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**Subject: State aid SA.35027, SA.35028 & SA.35029 (2012/N) – Poland
Local broadband network projects in Podlasie**

Sir,

I. SUMMARY

- (1) I am pleased to be able to inform you that the European Commission has assessed the measures "*Local broadband networks in Podlasie*" (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)¹.

¹ With effect from 1 December 2009, Articles 87 and 88 of the EC Treaty have become Articles 107 and 108, respectively, of the TFEU. The two sets of provisions are, in substance, identical. For the purposes of this Decision, references to Articles 107 and 108 of the TFEU should be understood as references to Articles 87 and 88, respectively, of the EC Treaty where appropriate.

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II. PROCEDURE

- (2) Pursuant to Article 108 (3) of the TFEU the Polish authorities notified to the Commission, by letters dated 25/06/2012, the measure for supporting the deployment of local broadband networks² in Podlasie.
- (3) The Commission requested additional information on the measure by letters registered on 13/08/2012 and 7/02/2012. The Polish authorities provided the requested information on the measure by letters registered on 2/10/2012, 16/10/2012, 7/12/2012, 8/03/2013, 16/05/2013 and 30/05/2013.

III. CONTEXT

III.1. The target region

- (4) The target area of the project covers 18 municipalities located in Podlaskie Voivodeship in Eastern Poland³.
- (5) The areas covered by the projects are mainly rural areas. The population densities in these municipalities (from 13 people/km to 46 people/km²) are among the lowest in the country, which makes it difficult to attract investments in the development of ICT networks that are usually more profitable in areas featuring higher density of population and where the potential demand is higher and more accumulated. Another factor discouraging investments in the development of broadband networks in the concerned areas is the very low average income of local inhabitants and thus potential clients of telecommunications services.
- (6) The dissemination of broadband access will be a stimulus for development of the modern electronic economy and e-government in the region, and as a consequence it shall favour development of areas of the knowledge-based economy. The construction of broadband network infrastructure will enable distance work, distance education; remote medical care, electronic commerce. The objectives of the project include the professional activation, improving the standard of living and raising the level of education of citizens.

III.2. The rationale for public intervention

- (7) According to the Polish authorities, the development of broadband in the target areas 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 the Podlaskie Voivodeship, advanced broadband services and the infrastructure required to support them are available for citizens and businesses in

² The projects include: the construction of 'Nadbuszanska' broadband distribution network, the construction of broadband distribution network with public Internet access points in municipalities such as Monki, Knyszyn, Goniadz and Jaswily and the construction of the Internet network in the municipality of Bakalarzewo.

³ The project is complementary to the regional broadband network project in Eastern Poland (SSPW) approved by the Commission decision of 10 November 2011.

more densely populated areas, whereas broadband infrastructure is inadequate or outright lacking in other areas which are not commercially attractive to electronic communication operators. This leaves citizens and businesses in such areas without the possibility of adequate broadband access and services.

- (9) In the middle of 2010, access to broadband services (i.e. equal or above 2 Mbit/s) in Eastern Poland reached the level of 13.8% (fixed and mobile access), which is still much below the EU average. Available capacities to an end user in 70% cases do not exceed 2 Mbps. A visible competition among operators able to provide services using a competing infrastructure exists only in bigger urban areas, where the broadband access to Internet is provided by cable television operators.

Table 1 - Distribution of services in target 18 municipalities across different connection speeds (% relates to a number of localities)

<1Mbps	1<2Mbps	>2Mbps
45,3%	28,5%	26,2%

- (10) The lack of broadband infrastructure in the areas covered by the measure emerged clearly during the preparation of the inventory of existing infrastructure and credible investment plans. In as many as 440 localities out of the 488 in total, there is no optical distribution node and no broadband access to Internet offered that would guarantee 2 Mbit/s download speed to an end-user.
- (11) In the localities covered by the measure the penetration rate of Internet access services is one of the lowest in Poland and ranges from 34% do 78%, taking into account all technologies, including providing access with bandwidth below 2 Mb/s (for example: UMTS, CDMA, Wi-Fi).

