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Subject: **State aid SA.33386 (2012/N) - Poland**
Broadband network in Lower Silesia

Sir,

I. SUMMARY

(1) I am pleased to be able to inform you that the European Commission has assessed the measure *"Broadband network in Lower Silesia"* (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].

II. PROCEDURE

(2) Following pre-notification discussions, by a letter dated 24/07/2012, pursuant to Article 108 (3) of the TFEU, the Polish authorities notified to the Commission a measure for supporting the deployment of a regional backhaul network in Lower Silesia. Following a request for information on the measure sent by the

[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.

Jego Ekscelencja
Pan Radosław SIKORSKI
Minister Spraw Zagranicznych
Al. J. Ch. Szucha 23
00-580 Warszawa
POLSKA

Commission on 21/09/2012, the Polish authorities submitted their reply on 18/10/2012.

III. CONTEXT

III.1. The target region

(3) The target area of the project covers the province of Lower Silesia, with a population of about 2.88 million.

(4) Population density in the province is 144 people per sq. km. and is higher than the national average of 122 144 people per sq. km. Approximately 30 % of the population lives in rural areas.

(5) With the notified measure, the Silesian authorities aim to mitigate the extent of digital and social exclusion in those areas and create new professional opportunities for the skilled residents. Broadband Internet will allow people who used to leave their residence due to financial considerations to engage into distance working. Dissemination of broadband access to Internet will be a stimulus for development of modern electronic economy and e-government in the region, and as a consequence it shall favour development of areas of knowledge-based economy.

III.2. The rationale for public intervention

(6) According to the Polish authorities, the development of broadband in the Lower Silesia region faces two key problems: (1) the shortage 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 infrastructure of commercial operators offering broadband services

(7) As regards the first concern, similarly to other regions in the European Union, also in the case of Lower Silesia, advanced broadband services and the infrastructure required to support them are available for citizens and businesses in more densely populated areas, whereas broadband infrastructure is inadequate or outright lacking in other areas which are not commercially attractive for electronic communication operators. This leaves citizens and businesses in such areas without the possibility of adequate broadband access and services.

(8) According to the statistics provided by the Polish authorities, at the end of 2011 fixed broadband access penetration reached 17.3%, which is still below the EU average of 27.7%.

(9) The table below shows the breakdown of broadband services in Lower Silesia across different connection speeds. The table above covers lines reported by operators in the NRA network inventory questionnaires. The data includes xDSL technologies (incl. LLU and BSA), as well as CATV, WiFi, WLAN, WiMAX, fixed CDMA, FTTH and satellite links. Cable operators offer the highest access speeds, which implies availability in the bigger cities and they own approx. 70.9% of lines with speeds in excess of 10Mbps. Competition among operators can be observed only in the bigger cities, where the broadband access to Internet is provided by cable television operators. This is particularly true with respect to the Lower Silesian Voivodship, which is middle-sized in geographic and demographic aspects.

Table 1 : Breakdown of broadband services availability in Lower Silesia by connection speed

<2Mbps	2-8Mbps	8-30Mbps
60.64%	31.89%	7.47%

(10) In the Digital Agenda Scoreboard[2], Poland is indicated as a country, which despite clear progress made in the years 2005-2009 still stays in the tail of the EU-27 with regard to the penetration of broadband Internet.

(11) Lack of broadband infrastructure in the Lower Silesia region emerged clearly during the preparation of the inventory of existing infrastructure and of credible investment plans. According to the Polish authorities, in as many as 217 localities out of the total of 2,608, there is no optical backhaul node. As far as the NGA infrastructure is concerned, among 2,608 localities in Lower Silesia there were only 267 where NGA services are offered or are planned to be offered in the next 3 years, and that was usually only in the most densely populated parts of these localities.

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 Lower Silesia. The Polish authorities indicated that the broadband access market share in Lower Silesia held by the incumbent operator (TP SA) was approx. 71% (xDSL market share), without taking into account the indirect share attributable to it due to line rental to other operators (leased xDSL lines market).

(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 ULL[3] penetration rate in Lower Silesia region was less than 5%. According to the Polish authorities, the alternative operators, aware of the dominant position of the incumbent and anti-competitive approach, are reluctant 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 backhaul infrastructure and 'last mile' infrastructure. The existing infrastructure concentrates in the vicinity of the biggest city in the region. Consequently, the Polish authorities decided to roll out the new Lower Silesian

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

[3] Unbundled Local Loop.

Broadband Network (hereafter "DSS") to bridge the infrastructural gap in the region.

(15) The DSS network will be open to private operators to obtain access for connecting ‘last mile’ infrastructure. Through the construction of a regional broadband network open for all telecommunications operators, devoted to the provision of wholesale services, the Polish central and regional authorities aim to reach objectives of social cohesion and economic growth. The construction of a new broadband infrastructure will allow additional operators of access networks to enter the market, which will have a positive impact on the supply of retail services and competition in the areas covered by the notified project.

(16) The Polish authorities also reported that the majority of operators of access networks were of the opinion that the construction of a new network, having its nodes at the level of municipalities and individual villages will help them to develop their activities by contributing to an increase in the profitability of investments.

