULL for example¹⁵) or they are realistically expected to induce future demand by multiple operators for unbundling. In more disadvantaged areas, where the infrastructure investment costs are expected to be higher or reutilisation of existing infrastructure is extensive (long lines, difficult geographical conditions), the regional authorities may consider the economic viability of other technical solutions, provided that access obligations are ensured according to the previous paragraph.
- (44) **Wholesale price benchmarking:** the NRA Agcom is entrusted with the task of defining the access pricing system. The determination of the price benchmark will include consideration of the network costs, net of the aid received.
- (45) **Claw-back mechanism:** All measures funded under the framework scheme will include an appropriate claw back provision in their tender documents and contracts with the operators. This will be to ensure that the successful supplier is not over-compensated in the target areas beyond anticipated levels. The claw back provision and related reporting obligations are likely to vary depending on the commercial model adopted and any requirements stemming from the other funding streams. The excess subsidy shall be reinvested in further network expansions.

¹⁴ Including P2P and GPON for FTTH networks.

¹⁵ According to the Italian authorities, no basic broadband black area is present among the target areas, while there are, at most, grey areas with ULL operators.

- (46) **Monitoring:** To achieve adequate monitoring and to facilitate the exercise of the claw-back provision, the Italian authorities will require local authorities and private operators to fulfil certain reporting obligations. These obligations will require regular reporting on matters such as: actual deployment; actual expenditure; total aid received by each beneficiary, and demand levels. The Italian authorities ensure that monitoring will continue after the end of the project and will involve the MISE (through *Infratel*, its *ad hoc* publicly owned entity), the NRA and the end users. In fact a continuous supervision will ensure that access at different net segments to all final operators in equal and no discriminatory terms. The monitoring system will also ensure that no aid is granted beyond what stated in the tender process. An accounting separation will be imposed on the selected bidders that will make it easier for the granting authorities to monitor the implementation of the projects as well as any excess subsidy. The provisions set out in paragraph (33) will apply to all projects falling in the present scheme.

V. ASSESSMENT OF THE MEASURE: PRESENCE OF AID

- (47) 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 a selective economic advantage to undertakings, 3) distort or threaten to distort competition and 4) affect intra-EU trade.

V.1.State resources

- (48) The measure will be financed by funds from the national budget and possible by EU funds, which qualify as state resources once they come under the control of a Member State¹⁶. Hence state resources are involved.

V.2.Economic advantage

- (49) *Selected operators:* Through the tender process, the selected operators will receive financial support which will enable them to enter the market and provide high or very high speed broadband services on conditions not otherwise available on the market. Therefore the financial support received will enable the successful bidder to conduct this commercial activity on conditions which would not otherwise be available on the market. In view of the above, an economic advantage will be granted to the selected operator.
- (50) *Third party providers:* Third party electronic communication operators will be able to offer their services by using the active and passive wholesale access to the subsidized network on open, non-discriminatory terms. They may therefore also indirectly benefit from the state

¹⁶ See for instance Commission decision in case N157/2006 South Yorkshire Digital Region Broadband Project - United Kingdom. JOCE C/80/2007.

resources under terms and conditions that would not apply without State intervention, as they will be customers of the selected electronic communication operator¹⁷.

V.3. Distortion of competition

- (51) According to case law of the Court of Justice of the European Union, financial support or support 'in kind' distorts competition in so far as it strengthens the position of an undertaking compared with other undertakings. Due to the state aid granted to a competitor, existing operators might reduce capacity or potential operators might decide not to enter into a new market or a geographic area. The intervention of the state alters the existing market conditions by allowing the provision of improved broadband services by the selected electronic communication operator and, potentially, third party providers. Furthermore, the measure will alter the conditions of competition between business users who are likely to subscribe to the very high speed broadband services in the targeted areas and business users elsewhere in Italy and the EU. Therefore, the fact that an improved broadband service becomes available has the effect of distorting competition.

V.4. Effect on trade

- (52) Insofar as the State intervention is liable to affect service providers from other Member States, it also has an effect on trade since the markets for electronic communications services (wholesale and the retail broadband markets) are open to competition between operators and service providers.

V.5. Conclusion

- (53) The Commission therefore concludes that the notified aid measure constitutes state aid within the meaning of Article 107(1) TFEU as moreover confirmed by the notifying Member State during the notification.

VI. ASSESSMENT OF THE MEASURE: COMPATIBILITY

- (54) Having established that the project involves aid within the meaning of Article 107(1) TFEU, it is necessary to consider whether the measure can be found to be compatible with the internal market.
- (55) 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*¹⁸ ('Broadband Guidelines'), which contain a detailed interpretation of Article 107(3)(c) TFEU in this area of state aid law.