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

- (12) As regards the second concern, there is a lack of competition as regards wholesale and retail bandwidth services in many areas of Eastern Poland. The Polish authorities indicated that the Internet access share in Eastern Poland held by the incumbent operator (TP SA) is 64.6 % (xDSL market share).
- (13) The Polish 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 SA 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 Eastern Poland was only 4.13%. According to the Polish authorities, the alternative operators, aware of the dominant position of the incumbent 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 infrastructure and ‘last mile’ infrastructure.

⁴ Unbundled Local Loop.

- (15) Furthermore, according to the Polish authorities in order for the public administration in the target areas to meet the growing expectations of its citizens as regards the provision of advanced e-government, education and health care services, a significant increase of its current broadband capacity and connectivity services is needed also to be able to provide broadband services in the most remote areas.
- (16) Consequently, in order to address these problems, the Polish authorities decided to roll out a new public broadband infrastructure connecting the public administration sites in these municipalities. Furthermore, in order to meet current and future private demand for broadband access and to foster the competitive provision of broadband services, the authorities of these municipalities are planning to enable private operators to obtain access to the public infrastructure.

IV. DESCRIPTION OF THE MEASURE

- (17) **Objective:** The objective of the project is the construction of a broadband network⁵ for the use of local authorities as well as for commercial use by other operators to deliver services to citizens and businesses in areas where adequate services are not available and there are no investment plans to provide such services in the near future. 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 targeted Voivodships.
- (18) **Legal basis:** The measure is based on the Resolution of the Council of Ministers on the terms and the conditions of subsidizing the Regional Operational Programme for the Podlaskie Voivodeship 2007-2013 (10 June 2009), adopted by the Commission Decision of 11 October, 2007, No. K(2007)5085 and changed by the Decision of 21 December, 2011, No. K(2011)9377, 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).
- (19) **Design of the project:** Three projects covered by the notified measure will be carried by 18 municipalities of the Podlaskie Voivodship that were allocated funds in the framework of the Regional Operational Programme. The construction of the broadband network is scheduled for 2014 or 2015.
- (20) In order to achieve its objectives the project is made up of the ‘self-provision’ part for the public administration sites and to provide free access to broadband services for inhabitants to use basic e-services and public sector information as well as the ‘commercial part’ whereby the spare capacity of the network could be used by third party operators to provide connectivity services to local businesses and inhabitants.

The self-provision part of the project

- (21) The municipal authorities which are currently procuring connectivity services for the public administration from private operators, on the basis of an internal evaluation, concluded that the existing infrastructure and services offered by commercial operators do not provide advanced services able to satisfy the connectivity needs of the public administration and that the operators lack the necessary infrastructure to provide end-user services in the target areas.

⁵ Including approximately 440 km of fibre network.

- (22) Consequently, the municipalities decided to fund the construction its own broadband network for internal use of the public administration and to assure the use of public sector services by inhabitants. The networks implemented under the measure will be built in wireless or mixed (fibre and wireless) technology, depending on the identified needs of individual communities. Furthermore, approx. 580 PIAPs (Public Internet Access Points) will be created mainly within public administration and public utility buildings in order to provide access to public sector services and information, whereby the Internet access will be very limited in terms of session duration, connection speed, maximum amount of downloaded data⁶. Furthermore, as confirmed by the Polish authorities, no ancillary services of commercial nature (e.g. advertising on a dedicated webpage) will be offered thorough the planned hotspots.
- (23) According to the Polish authorities this part of project does not involve State aid as the public administration bodies that will be connected exercise public function in the territory of target municipalities and perform only non-economic activities⁷.