(17) According to the Polish authorities the analyses conducted so far indicate the increasing significance of "digital exclusion" in the region, especially in rural areas and small towns. The limited supply has curtailed demand for broadband internet access, which is reflected in the lack of interest in the use of broadband internet access. The DSS project is to solve the crucial problem of the low usage of broadband internet access, especially in rural areas.

(18) The measure is necessary for the achievement of the objectives of the Digital Agenda for Europe[4] in order to avert the widening of the digital divide and to provide the population of Central Europe with competitive internet access.

IV. DESCRIPTION OF THE MEASURE

(19) ***Objective****:* The goal of the Polish authorities is to provide residential customers, business users, government and public administration bodies in Lower Silesia with the ability to access the electronic communication operator and technological platform of their choice and to have access to the services provided on NGA networks.

(20) The project is focused on "white NGA areas” (i.e. areas where currently there is no coverage of NGA infrastructure and where private investors do not plan to build such infrastructure in the next three years). According to the Polish authorities, providing access to the subsidised backhaul infrastructure to telecommunications operators will create incentives for investment in NGA last mile segments. The second objective of the project is to allow the use of the new network to eliminate the "digital divide" in traditional basic broadband in areas where currently there is no adequate broadband infrastructure. The DSS project will be implemented following the approval of the Commission.

(21) The DSS infrastructure will be available for use also to public administration, in line with the public procurement regulations. 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

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

of firms and will contribute to strengthening the role of peripheral areas in Lower Silesia.

(22) ***Legal basis:*** The measure is based on the Act on the principles of the conduct of development policies (of 6 December 2006), the Act on support for the development of telecommunications networks and services (of 7 May 2010), the Act on conduct in matters concerning State aid (of 30 April 2010) and Resolution No. 25/III/06 of 21 December 2006 on the adoption of the Regional Operating Programme for the Lower Silesian Voivodship for the years 2007-2013 (as amended).[5]

(23) ***Design of the project****:* The project will be implemented by the public authorities of the province with funds from the Regional Operational Programme for Lower Silesia.

(24) The voivodship authorities have first launched public procurement procedures for the design and construction of broadband infrastructure in Lower Silesia (DSS) and will subsequently, in a different procedure, select the infrastructure operator. The selected infrastructure operator will pay the province a fee for the lease of the broadband infrastructure and will keep the right to retain revenues from the management and operation of the network. The province will remain the owner of the network throughout the life of the contract with the infrastructure operator. The infrastructure operator will not offer any services to end-users, but only wholesale services to other telecommunications undertakings. The infrastructure operator will have the obligation to provide effective access to third parties throughout the life of the contract with the provincial authorities, i.e. over a period of 7 to 20 years.

(25) The project envisages the deployment of backbone infrastructure with backhaul elements whereas the subsidy will cover mostly passive elements, which are indispensable for installation and running of broadband access to Internet (such as e.g., ducts, cables, optical fibres, manholes, telecommunications racks, or other locations of telecommunications nodes) as well as to the adaptation of the premises at node locations, if required for achieving the desired objective within the allowed budget.

(26) By providing wholesale access to the Lower Silesian network to electronic operators wishing to connect to it, the Polish authorities aim to encourage private investment in NGA networks (i.e. last mile infrastructures[6]) by electronic communication operators so as to accelerate the supply of NGA services to end users. This initiative will ensure that all potential end-users will be able to choose the operator of electronic communications and/or technology platform for broadband access they deem most appropriate to their needs by providing an NGA network that is able to support high-bandwidth, high reliability and affordable connectivity services. Additionally, as a secondary objective, the authorities of the province aim also to reduce the digital divide in those areas in which not even basic broadband services are currently provided.

(27) The Polish authorities contend that a market failure is present in Lower Silesia as regards the provision of NGA services and, in some areas, also of basic broadband services and therefore, they consider State intervention necessary to

[5] The Regional Operating Programme for the Lower Silesia Voivodship has been formally approved by the European Commission on 4 September 2007.

[6] Access network connecting the end users with the backhaul network thus delivering connectivity from a communications provider to a customer.

correct it. Therefore, the Polish authorities have requested an authorisation for the project following State aid rules and the *Community Guidelines for the application of State aid rules in relation to rapid deployment of broadband networks*[7] (hereafter: the "Broadband Guidelines").

(28) ***Budget and funding instruments:*** The total project budget amounts to PLN 215 000 000 (approx. EUR 51.8 m). Most of the funds (approx. PLN 149.7 m) will be provided by the EFRD, while the remainder will come from the budget of the Lower Silesian Voivodship authorities.

(29) ***Aid amount and intensity:*** Aid intensity and aid amount to the chosen infrastructure operator will ultimately depend on the project model followed and the outcome the tender procedure held in the province. Nevertheless, given the ownership of constructed broadband infrastructure will remain with the province as well as the contractual arrangements between the provincial authorities and the selected infrastructure operator, the actual aid amount will be lower than the amount mentioned in the paragraph above related to the project budget.

(30) ***Mapping and coverage analysis****:* As confirmed by the Polish authorities, the analysis of the existing infrastructure and investment plans for the next three years was made on the basis of a detailed inventory carried out by the independent experts.