¹⁷ Providers of existing infrastructure for third party operators shall not be regarded as indirect beneficiaries of the aid measure. Access to such existing infrastructure is carried out in pure market terms in line with principles of the applicable regulatory framework in case of an SMP operator.

¹⁸ OJ C 235 of 30.9.2009, p. 7.

VI.1. The balancing test and its application to aid for the broadband network deployment

(56) 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 these Guidelines. In applying the balancing test, the Commission considers it appropriate here to ask 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?

VI.2. Objective of the measure

The aid is in line with the EU policy

- (57) As explained in section III.1, the scheme is fully in line with both the National Broadband Strategy of Italy and the EU objectives as highlighted in the EU2020 strategy and the DAE, 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 European households subscribing to internet connections above 100 Mbps*”. The project will contribute to avoid the digital divide in services which require very high speed broadband connection, between the less densely populated and more disadvantaged areas of Italy and urban areas that may benefit from competition of at least two competing infrastructure.
- (58) According to the 4th Pillar of the European Digital Agenda 2020, a public intervention is essential for an equitable market outcome as to meet the coverage and speed and take-up targets, granting out public resources in line with EU competition and state aid rules. By extending high speed broadband coverage to the target areas, the Italian measure will contribute greatly to achieve the objectives of the Digital Agenda targets of fast and ultra-fast coverage.

Aid is the appropriate instrument

- (59) Alternative instruments, such as demand side measures or other regulatory interventions have also been considered by the Italian authorities, as described above in paragraph (6) to (8). However, in the situation currently under assessment, the efforts from alternative

instruments (including *ex ante* regulation) do not solve the problems related to the lack of supply (non-existence of appropriate infrastructure) in the targeted areas. In line with paragraphs 47 and 48 of the Broadband Guidelines, the Italian authorities see no alternative but to grant public aid to the construction of a high speed broadband network in the targeted areas of the country.

The aid provides the right incentives to operators

- (60) Regarding the incentive effect of the measure, the Broadband Guidelines set out in paragraph 50 that it needs to be examined whether the broadband network investment concerned would not have been undertaken within the same timeframe without any state aid. The market analysis and the public consultation described above in paragraph (25) have demonstrated that in the target areas no comparable investment would take place without public funding in the near future of three years, hence the aid produces a change in the investment decisions of the operators. Therefore, the aid should provide a direct and appropriate investment incentive for the selected operators

VI.3. Design of the measure and the need to limit distortions of competition

- (61) In order to minimise the state aid involved and the potential distortions of competition, the notified measure has to meet a number of necessary conditions.

(a) *Market research and consultation:* As set out in detail in paragraphs (25) and (37), the Italian authorities undertake a detailed analysis of the existing broadband infrastructure, which all local authorities will be obliged to respect in the design of their implementing measures. The consultation with existing operators in an open, transparent way ensures that any potential investments plans of commercial operators are sufficiently taken into account, and public funds are used only in areas where similar commercial investments do not exist and they are not planned in the near future. Several positive elements appear in the Italian framework scheme: a (1) central database of existing infrastructure ad types of broadband services provided; (2) the precise areas will be validated through a public consultation allowing all third party operators to comment; (3) all information will be available on a central webpage thereby increasing the transparency. Publishing all relevant information related to the broadband scheme and to the individual projects will ensure a high level of transparency on the use of public funds and also provides additional evidence for the Commission on the reliability of the market research and consultation undertaken. In summary, the Commission concludes that the detailed market research and "mapping" together with the public consultation as described by the Italian authorities will limit any potential distortion of competition *vis-à-vis* existing operators and reduce the amount of state aid required for the measure.

(b) *Open tender process:* The open tender approach ensures that there is transparency for all investors wishing to bid for the realisation of the subsidised project. Equal and non-discriminatory treatment of all bidders is an indispensable condition for an open tender in compliance with national and EU public procurement principles. The Italian authorities have required that for all intervention Models, competitive tender procedures have to take place, as explained above in the description of the various models in paragraphs (18) to (24) and in in paragraph (38).