The commercial part of the project

- (24) As mentioned above, given the existing infrastructure in the target areas is not able to provide adequate broadband services not only to the public administration but also to local citizens and businesses located there, the municipal authorities intend to make the excess capacity of the network available to private operators at the wholesale level.
- (25) By giving wholesale access to spare capacity of the broadband network to operators, the municipalities aim to reduce the digital divide in those areas in which even basic broadband services are not currently provided and there are no investment plans to provide such services in the near future. The project envisages the deployment of backhaul infrastructure and covers only white and 'problematic' grey areas of basic broadband infrastructure (see paragraph (35) below).
- (26) To implement the commercial part of the project, the municipal authorities will select the infrastructure operator that will be provided with the spare capacity of the public network. In exchange the infrastructure operator will pay for rent for leasing the constructed broadband infrastructure and will have the right to retain revenues from managing and operating the network.
- (27) The Infrastructure Operator will be obliged to provide other operators with effective wholesale access to the subsidised network through at least 7 years from the beginning of the exploitation of public network spare capacity. The infrastructure operator will be also obliged to render retail broadband network services to end users (inhabitants and entrepreneurs) by using public Internet access points.

⁶ Data transfer speed limited to 512 kb/s for the user, transmission time limited to 60 minutes per session, data transmission volume limited to 750 MB per user per month.

⁷ The Polish authorities confirmed that in a case where a public entity could be considered as performing an economic activity within the meaning of State aid rules and thus potentially involve State, the authorities assure that in such a case they would only grant support to public entities performing an economic activity in compliance with the SGEI package of 2011 (Commission Communication on the application of the EU State aid rules to compensation granted for the provision of services of general economic interest, the Commission Decision of 20 December 2011 on the application of Article 106(2) of the Treaty on the Functioning of the European Union to State aid in the form of public service compensation granted to certain undertakings entrusted with the operation of services of general economic interest, the Commission Communication on a European Union framework for State aid in the form of public service compensation.

- (28) Given that the projects covered by the notified measure mainly applies to rural and scarcely populated areas, according to the Polish authorities there is a risk that no operator will be interested in acting as the infrastructure operator of the planned networks under the terms required by the 18 municipalities. In such a case, the municipal authorities⁸ will carry out the duties related to the commercial part of the project. They will comply with all conditions determined for the infrastructure operator (such as providing effective wholesale access for at least 7 years, retail and wholesale prices based on benchmarking by publishing market prices or prices set by NRA, a claw back mechanism).
- (29) **Budget and funding instruments:** The total budget of three projects amounts to approx. PLN 50 million (around EUR 12 million). The significant part (85%) of the budget will be funded from ERDF and the state budget through grants under the Regional Operational Programme for Podlaskie Voivodeship for the years 2007-2013. The remainder of the budget will be financed from budgets of 18 municipalities which will implement the project.
- (30) The costs of managing and maintaining the network in the part related to own administrative needs will be covered from budgets of 18 municipalities and the rent paid by the infrastructure operator. Such costs of the commercial project part will be covered by the infrastructure operator.
- (31) **Aid amount and intensity:** The aid intensity and aid amount to the chosen infrastructure operator will ultimately depend on the outcome of the tender procedure. Nevertheless, given the ownership of constructed broadband infrastructure will remain with the municipalities as well as the contractual arrangements between the municipalities 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.
- (32) **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 made during a detailed inventory, prepared by independent experts selected by the Ministry of Regional Development.
- (33) The inventory covered both the distribution infrastructure and the access infrastructure. 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 made in January-May 2008 and it was subsequently updated in July 2010, by surveying all telecommunications operators registered by the Regulatory Authority as regards their infrastructure and investment plans. 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 April 2011 the inventory was once again updated by experts on the basis of the data obtained from the National Regulatory Authority, TP S.A. and surveys regarding NGA infrastructure.
- (34) **Public consultation:** As part of the regional broadband project in Eastern Europe (SSPW), which also covered the Podlaskie Voivodship, the Polish authorities undertook the public consultation between 6 April 2011 and 6 May 2011 in order to verify the results of its mapping, planned classification of areas eligible for

⁸ Directly or through a fully controlled local government entity created for that purpose.

intervention (with the projected location of the network nodes) and to obtain information from stakeholders on their plans on planned NGA and fibre investments as well as their views on the project. As confirmed by the Polish authorities, the comments submitted by the parties were fully taken into account, which led to reclassification of certain areas with respect to their eligibility for intervention.