(31) The inventory covered both backhaul and 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 carried out between April and May 2009, subsequently updated in October 2009. The results of the 2009 inventory were updated with data from the report "Report on the coverage of the Republic of Poland with telecommunications infrastructure built until 2010 and planned for 2011 and buildings suitable for co-location" published by the Office of Electronic Communications (NRA) in 2011, inventory data obtained by the Marshal's Office of the Lower Silesian Voivodship from TP S.A. in 2011 and inventory data obtained from the NRA in April 2012.

(32) As illustrated in paragraph (9) above the broadband access availability in the Lower Silesian region is very limited. Furthermore the investment plans of operators in the next 3 years, especially as regards the development of NGA infrastructure, mostly concern the urban and densely populated areas of the country.

(33) According to the Polish authorities the incumbent operator, TP S.A, has a significant share, ranging from 70% to 97% of backhaul nodes in individual investment areas. At the same time, the Polish authorities having verified with TP S.A. the availability of these backhaul nodes for other operators found that TP S.A. planned to make the node infrastructure available to other operators only in 26 out of the total 2608 localities in the province of Lower Silesia. The Voivodship has 155 communes, while backhaul nodes open to third parties are situated only in 26 of them. Consequently, the availability of backhaul infrastructure for other operators is very low.

[7] OJ C 235 of 30.9.2009, p. 7.

(34) ***Public consultation:*** The Polish authorities undertook the public consultation between March and May 2010 in order to verify the results of its mapping, planned classification of areas eligible for intervention (with the projected location of the network nodes) and to obtain information from stakeholders on their plans on planned NGA and fibre investments as well as their views on the project. The comments received were duly taken into account, which has led to changes in the classification of some of the areas with regard to their eligibility for intervention.

(35) Subsequently, another two rounds of public consultations with stakeholders were carried in April and May 2011 and in May 2012 to take into account most recent developments. These consultations have not produced any comments, which would entail the need to change the assumptions made in the DSS project.

(36) ***Opinion of the National Regulatory Authority:*** The project was also subject to ongoing consultations with the National Regulatory Authority (UKE). A positive opinion on the notified project was issued by UKE in the letter dated 31 May 2011.

(37) ***Conditional access to DSS****:* The Polish authorities designed a conditional system of access to the DSS in order on one hand to meet the objectives of the scheme and at the same time to minimize the potential distortion of competition on existing operators.

(38) The primary objective of the Polish authorities is to give access to the subsidised infrastructure to the telecommunications operators in order to create incentives for them to invest in the NGA last mile[8] segment. The second objective of the project is to allow the use of new network to eliminate the "digital divide" in traditional basic broadband access in areas where there is no adequate broadband infrastructure.

(39) In order to minimise the potential distortion of competition, the Polish authorities will not allow third party operators to connect to the DSS with basic broadband infrastructures where sufficient competition is available at the level of such networks or where at least two competing basic broadband infrastructure[9] are already in place. According to the Polish authorities such limitations in the use of the DSS network will reduce any potential distortion of competition as regards basic broadband services providers, but at the same time will incentivize NGA network roll-out by contracting a capillar fibre backhaul network in the region.

(40) On the basis of the above described mapping exercise, the list of targeted areas was finalised and the type of access to DSS per type of area was identified according to the following table[10].

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8 According to paragraph 53 of the Broadband Guidelines, NGA networks are wired access networks which consist wholly or in part of optical elements and which are capable of delivering broadband access services with enhanced characteristics (such as higher throughput) as compared to those provided over existing copper networks, i.e. in the current case FTTx solutions capable of providing end user speeds of minimum 40 Mbps or cable networks able to deliver speeds up to and beyond 50 Mbps using the new 'DOCSIS 3.0' cable modem standard.

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

10 In line with the method already applied in decision N 407/2009 Optical fibre Catalonia (Xarxa Oberta) C(2010)5696 of 11.8.2010, decision SA.31687 (N436/2010) Broadband in Friuli Venezia Giulia (Project Ermes) C(2011)3498 of 23.5.2011 and decisions SA.33438 (2011/N), SA.33440 (2011/N), SA.33441 (2011/N), SA.33439 (2011/N), SA 30851 (2011/N) Broadband Network for Eastern Poland of 10.11.2011.

Table 2: Conditional access to nodes of the Regional broadband network in Lower Silesia (DSS) with the type of available basic broadband access services

-	Total number of localities in category/ number of localities with planned DSS nodes[11]	Infrastructure in place (including dark fibre)	Basic broadband retail offers[12]	NGA infrastructures or plans for the near future	Conditional access to DSS
1	217 /23	None	No	No	All operators can connect to DSS, because no infrastructure is available
2	1915 /122	Only one	Only one	No	All operators can connect to DSS because the target areas are deemed to be problematic grey areas[13]
3	20 /1	TP S.A.	TP S.A. + ULL[14]	No	Only 'NGA last mile' infrastructures can connect to DSS
4	0 /0	More than one	Only one	No	Only 'NGA last mile' infrastructures can connect to DSS
5	0 /0	More than one	TP S.A. + ULL	No	Only 'NGA last mile' infrastructures can connect to DSS
6	189 /3	More than one	More than one	No	Only 'NGA last mile' infrastructures can connect to DSS
7	267 / 8	One or more	One or more	Yes	Nodes located in such locality can be used as technical nodes only[15] unless the following two conditions are met: a) the closest existing or planned (in next 3 years) optical distribution node available for use in a "last mile" NGA network is located not closer than approx. 4 km from the planned location of the node, and b) no NGA services are provided in the area (and no reliable plans in the next 3 years). In this case 'NGA last mile' infrastructures can connect to DSS.

