



EUROPEAN COMMISSION

Brussels, 13.12.2013
C(2013) 9343 final

PUBLIC VERSION

This document is made available for
information purposes only.

Subject: **State aid SA.36601 (2013/N) – Germany**
 NGA Sachsen-Anhalt

Sir,

I. SUMMARY

(1) I am pleased to inform you that the European Commission has assessed the measure "*Next generation network for commercial and accumulation areas in Sachsen-Anhalt*", as laid down in the "*Richtlinie zur Förderung des Aufbaus von Hochgeschwindigkeitsnetzen in Gewerbe- und Kumulationsgebieten in Sachsen-Anhalt*" (hereafter: "the measure") and decided not to raise objections as the State aid contained therein is compatible with Article 107(3)c of the TFEU.

II. PROCEDURE

(2) Germany notified the measure to the Commission on 26 April 2013 pursuant to Article 108 (3) of the TFEU. The German authorities replied to the Commission's requests for information of 21.06.2013 and 27.09.2013 by letters registered on 14.08.2013 and 24.10.2013 and in reply to emails of 4.12.2013 and 5.12.2013 they submitted additional information on 5.12.2013 and 6.12.2013.

III. CONTEXT

Seiner Exzellenz Herrn Dr.Guido WESTERWELLE
Bundesminister des Auswärtigen
Werderscher Markt 1
D - 10117 Berlin

- (3) In line with the "Europe 2020" strategy for more growth, with the "Digital Agenda for Europe" and with the German federal broadband strategy (that calls for comprehensive broadband networks with download speed of up to 50 Mbit/s), the Region of Sachsen-Anhalt aims at deploying a comprehensive ("flächendeckend") NGA-network in the region with download speed of at least 50 Mbit/s and with upload speed that is significantly higher than that of basic broadband networks.
- (4) At present, while around 95 percent of households and undertakings in the region of Sachsen-Anhalt have access to basic broadband (download speed of at least 2 Mbit/s), only around 10 percent of households and undertakings reach download speeds of 50 Mbit/s or more.

IV. DESCRIPTION OF THE MEASURE

- (5) The measure is similar to the German support measure regarding the development of high speed networks in Bavaria ("NGA Bavaria"), which was approved by the Commission on 20 November 2012¹. Its main characteristics are the following:
- (6) **Objective:** Purpose of the measure is to promote the development of NGA broadband networks with download speeds of at least 50 Mbit/s and with upload speeds that are significantly higher than those of basic broadband networks, in commercial and "accumulation" areas² of Sachsen-Anhalt allowing widespread access to NGA services. This should strengthen competitiveness of companies located in these areas, increase attractiveness of these areas as business location and reduce social and regional disparities, therefore contributing to the achievement of common interest objectives.
- (7) **Duration:** The measure should enter into force on 1.01.2014 and remain in force until 31.12.2017.
- (8) **Legal basis:** the notified measure is based on the directive on the promotion of the development of high speed networks in commercial and accumulation areas in Sachsen-Anhalt ("*Richtlinie zur Förderung des Aufbaus von Hochgeschwindigkeitsnetzen in Gewerbe- und Kumulationsgebieten in Sachsen-Anhalt*").
- (9) **Budget and financing instruments:** The overall estimated (maximum) budget of the measure is 125 million EUR (annual amount of 31 250 000 EUR) funded to around 25 million EUR from the budget of the municipalities and to around 100 million from the European Regional Development Fund (ERDF) and the European Agricultural Fund for Regional Development (EAFRD).
- (10) **Aid amount and intensity:** Under the measure, municipalities or combinations/associations of municipalities³ (hereinafter referred to as "municipality"/"municipalities") can provide a grant for covering a maximum of 80% of

¹ Case SA.35000, NGA Bayern, Commission Decision of 20.11.2012, see http://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=3_SA_35000.

² An "accumulation" area is defined as an area in which in principle at least 5 entrepreneurs or enterprises (hereinafter "entrepreneurs") are located.

³ Original: "kreisangehörige Gemeinden, Verbandsgemeinden, kreisfreie Städte, Landkreise" or "Zweckverbände".

the "profitability gap"⁴ of a (selected) network operator in constructing and operating a broadband infrastructure. The maximum aid amount per project under the measure is 10 million EUR.