- (35) Between 5 September and 5 October 2012, the Polish authorities carried out the final follow-up public consultations to confirm the classification of the target areas of the notified local projects in Podlasie. No negative opinions or further comments/plans concerning future investments in the target areas were submitted by the telecommunication operators.
- (36) The table below shows the final categories (white, grey, black) as regards the basic broadband infrastructure in the area of the project. The target areas for public intervention only include those in categories of 'white' and 'grey problematic'.

Table 2 - Final categories of the project areas as regards the basic broadband infrastructure

	Category	Number of localities
1	W - white (there is no network infrastructure)	440
2	GP - grey problematic (only one network infrastructure present, which is not available for the use of third party operators)	44
3	GN (grey non-problematic) or B (black)	4
		Total: 488

- (37) **Opinion of the National Regulatory Authority:** The National Regulatory Authority (UKE) issued a positive opinion on the notified project in the letter dated 30 November 2012.
- (38) **Open tender process:** The Polish authorities confirmed that there will be an open tender process to select the infrastructure operator and that the fundamental principles of openness, competition and transparency of the national and EU procurement rules will be respected.
- (39) **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 municipal authorities. The main award criteria are: the amount of public aid requested (weight at least 65 %), the level of private partner's capital expenditures (weight 0-15%), other economic criteria⁹ (weight 0-20%).
- (40) **Use of existing infrastructure:** The municipal authorities encourage using the entire existing infrastructure (e.g. roads, ducts, roofs of existing buildings, etc.). It will be possible to hold a separate open tender for purchasing existing telecommunications infrastructure, or alternatively, during the procedure for design and construction of the public infrastructure, the contractors will be allowed to procure existing infrastructure if it is economically reasonable. The Polish authorities also confirmed that they would ensure that any operator which owns or controls infrastructure (irrespective of whether it is actually used) in the target area and which wishes to participate in the selection to receive the aid, shall meet the

⁹ E.g. efficiency of the use of public infrastructure, costs of using the infrastructure, license duration period in excess of 7-year minimum, quality level of offered services, technological solutions, fees and their affordability, methodology for monitoring the project performance, maintenance conditions.

following conditions: (i) to inform the aid granting authority and the NRA about that infrastructure during the public consultation; (ii) to provide all relevant information to other bidders at a point in time which would allow the latter to include such infrastructure in their bid. In addition, the authorities confirmed that there is a national database managed by the NRA on the availability of existing infrastructures that could be re-used for broadband roll-out.

- (41) **Technology:** The main goal of the project is to develop distribution network most in rural and remote localities. It should be emphasized that the network is built principally for own needs of public administration and only spare capacity will be available for the commercial use. Moreover, the municipal authorities confirmed the choice of technology for the relevant equipment 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 subsidised network of any possible technology, which operators wish to use for their access infrastructure.
- (42) **Wholesale access:** As confirmed by the Polish authorities the wholesale access will be provided by the infrastructure operator on non-discriminatory and open access terms for a period of at least 7 years. Wholesale services will include active access by means of the provision of transport 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.
- (43) **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 NRA.
- (44) The contract concluded between the municipal authorities and the infrastructure operator will specify rules for the infrastructure operator to calculate fees for access to the public infrastructure. As stated by the Polish authorities, 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.
- (45) Furthermore, detailed consultations with the NRA will be held 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 UKE, which will be able to resolve potential disputes between the infrastructure operator and third party operators with regard to the level of the fees and eventually may determine the conditions of access to the planned public network.
- (46) **Monitoring and claw-back mechanism:** The compliance of the selected bidder with the contract obligations will be monitored on a regular basis by the municipal authorities as well by the Podlaskie Voivodship Marshall's Office and the National Regulatory Authority (NRA). 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 with the infrastructure operator. The Polish authorities envisage also a claw back mechanism in the notified project in order to avoid any overcompensation to the beneficiary. The calculation of the amount to

claw-back will be dependent on the EBITDA¹⁰ 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 operator's revenues but also whether the costs really faced are lower than those estimated in the feasibility study of the project¹¹.