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

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

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

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

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

(41) ***Open tender process****:* As confirmed by the Polish authorities, the infrastructure operator will be selected in an open tender procedure in accordance with the fundamental principles of openness, competition and transparency laid down in national and EU procurement rules.

(42) ***Award criteria:*** In the tender procedure leading to selection of the infrastructure operator, the prospective contract will be concluded with the applicant presenting the most economically advantageous offer. In this respect, as confirmed by the Polish authorities the main award criteria will include: the amount of public aid applied (weight at least 65 %), level of private partner's capital expenditures (weight 0-15%), other economic and quality criteria[16] (weight 0-20%). The award criteria will be defined in detail before the final bids are requested, in conformity with the principles of the public procurement legislation.

(43) ***Use of existing infrastructure:*** The Lower Silesian authorities encourage use of the entire existing infrastructure (e.g. roads, ducts, etc.) in order to limit the aid necessary for the measure as well as to avoid duplication of infrastructures. The contractor in charge of rolling out the passive infrastructure could assess the cost of building the whole DSS to the required standard or opt for an alternative solution, including long-term lease for 20 years on IRU[17] principles. In the case of IRU, the agreement would be concluded between the infrastructure provider and the Voivodship authorities, but the lease fee would be paid by the contractor out of the overall remuneration for the deployment of the network. Most of the backbone network will be built on land made available by Polish Railways. This will dispense with administrative complications associated with the need to obtain a large number of approvals to build ducts along the road rights of way.

(44) ***Technology*****:** The main goal of the project is to develop backbone network with backhaul-type components for NGA networks. At the current stage of development of telecommunications technologies there is no transmission medium for backbone networks that would allow to provide NGA services other than optical fibre links. Therefore, the project envisages construction of the network using fibre-optics links, whereas for every other equipment, choice of technology will be based pursuant to technical plans, and in public procurement procedures no technology will be excluded a priori. Consequently, the services provided on the wholesale market will be such as to enable the interconnection to the backhaul network of any possible technology, which operators wish to use for their access infrastructure.

(45) ***Wholesale access:*** The key objective of the DSS project is to provide capacity to any third operator wishing to connect its last mile infrastructure according to the modalities highlighted above. Hence, the wholesale access will be provided on non-discriminatory and open access terms. Wholesale services will include active access through the provision of transmission services, as well as passive access assured through the leasing of dark fibre and access to ducts. As mentioned above, the obligation to provide effective wholesale access to third parties will

16 E.g., efficiency of the use of DSS infrastructure, costs of using the infrastructure, license duration period beyond the 7 years minimum, quality level of services offered, fees and their accessibility, methodology for monitoring project performance, maintenance conditions.

17 IRU – Indefeasible Right of Use.

apply throughout the term of the agreement with the Infrastructure Operator, i.e. for at least 7 years.

(46) The winning bidder for the operation of the infrastructure will not be allowed to provide retail services in order to avoid any concern of possible anticompetitive exploitation (i.e. by giving preferential treatment to its retail branch with regard to the use of the network) of the advantages created by the management of the network.

(47) ***Duration of the measure:*** The contract lifetime between the Lower Silesian authorities and the infrastructure operators will be ultimately determined in the course of the relevant tender procedure but will range between 7 and 20 years.

(48) ***Monitoring and claw-back mechanism:*** The compliance of the selected bidder with the contract obligations will be monitored on a regular basis by the provincial authorities and by the National Regulatory Authority (NRA). The monitoring will be performed during the lifetime of the contract with the infrastructure operator. The Polish authorities envisage also a claw back mechanism for the DSS project in order to avoid any overcompensation to the beneficiary. The calculation of the amount to claw-back will be dependent on the EBITDA[18] 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 business plan[19].

(49) ***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.

(50) The contract concluded between the provincial authorities and the infrastructure Operator will specify rules for the infrastructure operator to calculate fees for access to DSS 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.

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

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

[19] 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 the Lower Silesian authorities and the infrastructure operator proportionately to the level of state aid.

V. ASSESSMENT OF THE MEASURE: PRESENCE OF AID

(52) According to Article 107 (1) TFEU, *"any aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods shall, in so far as it affects trade between Member States, be incompatible with the internal market"*. It follows that in order for a measure to qualify as State aid, the following cumulative conditions have to be met: 1) the measure has to be granted out of State resources, 2) it has to confer an economic advantage to undertakings, 3) the advantage has to be selective and distort or threaten to distort competition, 4) the measure has to affect trade between Member States.