- (11) **Target areas:** Support can be granted in commercial and accumulation areas in the Region of Sachsen-Anhalt, where currently no comprehensive ("flächendeckend") NGA network is in place or being deployed in the coming three years and where existing broadband services are not sufficient to cover actual and forecasted demand. An NGA network is defined as "comprehensive" if it ensures a download speed of at least 50 Mbit/s for at least 99% of the connections in the area concerned. In case an NGA network with download speed of at least 50 Mbit/s does not cover 99% of the connections in the area, support under the measure can be granted only for the (parts/connections of the) area that are not currently covered and are not planned to be covered with download speed of 25 Mbit/s or more in the next three years⁵ ("gap filling"). If users profit from the deployment of a broadband network under the measure as a side effect, they should benefit from download speeds of at least 30 Mbit/s and upload speeds that are significantly higher than those provided by basic broadband networks. Accordingly, only so called "NGA white" spots/areas in the sense of paragraph 75 of the Broadband Guidelines⁶ will be eligible and this only in areas in which – without State support – no adequate high speed internet services would be available on commercial terms (see recitals (12) to (15)). "Grey/black" NGA areas/spots are not eligible.
- (12) **Mapping and coverage analysis, and public consultation:** the municipality must first establish the available broadband services. The federal broadband atlas and the broadband atlas of Sachsen-Anhalt⁷ can be used for this purpose. Further, it must make a comprehensive assessment of the actual and predicted demand for broadband services with download speeds of at least 50 Mbit/s and upload speeds that are significantly higher than provided by basic broadband networks ("demand survey"). This assessment is to be made on the basis of a consultation of entrepreneurs in the target area (individually and through posting on the central online portal www.breitband.sachsen-anhalt.de⁸, hereafter the "central online portal"), inviting them to credibly indicate the download and upload speed⁹ they currently benefit of as well as the speed they would need. The results of this

⁴ The "profitability gap" is calculated by subtracting the estimated operating revenues from the operating costs, including capital costs. The period to be taken into account is at least 7 years from commissioning. The detailed calculations have to be submitted by the applying network operator to the municipality when participating in the tender (see recital (19)).

⁵ "Step change condition"/"Aufgreifschwelle". E.g. in case an area is covered by an NGA network ensuring download speeds of at least 50 Mbit/s for 97% of the connections, only the 3% of the area not covered with this download speed can benefit from support under the scheme (and this only insofar as this 3% does not already benefit from download speeds of 25 Mbit/s or more).

⁶ EU Guidelines for the application of State aid rules in relation to rapid deployment of broadband networks, OJ C 25 of 26.01.2013, p. 1.

⁷ According to the German authorities, this Atlas is continuously updated. Moreover, on the initiative of the Bundesnetzagentur, the internet site www.initiativenetzqualitaet.de provides information on actual download- and upload speed.

⁸ Through the federal site www.breitbandbuero.de, the central online portal is linked with the other German regional broadband internet sites as well as with the federal broadband site (www.zukunft-breitband.de) and the federal procurement site (www.breitbandausschreibungen.de).

⁹ This should include the nominal and the real download speed. Users should be explained how to measure these download speeds, e.g. by referring to websites containing the relevant information (such as <http://www.initiative-netzqualitaet.de/startseite>).

survey are to be documented and summarized in a map that must be published without delay on the central online portal. Furthermore, the demand estimate based on this survey is to be submitted to the responsible licensing authority¹⁰ before the aid can be granted (cf. recital (29) below).

- (13) Interested parties must moreover be requested to comprehensively describe their infrastructure insofar as it could be used in the context of the measure and it is not yet fully described in the federal broadband atlas or the broadband atlas of the region of Sachsen-Anhalt at the time of the consultation. Further, they must be requested to provide full information on the access conditions for third parties to this infrastructure. This should enable these third parties to take into account this information in preparing their bid during the selection procedure (see also recital (22)).
- (14) Moreover, the municipality must investigate, also by public consultation via the central online portal, whether no private investor will invest in the development of a NGA network or a network with download speed of 25 Mbit/s or more in the area concerned in the next three years. This is done by requesting interested parties to confirm (by way of a binding commitment) that they intend to deploy a network allowing to offer NGA broadband services that cover demand or broadband services with download speed of at least 25 Mbit/s in the area concerned within the next three years. This commitment should be substantiated with plans on the network concerned, its financing and the timing. Interested parties have a deadline of one month to reply.
- (15) Support can be envisaged under the measure only if it is established that the broadband services which can be provided through the existing networks or those contemplated over the next three years are not sufficient to satisfy the needs of citizens and business users in the area in question and that no network allowing to offer broadband services with download speed of 25Mbit/s or more will be available in the next three years¹¹.
- (16) ***Open tender and obligations imposed on the network operator:*** The network operator is selected by way of an open, transparent and non-discriminatory selection procedure in conformity with European and German public procurement rules. A prior notice regarding the selection procedure must be published on the central online portal, the federal site www.breitbandausschreibungen.de as well as on the relevant website of the Region (www.evergabe.sachsen-anhalt.de) and the website of the municipality. In order to ensure that the results of the demand survey and market consultation are up-to-date, the notice shall be published no more than one month after publication of the results of the market consultation.
- (17) The description of the work in the tendering procedure, including the required upload and download speed of the network concerned, must be based on established and forecasted demand (see recitals (12) to (15)) and must be technology and provider neutral. It must include the selection criteria and their respective weight in the evaluation. The description must moreover be directed to the conclusion of a contract between the municipality and