- (47) **Transparency:** The Polish authorities confirmed that they would publish on a central website at least the following information on the State aid measures: the full text of the approved aid scheme and its implementing provisions, name of the aid beneficiary, aid amount, aid intensity and used technology¹². Furthermore, the aid beneficiary will be obliged to provide entitled third parties with comprehensive and non-discriminatory access to information on its infrastructure (including *inter alia* ducts, street cabinets and fibre) deployed under a State aid measure.
- (48) **Reporting:** The Polish authorities confirmed that starting from the date when the network is put into use, for the duration of the aid measure, the State aid granting authority would report every other year the key information on the aid projects to the European Commission.

V. ASSESSMENT OF THE MEASURE: PRESENCE OF AID

- (49) 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.
- (50) As regards the **self-provision part of the project** the Commission has already accepted in the past that the fact that a public authority builds its own public-sector network to satisfy its needs for Internet connectivity (instead of procuring such services from private operators) does not entail an economic advantage for the beneficiaries since they do not exercise an economic activity¹³. Furthermore, as mentioned in paragraph (23) above, for the public entities conceivably performing an economic activity – thus potentially, recipients of an "advantage" – any compensation received for connectivity services would not be covered by the present decision. The mere fact that the local authorities decided to build its own public-sector network in order to satisfy their own needs for internet connectivity instead of procuring such services from private operators does not raise concerns under Article 107(1) TFEU, this being an autonomous organizational decision by a public authority.

¹⁰ Earnings before interest, tax, depreciation and amortization - a widely used financial indicator also in the telecommunication industry.

¹¹ The Polish authorities envisaging 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 between a given Voivodship and the Infrastructure Operator pro rata to the level of state aid.

¹² Such information will be kept for at least 10 years and shall be available for the general public without restrictions.

¹³ See Commission decision in case NN24/2007, Prague Municipal Wireless Network, OJ C/141/2007 and Commission decision in case N46/2007 Welsh public network scheme, OJ C/157/2007.

- (51) As regards the planned Public Internet Access Points (PIAPs) that will be created mainly within public administration and public utility buildings in order to provide access to public sector services and information¹⁴, the Commission notes that the heavy restrictions imposed on the use of such services (session duration, connection speed, amount of downloaded data¹⁵) ensure that this offer is not substitutable to the broadband services provided by the commercial operators and hence does not distort or threaten to distort competition.
- (52) The PIAPs will be used free of charge by citizens and the operator will not be allowed to commercially exploit them to provide broadband services to their users. Given the restrictions imposed on the use of the PIAPs, it is highly unlikely that existing broadband users will give up their existing broadband subscription just because of the very limited services now available for free via the PIAPs. Hence, the project has no perceived impact on existing broadband providers, and no advantage is transferred to the selected operator of the public administration network. Furthermore, as confirmed by the Polish authorities, no ancillary services of commercial nature (e.g. advertising on a dedicated webpage) will be offered through the planned hotspots.
- (53) Consequently, the Commission concludes that the self-provision part of the project does not involve State aid within the meaning of Article 107 (1) TFEU.
- (54) As regards the ***commercial part of the project*** the Commission carried out the following assessment of the existence of State aid:

State resources

- (55) 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.
- (56) 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

- (57) *Selected operators*: The municipalities of the target areas will conclude the contract with the selected operator for managing the planned network, whereas this operator will be also entitled provide the wholesale communications services on the private market. The funding the rollout of a broadband network in areas in which a private operator would not otherwise invest, implies that in both scenarios, the Polish authorities will have to cover the additional costs needed to invest in such non profitable areas.
- (58) Therefore, the selected operators 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 operators to offer end-to-end services *prima facie* at lower prices than if it had had to bear all costs itself and thus attract more

¹⁴ That will be located e.g. at local authorities building, local school or public library.

¹⁵ Data transfer speed limited to 512 kb/s for the user, transmission time limited to 60 minutes per session, data transmission volume limited to 750 MB per user per month.

customers than under normal market conditions. In view of the above, an economic advantage will be granted to the selected operator.