State resources

(53) As described in paragraph (28), 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.

(54) 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.

Selective economic advantage

(55) *Selected operator*: The provincial authorities will conclude a contract for the management of DSS with the selected operator. This operator will be also entitled to provide the wholesale communications services on the private market. The funding of 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.

(56) Therefore, the selected operator will receive financial support which will enable it to provide broadband services at conditions not otherwise available on the market. The aid will allow the operator 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 customers than under normal market conditions. In view of the above, an economic advantage will be granted to the selected operator.

(57) *Third party providers*: The DSS will provide third party operators wholesale broadband services with access to a future-proof backhaul infrastructure. This way, third party operators will be granted an economic advantage since they will have access to wholesale capacity made available by State funding, as they will be customers of the selected electronic communication operators. By using such capacity, they can sell advanced broadband services to end customers.

(58) *End users:* The measure aims at improving the provision of existing broadband services to residential and business users in Lower Silesia. Undertakings in the targeted areas will therefore ultimately benefit from the provision of the new and improved services.

(59) The scheme is also selective in that it is addressed to undertakings active only in a specific region and in certain markets for electronic communications services

Distortion of competition

(60) 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 DSS in the targeted areas and wholesale operators elsewhere in Poland and the EU.

(61) Therefore, the fact that an improved broadband service and additional (wholesale) capacity becomes available has the effect of distorting competition.

Effect on trade

(62) 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

(63) The Commission therefore concludes that in so far as state funds are used to finance the deployment of a backhaul network for wholesale provision of services on the private market, the notified measure "Broadband network in Lower Silesia" 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 provider, it is necessary to consider whether the measure can be found to be compatible with the internal market.

VI. ASSESSMENT OF THE MEASURE: COMPATIBILITY

(64) 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*[20]. The Broadband Guidelines contain a detailed interpretation of Article 107 (3) (c) TFEU in this area of State aid law. As regards the applicable substantive provisions, the Commission has essentially analysed the measure in the light of the criteria outlined in the Broadband Guidelines.

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

(65) 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

[20] OJ C 235 of 30.9.2009, p. 7.

the Guidelines. In applying the balancing test, the Commission will assess the following questions:

(1) Is the aid measure aimed at a well-defined objective of common interest (i.e. does the proposed aid address a market failure or other objective)?

(2) Is the aid well designed to deliver the objective of common interest? In particular:

  (a) Is the aid measure an appropriate instrument?

  (b) Is there an incentive effect, i.e. does the aid change the behaviour of firms?

  (c) Is the aid measure proportional, i.e. could the same change in behaviour be obtained with less aid?

(3) Are the distortions of competition and the effect on trade limited, so that the overall balance is positive?

VI.2. Objective of the measure

The aid is in line with the policy of the Union

(66) The Commission defined in its Europe 2020 strategy of 3 March 2010[21] 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."*

(67) The notified DSS project has as its main target "*white NGA areas*"[22], i.e. areas where no NGA broadband coverage is currently available and where there are no plans by private investors to roll out such infrastructure in the near future of three years. By granting access to the backhaul of the DSS to third party NGA operators, the measure facilitates and encourages investments in NGA (last mile) networks, in line with the objectives of the Broadband Guidelines. As a secondary objective, the Polish authorities also intend to allow the use of the backhaul of the DSS 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.

(68) By extending NGA broadband coverage to areas where private operators have no commercial interest to invest in the near future, the Polish authorities pursue genuine cohesion and economic development objectives which is in line with the Digital Agenda and Sections 2.3.2. and 3.1 of the Broadband Guidelines.

Aid is the appropriate instrument

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

22 See section 3.3 of the Broadband Guidelines.

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

(70) 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 Lower Silesia regulation has not fully been able to ensure effective competition in some of the markets for electronic communications and has not led to sufficient investments to bridge the digital divide affecting certain areas. Regulation is, indeed, a necessary, but not a sufficient instrument for the development of broadband services as alternative providers need to combine the use of wholesale products from the incumbent with own network investments which may not be profitable in areas where demand is low.

(71) In order to ensure the supply of high-speed broadband services to all its citizens, the Polish authorities see no alternative but to grant public aid to the construction of a backhaul network for the provision of NGA services.

(72) The Commission can agree that, in line with paragraphs 47 and 48 of the Broadband Guidelines, without further public intervention, avoiding the emergence of a new "*digital divide*" between different areas of the country seems not possible, which could lead to the economic exclusion of the local undertakings. Hence in the current situation, State aid is an appropriate instrument to achieve the set objectives.

The aid provides the right incentives to operators

(73) As set out in paragraph 50 of the Broadband Guidelines, regarding the incentive effect of the measure, it needs to be examined whether the broadband network investment concerned would not have been undertaken without any State aid. According to the results of the public consultation and market research referred to above in paragraph (34) and following, in the targeted areas no NGA network investment would take place without public funding, hence the aid produces a change in the investment decisions of the operators. Moreover, by granting access to the DSS to third party NGA operators, the measure facilitates and encourages investments in NGA (last mile) networks. Therefore, the aid shall provide a direct and appropriate investment incentive for the selected operator and for third party beneficiaries.