- (c) *Most economically advantageous offer*: Within the context of an open tender, the Italian authorities will select the most economically advantageous offer among those presented by the operators. In line with footnote 55 of the Broadband Guidelines, for the purposes of determining the most economically advantageous offer, the awarding authority will specify in advance the relative weighting which it gave to each of the (qualitative) criteria.
- (d) *Technological neutrality*: the measure does not favour any technology or network platform leaving it to commercial operators to propose the most appropriate technological solutions to provide the required broadband services to end users.
- (e) *Use of existing infrastructures*: To avoid unnecessary and wasteful duplication of resources, Italy encourages the use of existing infrastructure. As explained in paragraph (41), Italy expressly foresees widespread use of existing public and privately owned infrastructure.
- (f) *Wholesale access*: third parties' effective wholesale access to a subsidised broadband infrastructure is mandated under the scheme. The selected operator will have to offer a wide range of wholesale services and access to the subsidised network (independently of any change in ownership or any other conditions). The selected operator will have to offer other operators access to a network element or to the capacity of the network in an open, transparent and non-discriminatory manner. The wholesale access enables third party operators to compete with the selected bidder (when the latter is also present at the retail level), thereby strengthening choice and competition in the areas concerned by the measure while at the same time avoiding the creation of regional service monopolies. Vertical separation, in different forms, is required to further ensure that no discrimination takes place at the retail level. The technical design of the subsidised network will provide all necessary conditions to ensure access, as explained above in paragraph (42).
- (g) *Price benchmarking*: In order to ensure effective wholesale access and to minimise potential distortion of competition, the prices of wholesale access will be assessed and approved by the Italian NRA Agcom as indicated above in paragraph (44). The benchmark will be determined on the basis of the costs borne by the network operator.
- (h) *Monitoring and claw-back mechanism to avoid over-compensation*: The project will be examined on a regular basis in a monitoring exercise. An accounting separation will be imposed on the selected bidders as regards the subsidized projects, thereby making it easier for the granting authorities to monitor the implementation of the projects as well as any extra profit generated. A benchmarking mechanism will be implemented to avoid any bidders inflating their investment costs and thereby avoiding possible overcompensation to those undertaking. In case any extra profit is generated by the selected bidder (for instance by lower investments costs, higher broadband or non-broadband revenues than anticipated at the bidding phase), as explained in paragraph (45), some or all of extra profit will be clawed back and reinvested in network expansion. These mechanisms – to the extent possible - will ensure that the recipient 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.

(62) Concerning the conditions laid down in paragraph (79) of the Broadband Guidelines, Italy proved that the following conditions will be met:

(a) In exchange for receiving state support, the direct beneficiaries of the Italian scheme will provide third parties with effective wholesale access for at least seven years. In particular, the access obligations imposed include the right to use ducts or street cabinets in order to allow third parties to have access to passive and not only active infrastructure. All newly built network elements will have to be sized to accommodate access requests. This is 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 or measures adopted after the expiry of that period. An ‘open access’ obligation is all the more crucial in order to deal with the temporary substitution between the services offered by existing network operators and those offered by future NGA network operators. An open access obligation will ensure that existing access seekers can migrate their customers to a NGA network as soon as a subsidised network is in place and thus start planning their own future investments without suffering any real competitive handicap.

(b) As explained in paragraph (31), the national regulatory authority, Agcom will play an important role in the implementation of the scheme. The NRA will regulate access conditions on the subsidised network, according to the relevant Italian legislation and will also continue to regulate *ex ante* the competitive conditions of the overall broadband market, imposing where appropriate the necessary remedies provided by the applicable regulatory framework. The Commission values favourably the involvement of the NRA in the state aid scheme as it helps to improve the design of the aid projects (in particular regarding wholesale access prices and conditions), helps achieving effective competition and supporting the granting authorities in solving access disputes *ex post*. Finally, the NRA will also ensure a smooth transition of the wholesale access provisions after the expiry of the access obligations deriving from the state aid rules, if the operator of the subsidised network is found to have SMP under the applicable regulatory framework.

(c) The subsidised networks will support effective and full unbundling and satisfy all different types of network access that operators may seek as explained above in the description of the measure.

VI.4. The distortions of competition and the effect on trade are limited, so that the overall impact of the measure is positive

(63) 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 supports the achievement of the DAE objectives. 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.

VI.5. Conclusion

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

VII. DECISION

(65) On the basis of the foregoing assessment, the Commission has accordingly decided that the aid measure "Strategic Digital Plan – Superfast - broadband" is compatible with Article 107(3)(c) TFEU.

(66) The Italian 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. In view of the duration of the scheme, the Commission would like to draw Italy's attention to future revisions of the Broadband Guidelines, which might require appropriate measures to the scheme necessary. Italy has committed itself to submit an evaluation of the scheme to the Commission before 28 February 2015.

(67) 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/competition/elojade/isef/index.cfm>

(68) Your request should be sent by registered letter or fax to:

European Commission
Directorate-General for Competition
State Aid Greffe
Rue Joseph II 70
B-1049 Brussels
Fax No: +32 2 29 61242

Yours faithfully,

For the Commission

Joaquín ALMUNIA
Vice-President