- (59) *Third party providers*: The planned network will provide third party operators wholesale broadband services with access to a 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.
- (60) The measure is also selective in that it is addressed to undertakings active only in a specific region and in certain markets for electronic communications services

Distortion of competition

- (61) 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 planned network in the targeted areas and wholesale operators elsewhere in Poland and the EU.
- (62) Therefore, the fact that an improved broadband service and additional (wholesale) capacity becomes available has the effect of distorting competition.

Effect on trade

- (63) 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

- (64) The Commission therefore concludes that in so far as state funds are used to finance the deployment of the commercial part of the notified measure "*Local broadband network projects in Podlasie*" 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 service providers, 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

- (65) The Commission has assessed the compatibility of the scheme according to Article 107 (3) (c) TFEU and in the light of the *EU Guidelines for the application of State aid rules in relation to rapid deployment of broadband networks*¹⁶. The Broadband Guidelines contain a detailed interpretation of Article 107 (3) (c) TFEU in this area of State aid law.

¹⁶ OJ C25, 26.01.2013, p.1.

- (66) As explained in paragraph 33 of the Broadband Guidelines, every aid measure has to comply with the below necessary prerequisites in order to be possibly declared as compatible with the internal market:

(1) Contribution to the achievement of objectives of common interest

- (67) The Commission defined in its Europe 2020 strategy of 3 March 2010¹⁷ 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."
- (68) With the notified project the Polish authorities intend to allow the use of the public network 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.
- (69) By extending 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.

(2) Absence of market delivery due to market failures or important inequalities

- (70) As indicated in paragraph (36) in 440 out of the total 488 localities in the target regions there is currently no broadband infrastructure at all. In another 44 where there is one infrastructure in place it is not available for use by the third party operators (see also below points 83-86). Furthermore, the public consultations revealed no investment plans in this area in the near future in view of their low commercial attractiveness for private operators. This clearly demonstrates the absence of the market delivery due to market failures/important inequalities in the target areas.

(3) Appropriateness of State aid as a policy instrument

- (71) In the situation currently under assessment, due to the economics of broadband networks, the problem of the lack of supply of high speed broadband networks cannot be solved by measures involving demand stimulation or regulatory interventions.
- (72) 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 some areas of Podlasie 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

¹⁷ EUROPE 2020 - A strategy for smart, sustainable and inclusive growth, COM(2010) 2020, page 12.

development of broadband services as alternative providers need to combine the use of wholesale products from the incumbent with own network investments which may not be profitable in areas where demand is low.

- (73) In order to ensure the supply of broadband services to all its citizens, the Polish authorities see no alternative but to open the planned public network also for the commercial use by access operators.
- (74) Furthermore, the measure was consulted with the NRA, which issued a positive opinion on the design of the project. As mentioned in paragraph (43) above, the NRA will also be consulted with regard to determining the wholesale access prices and conditions and solving disputes between access seekers and the subsidised infrastructure operator.
- (75) Consequently, the Commission can agree that 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.

(4) Existence of incentive effect

- (76) As set out in paragraph 45 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 (34) and following, in the targeted areas no broadband 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 public network to third party operators, the measure facilitates and encourages investments in last mile networks. Therefore, the aid shall provide a direct and appropriate investment incentive for the selected operator and for third party beneficiaries.

(5) Aid limited to the minimum necessary

- (77) In assessing the proportional character of the notified measures, the Commission has assessed in paragraph (89) and following a number of necessary conditions to minimise the State aid involved and the potential distortions of competition.

(6) Limited negative effects

- (78) The significance of the distortion of competition has been assessed in terms of effects on competitors in paragraph (89) and following. Given the design of the project, it is unlikely to have a crowding out effect on potential future investments of private operators.

(7) Transparency

- (79) As further explained in paragraph (97) below, the aid will be awarded in a transparent manner and it will be ensured that the public authorities, economic operators, the interested public and the Commission have easy access to all relevant acts and pertinent information about the aid.