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

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

Pro-competitive nature of the project

(75) The wholesale provision of services is not aimed to develop an access network but only a transport "*backhaul*" network. Use of the transport network is a necessary input for retail telecommunication operators to provide (high speed and

very high speed) access services to the end users. The operator of the new network will offer access to wholesale products (such as ducts, dark fibre) on a commercial basis. Construction of backhaul networks is generally a measure that fosters competition and investment and, for NGA networks, encourages third party operators to rollout last mile infrastructures capable of supplying advanced connectivity services to end-users. Backhaul networks have the potential to stimulate competition on all access technologies, while leaving the bulk of the investments to connect end-users to private operators.

(76) However, backhaul networks are "hybrid networks" in the sense that they are able to sustain both basic and NGA types of networks: it is the (investment) choice of the telecommunication operators what type of 'last mile' infrastructure they wish to connect to the backhaul network. In particular, operators could decide to use ADSL or wireless solutions (i.e. basic broadband infrastructures), but they could also opt for rolling out, for example, an FTTH architecture (i.e. an NGA infrastructure).

(77) Hence from a competition point of view, the possible distortion resulting from the deployment of subsidised backhaul networks shall be assessed on two levels: (1) the level of basic broadband networks and (2) the level of NGA networks, in line with the distinction made in the Broadband Guidelines.

(78) With respect to (1), the measure could cause distortions of competition in those localities in which market forces seem to work adequately to provide basic broadband services to citizens. In these areas, public intervention would not be justified, since it would not address a market failure (as competitive broadband providers exist), it would not bring any significant benefits for the targeted areas (as citizens would receive the same level of services), state aid would not have any incentive effect and it could crowd out private investments. By contrast, in localities where a market failure exists with regards to basic broadband, the provision of subsidised backhaul services has a pro-competitive character.

(79) As regards point (2), i.e. concerning NGA networks, according to the information submitted by the Polish authorities, the major part of the area of Lower Silesia (except larger cities and densely populated areas) has to be considered a "white NGA area": even where the incumbent's backhaul infrastructure is present, the access infrastructure is not yet upgraded nor will it be in the next three years (in the target areas no "credible investment plans" have been reported in the public consultation).

The system of conditional market access to DSS

(80) To alleviate these different concerns, the Polish authorities have proposed a system of conditional market access to DSS, depending on the existing market situation in the various municipalities, as explained above in Table 2.[23]

[23] In line with Commission precedents in decision N 407/2009 Optical fibre Catalonia (Xarxa Oberta) C(2010)5696 of 11.8.2010, decision SA.31687 (N436/2010) Broadband in Friuli Venezia Giulia (Project Ermes) C(2011)3498 of 23.5.2011 and decisions SA.33438 (2011/N), SA.33440 (2011/N), SA.33441 (2011/N), SA.33439 (2011/N), SA 30851 (2011/N) Broadband Network for Eastern Poland of 10.11.2011.

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

(81) As shown in Table 2 above, there are 217 localities in which there is no backhaul infrastructure at all (Category 1). These areas are "white" also from the perspective of basic broadband, hence there is no need to impose restrictions on the type of last mile infrastructures allowed to use DSS, provided that the conditions indicated in paragraph 51 of the Broadband Guidelines are respected (see below in paragraph (98) and following).

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

(82) Category 2 comprises 1915 localities which are only served by the incumbent, not only in the backhaul but also in the access segment. These areas are "grey" from the perspective of basic broadband, but the Polish authorities demonstrated that the conditions laid down in paragraph 46 of the Broadband Guidelines are fulfilled.

(83) In the target areas the provision of a broadband infrastructure is still a *de facto* monopoly only provided by TP S.A. The Polish authorities provided evidence that (i) no adequate services are offered to satisfy the needs of citizens or business users and that (ii) there are no less distortive measures available (including ex ante regulation) to reach the same goals.

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

(a) in areas included in this category the backhaul network is not open for third party operators. Furthermore, no other access nodes are planned to be constructed in the area within the next 3 years.

(b) the overall market conditions are not adequate, by looking, *inter alia*, at the low accessibility of broadband services and the type of services offered to end-users as described in section III.2.

(c) the overall barriers preclude potential entry of other electronic communication operators.

(d) any measures taken or remedies imposed by the competent national regulatory or competition authority with regard to the existing network operator have not been able to overcome such problems. For instance, according to the Polish authorities, even if regulation may have been successful in establishing a competing offer of broadband services, the geographical remoteness and demand characteristics in the areas of Category 2 still prevent the achievement of supply conditions similar to those prevailing in urban areas.

(85) Hence although a broadband infrastructure is present in the target areas, the evidence provided by the Polish authorities suggests that a market failure exists. Accordingly, there is no need to impose restrictions on the type of last mile infrastructures allowed to use DSS`s in the localities belonging to category 2, provided that the conditions indicated in paragraph 51 of the Broadband Guidelines are respected (see below in paragraph (98) and following).

(86) For all other targeted localities, the Polish authorities will allow third operators to connect to DSS only if they deploy NGA capable 'last mile' infrastructures[24]. Those localities can be considered 'NGA white areas' where there are no existing NGA infrastructures, no NGA services are currently offered to end users and

[24] For the definition of "NGA last mile" see footnote 9

there are no plans for investment in NGA in the near future of three years. However, in terms of basic broadband networks, on the basis of the available data sufficient competition seems to exist (i.e. traditional “black” areas or unproblematic “grey” areas).

(87) In particular, as far as Category 3 is concerned, the data show the presence of only one infrastructure at the wholesale level, but there are operators alternative to the incumbent active on the retail market offering basic broadband services. This fact suggests that, although the area is "grey" (for traditional broadband), it is not problematic as Category 2 above: a competitive retail market could ostensibly develop due to ULL operators gaining access to the incumbent's network. In presence of the mentioned factors and lacking evidence supporting the existence of a market failure, the conditions of paragraph 46 of the Broadband Guidelines cannot be considered fulfilled and the areas in question can be considered sufficiently competitive from the point of view of basic broadband.

(88) With respect to the conditions laid down in paragraph 73 of the Broadband Guidelines concerning "white NGA areas" which are "grey" from the perspective of basic broadband, the Polish authorities proved that (a) the broadband services provided over the existing networks are not sufficient to satisfy the continuously growing needs of citizens and business users in the areas in question and commercial operators do not have sufficient commercial incentives to upgrade the existing networks and (b) there are no less distortive means (including ex ante regulation) to reach the stated goals of the scheme.

(89) Accordingly, in the municipalities belonging to category 3, DSS can be used to obtain backhauling only by those third party operators that are investing in *NGA last mile infrastructures* but not by operators wishing to obtain backhaul services from DSS for their *basic broadband* infrastructures (for instance, adsl, basic cable, wireless or mobile solutions). As confirmed by the Polish authorities there is only one node planned in the localities of category 3.

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

(90) As regards Category 4, there appear to be more than one wholesale infrastructure, i.e. backhaul and other (possibly "pure") passive infrastructures, although only the incumbent is offering broadband services at retail level. Even if at this stage it is not known whether such "other" infrastructures are available for access by third party operators and adequate to the provision of retail broadband services by alternative providers, there is not sufficient proof to exclude it either. As confirmed by the Polish authorities, no localities had been identified in this category.

(91) In Category 5 there are localities in which not only there appear to be several wholesale infrastructures, but also a competitive retail market due to the presence of ULL operators. In absence of evidence to the contrary, these areas as well as those of Category 4 could be considered sufficiently competitive from the point of view of traditional broadband and therefore, in line with paragraph 43 of the Broadband Guidelines, State aid cannot be allowed. As confirmed by the Polish authorities, no localities had been identified in this category.

(92) Category 6 comprises localities in which there are at least two backhaul infrastructures (besides "other" passive infrastructures) and a competitive retail market not only with the presence ULL operators accessing the network of the

incumbent but with also an alternative cable infrastructure. These localities constitute black areas from the point of view of traditional broadband. As confirmed by the Polish authorities there are three nodes planned in localities identified in this category.

(93) Category 7 features particular conditions, since it only includes white NGA "spots" constituting parts of larger areas marked as NGA grey or NGA black. In category 7 localities, the operators will not be allowed to obtain backhaul services from DSS for their basic broadband infrastructures. However, in such "white spots", access to DSS for use in a "last mile" NGA network will be possible if the following two conditions are met: a) in a given part of the locality the NGA services are currently not provided and they are not planned in the next 3 years b) at the same time the closest existing or planned (in the next 3 years) optical distribution node available for use in a "last mile" NGA network is located not closer than approx. 4 km from the planned location of the DSS node. Without the public intervention, these areas, despite being included in a larger locality with one or more optical distribution node, would not benefit from the access to the NGA services in the near future. The Polish authorities are planning a node in 8 out of 267 of localities classified in this category.

(94) No localities belonging to the categories 4 and 5 have been identified. As regards the categories 6 and 7 areas the Polish authorities contend these are "white NGA areas" and hence submitted information to prove that the conditions laid down in paragraphs 75 and 78 of the Broadband Guidelines are fulfilled (as some of these areas are traditional "black areas" or unproblematic "grey"). In particular, the Polish authorities demonstrated (as described in detail in section III.2 of the current decision) that:

(a) the overall market conditions are not adequate: there is no provision of NGA services in any of the areas belonging to these categories (as evidenced by the public consultation conducted by the Polish authorities), and demand for new services cannot be met by existing networks;
(b) since no NGA network exists, even in presence of regulation imposed by the NRA, network access cannot be conducive to effective competition in NGA;
(c) due to the geographical or competitive situation of the areas in question, there are significant entry barriers precluding potential entry by new NGA network investors;
(d) measures and remedies imposed by the national regulatory authority cannot overcome the problems, in the absence of investments plans;
(e) existing basic broadband infrastructure operators are not proceeding to invest in upgrading their broadband infrastructures within the next three years to provide higher speeds in response to users' demands.