(8) The overall balancing exercise and the compatibility conditions

- (80) The Polish measure has been carefully designed to ensure that the overall balance of the effects of the measure is positive.
- (81) As mentioned above, the objective of the project is to bridge the digital divide and provide access to broadband services where they are currently unavailable by making a significant new investment in sparsely populated areas where the private operators are not planning any investments in the near future. Furthermore, as noted in paragraph (36) above there are altogether 44 target areas in which some limited infrastructure suitable for basic broadband exists (based on cable, mobile and fiber optic technologies). However, whereas there is significant unsatisfied demand for Internet services (see table 3 below), the existing infrastructure is not able to support evolution towards the provision of advanced next generation services due to the lack of underlying fibre distribution infrastructure (more than 90% of localities do not have any optical access node) as highlighted in paragraph (14) above. The existing infrastructure is not open for access by third parties. Moreover, the incumbent has no possibility to offer services with bandwidth of 2 Mb/s for all users in any of localities (the bandwidth of 2 Mb/s is available only at a distance not further than 3-4 km from a DSLAM node). Alternatives to the services of the incumbent are mobile networks (but they do not guarantee bandwidth of 2 Mb/s to an end user) or satellite access services (which prices are several times higher than the offer of the incumbent). Therefore they are "problematic" grey areas in which the planned investment will allow the rollout of an open and modern infrastructure (built in fiber and wireless technology) on which competing providers will be able to offer next generation services (FTTB and FTTH) to the end users, including voice services (VoIP provided), multimedia services such as Web TV, IPTV standard and high-definition; video on demand). Thus, in line with paragraph 51 of Broadband Guidelines such an open infrastructure brings significant new capabilities to the market as it provides further condensation of distribution nodes, shorten 'the last mile' to end-users and allows for competition between operators which will provide access to final customers. As regards these areas, the broadband availability (>2Mbit/s) that will be ensured as a result of the project according to the analysis carried out by the Polish authorities will amount to 84% in case of the 'Nadbuzanska' broadband network project and 100% in the other two projects. According to the Polish authorities, as confirmed by the market analysis carried out, the project will lead to a significant increase in the penetration rate of broadband services in the target grey problematic areas (from 4.9% to 15% in the broadband network project in communes of Monki, Knyszyn, Goniadz and Jaswily, from 5.7% to 16% in the 'Bakalarzewo broadband network project and from 6.7% to 40% in the 'Nadbuzanska' broadband network project). Consequently, such investment ensures a "step change" in terms of broadband availability for the target areas, in line with the requirements of paragraph 51 of the Broadband Guidelines.

Table 3 - Percentage of households with unsatisfied demand for Internet access in the "grey problematic area" in 2012¹⁸

Brańsk - gmina	25,11%
Brańsk - miasto	20,12%
Drohiczyn	53,68%
Dziadkowice	36,39%
Mielnik	55,87%
Milejczyce	43,15%
Perlejewo	64,34%
Rudka	67,57%
Nurzec-Stacja	43,78%
Siemiatycze - miasto	75,15%
Siemiatycze - gmina	50,83%
Grodzisk	50,08%

- (82) Furthermore, the project aims at the funding of backhaul network open for access to all operators and technologies, which as confirmed in the paragraph 81 of the Broadband Guidelines, exhibit especially pro-competitive features.
- (83) The Polish authorities have designed the measure in such a way as to minimise the State aid involved and potential distortion of competition arising from the measure. As set out in paragraph (36) the project will only target localities that were classified as traditional 'white' and 'grey' areas.

Traditional "white areas"

- (84) As showed in Table 1 above, the target areas include 440 localities in which there is no broadband infrastructure at all and it is unlikely to be developed in the near future. The Commission acknowledges therefore that by providing financial support for the provision of broadband services in areas where broadband is currently not available, Member States pursue genuine cohesion and economic development objectives and thus, their intervention is likely to be in line with the common interest, provided the conditions set out in paragraph 78 of the Broadband guidelines are respected. (see below in paragraph (89) and following).

Traditional "grey areas"

- (85) The target areas also include 44 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 70 of the Broadband Guidelines are fulfilled.
- (86) 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

¹⁸ Feasibility study on the project *Budowa Nadbużańskiej Sieci Dystrybucyjnej*.

(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.

(87) For the purpose of establishing the above, the Polish authorities provided evidence that:

- (a) in areas included in this category the incumbent has significant market power. Furthermore, the backhaul network is not open for third party operators and 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 very low accessibility of broadband services and the type of services offered to end-users as described in section III.2. The Polish authorities confirmed that due to the shortage or outright of infrastructures and to the high price of services as well as the lack of competition regards wholesale and retail bandwidth services, in the target grey areas the average broadband services penetration rate amounts to approx. 5%.
- (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.

(88) Hence although a broadband infrastructure is present in the target areas, the evidence provided by the Polish authorities suggests that a market failure might exist. The state support for the deployment of a backhaul broadband network in these areas is justified, provided that other proportionality conditions indicated in paragraph 78 of the Broadband guidelines are respected (see below in paragraph (89) and following), in particular in order to allow the deployment of enhanced access networks. Accordingly, the Polish authorities will allow third operators to connect to the subsidised network only if they commit to deploying access networks capable of carrying NGA services.

The other proportionality conditions of the Broadband Guidelines

(89) ***Detailed mapping and analysis of coverage, public consultation:*** As set out in detail in paragraph (32) 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 (34) 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 broadband networks. As confirmed by the Polish authorities, no operator has objected to the project. Comments from two operators as regards the mapping and the areas eligible for intervention have been taken into account and no operator has put forward the existence of investment plans for the near future. As such, the Polish authorities ensure that the aid is given only where it is

necessary and limit the possibility of crowding out private investments and distortion of competition to the minimum possible.

- (90) **Competitive selection 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 (38). This procedure has the effect of maximising the effect of the aid provided while minimising any potential advantage granted for the selected operator.
- (91) **Most economically advantageous offer:** 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 (39). 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.
- (92) **Technological neutrality:** The Polish authorities confirmed the choice of technology for the relevant equipment 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 subsidised network of any possible technology, which operators wish to use for their access infrastructure.
- (93) **Use of existing infrastructures:** As confirmed by the Polish authorities, wherever possible, the new network will use existing infrastructure. 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 (40), 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 the planned infrastructure, the contractors will be allowed to procure existing infrastructure if it is economically reasonable.
- (94) **Wholesale access:** As described in paragraph (42), 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. The access obligations will be supervised by the Polish NRA (UKE). Adequate safeguards will be put in place to prevent any undue discrimination towards access seekers or content providers and any other hidden indirect advantage.
- (95) **Wholesale access pricing:** 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 the NRA, as detailed in paragraphs (43) and following.

- (96) **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 of the networks will be clawed back as explained in paragraph (46), the Polish authorities 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.
- (97) **Transparency:** As described in paragraph (47) above the Polish authorities confirmed that they would publish on a central website at least the following information on the State aid measures: the full text of the approved aid scheme and its implementing provisions, name of the aid beneficiary, aid amount, aid intensity and used technology¹⁹. Furthermore, the aid beneficiary will be obliged to provide entitled third parties with comprehensive and non-discriminatory access to information on its infrastructure (including *inter alia* ducts, street cabinets and fibre) deployed under the State aid measure.
- (98) **Reporting:** The Polish authorities confirmed that starting from the date when the network is put into use, for the duration of the aid measure, the State aid granting authority would report every other year the key information on the aid projects to the European Commission.

Conclusion

- (99) The Commission concludes that the notified measure "*Local broadband network projects in Podlasie*" meet 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.

VII. DECISION

On the basis of the foregoing assessment, the Commission has accordingly decided that the measure "*Local broadband network projects in Podlasie*" 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:

<http://ec.europa.eu/competition/elojade/isef/index.cfm>.

¹⁹ Such information will be kept for at least 10 years and shall be available for the general public without restrictions.

Your request should be sent by encrypted e-mail to stateaidgreffe@ec.europa.eu or, alternatively, by registered letter or fax to:

European Commission
Directorate-General for Competition
State Aid Greffe
Place Madou 1/Madouplein 1
1210 Bruxelles/Brussel
BELGIQUE/BELGIË

Yours faithfully,
For the Commission

Joaquín ALMUNIA
Vice-President