(95) Hence although several broadband infrastructures exists in the municipalities belonging to categories 6 and 7, according to the evidence provided by the Polish authorities, no operator has plausible commercial plan to upgrade its infrastructure to NGA network in the near future of 3 years. Concerning basic broadband services, based on the data provided by the Polish authorities, it seems that these areas are served by at least 2 competing infrastructures or ULL operators, hence there is no evidence that these services are not offered at competitive conditions.

(96) Accordingly, in the municipalities belonging to categories 6 and 7, DSS can be used to obtain backhauling only by those third party operators that are investing in *NGA last mile infrastructures* (see footnote 6) but not by operators wishing to obtain backhaul services from DSS for their *basic broadband* infrastructures (for instance, adsl, basic cable, wireless or mobile solutions).

The other proportionality conditions of the Broadband Guidelines

(97) As set out in paragraph 51 of the Broadband Guidelines, in assessing the proportional character of the notified measure in "white NGA areas" (in the current case, for all target areas from category 1 to category 7) a number of conditions has to be met in order to minimise the State aid involved and the potential distortions of competition.

(98) ***Market research and consultation****:* As set out in detail in paragraph (30) 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 high speed or very high-speed (NGA) networks.

(99) In addition, according to paragraph 67 of the Broadband Guidelines, at present, some advanced basic broadband networks (for instance ADSL 2+) can, up to a certain point, also support some of the types of broadband services that in the near future are likely to be offered over NGA networks (such as basic triple play services). However, and without prejudice to the imposition of ex-ante regulation, it should be noted that novel products or services which are not substitutable from both demand and supply side perspectives may emerge and will require broadband speeds in excess of the upper physical limits of basic broadband infrastructure. Hence, such conditional access will ensure that distortion of competition to existing basic broadband infrastructures will be minimised in line with the provisions of the Broadband Guidelines[25].

(100) Furthermore, in the context of the public consultation, no operator has put forward the existence of NGA investment plans for the near future[26] for the target localities belonging to categories 1 to 7. Thus, the Commission considers that the system of conditional access above delineated allows to exploit the pro-competitive aspects of the present measure while minimising the negative impact on competition and investment.

(101) ***Open tender procedure*****:** To minimise the amount of aid involved, the Polish authorities run a selection procedure in line with the principles of openness, competition and transparency of the national and EU procurement rules, to select the undertaking for the construction and the management of the network. Details

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

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

of the procedure and its outcome are described above in paragraph (41). This procedure has the effect of maximising the effect of the aid provided while minimising any potential advantage granted for the selected operator. The Polish authorities designed the selection procedure so as to choose the most economically advantageous offer among those presented by the operators, as detailed above in paragraph (42). 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.

(102) The measure prevents a distortion of competition which could arise from a conflict of interest if the selected network operator provided access to wholesale capacity at the upstream level while at the same time competing downstream on the retail market. By being excluded from entering the downstream market, the operator will have no strategic incentive to deny certain retail companies access to its wholesale capacity.

(103) ***Technological neutrality***: At the current state of technological development, as acknowledged in paragraph 53 of the Broadband Guidelines, only optical fibre can provide the backhaul capacity necessary to provide NGA retail services. On the other hand, as regards the provision of retail broadband services to end users, the design of the measure under assessment does not favour any particular technology or network platform, leaving it to commercial operators to come up with the most appropriate technological solutions to provide retail broadband services to end users. Therefore any third party operator, regardless of the type of technology used, can benefit from the measure in line with the conditions detailed in Table 2.

(104) ***Use of existing infrastructures:*** The Polish authorities have designed the measure with the objective to minimize the impact of the new network on the market and on the investment plans of existing electronic communication operators. Wherever possible, the new network will use existing infrastructure, whether owned or leased. This way, the Polish authorities avoid the unnecessary and wasteful duplication of existing networks and minimise the overall costs of the project.

(105) ***Wholesale access:*** The selected operator will offer wholesale services and access to the subsidised network to other operators in an open, transparent and non-discriminatory manner for at least seven years. This will represent in fact the core business model of the winning bidder, given that the operator of the infrastructure will not be allowed to provide retail services. The access obligations will be supervised by the Polish NRA (UKE).

(106) ***Price benchmarking:*** A price benchmarking mechanism is incorporated in the funding agreement. In line with the provision of the Broadband Guidelines, the price for wholesale access will be based on average prices for comparable services in more competitive areas and whenever a reference offer is not available, wholesale prices and access conditions will be approved by UKE, as detailed in paragraph (49) and following.

(107) ***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 (48), 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.

VI.4. Conclusion

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

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

VII. DECISION

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

The Polish authorities are reminded that, pursuant to Article 108(3) TFEU, they are obliged to inform the Commission of any plan to extend or amend the measure.

If this letter contains confidential information which should not be disclosed to third parties, please inform the Commission within fifteen working days of the date of receipt. If the Commission does not receive a reasoned request by that deadline, you will be deemed to agree to the disclosure to third parties and to the publication of the full text of the letter in the authentic language on the internet site:

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

European Commission
Directorate-General for Competition
State Aid Greffe
Rue Joseph II 70 / Jozef II straat 70
B-1049 Brussels
Fax No: +32 2 2961242

Yours faithfully,
For the Commission

Joaquín ALMUNIA
Vice-President