¹⁰ The responsible licensing authorities are the departments of Agriculture, Land Consolidation and Forestry of Sachsen-Anhalt.

¹¹ If broadband services with download speeds of at least 25 Mbit/s are available or contemplated in an area, without this area being covered comprehensively by these services, funding under this measure is possible only for those parts/spots of the area in which no broadband services with download speeds of at least 25 Mbit/s are available or contemplated over the next three years (see recital (11)). The municipality's analysis in this respect is to be published on the central online portal.

the operator that ensures that all objectives and conditions of the measure and all requirements imposed by the licensing authority are fulfilled. Prior to its conclusion, the contract must be submitted to the Bundesnetzagentur for its opinion. Such opinion is binding on the municipality. The contract must include at least the following obligations on the network operator:

(i) obligation to establish and maintain the network operation for a period of at least seven years and to grant open access at wholesale level on equal and non-discriminatory terms for at least the same period, as described in recital (23). The contract must include a detailed description how this will be ensured.

(ii) obligation to inform third parties comprehensively and without discrimination, on demand, on all infrastructure (such as ducts, fibre, street cabinets, etc.) built in the context of this measure and to grant access as early as possible (and at the latest 6 months before launch of the services concerned).

(iii) obligation to orient the wholesale price for network access at the average published wholesale prices that prevail in more competitive regions for the same or comparable access services or at the price set or approved by the Bundesnetzagentur for the same or comparable access services. The wholesale access price should be set taking also into account the aid received by the network operator. The cost structures on site are to be taken into account. If there are no regulated or published prices for certain wholesale access products, the price should be fixed in accordance with the principles of cost orientation and the methods defined in the relevant sectorial regulation. In case the price is not yet regulated and there is a dispute on the wholesale access price between the network operator and access seekers, the municipality can prescribe the price on the basis of an opinion of an independent expert to be appointed in consultation with the licensing authority and after having consulted the Bundesnetzagentur. The Bundesnetzagentur must also be consulted regarding the wholesale access conditions.

(iv) obligation to inform the municipality of the wholesale access price, as soon as it is fixed, for publication of this price on the central online portal (see also recital (27)).

(v) obligation to describe the funded infrastructure on the basis of plans, including a description of the connections and download and upload speeds realized, and to provide this documented description to the municipality at the latest within 6 weeks from commissioning.

(vi) obligation to (pro-rata) reimbursement of the grant in case the conditions of the measure have not been respected due to circumstances attributable to the operator or when ordered by the Commission.

- (18) The contract must also provide that these contractual obligations must be passed on in case of changes in ownership, administration or operation of the network concerned.
- (19) Tenderers must submit a technical offer (including, inter alia, a description of the ways proposed to ensure effective wholesale access (see recitals (17)(i) and (23)), data on download and upload speed, retail prices and degree of supply reached etc.) as well as a detailed and plausible account of the profitability gap (see also footnote 4).
- (20) The network operator claiming the lowest profitability gap (and thus the lowest funding) is to be selected. If it wishes, the municipality can define additional criteria for evaluation. In that case, it must specify in advance the weighting of the qualitative

criteria, whereby the level of the profitability gap should be given the most important weight. The selection decision following the tender must be published on the central online portal.

- (21) **Aid intensity:** the aid intensity of a project will depend on the outcome of the local tendering procedure. The amount of the grant will not be the total cost of the project, but a maximum of 80% of the profitability gap, which will be calculated for each project and submitted by the tenderers to the municipality concerned in the course of the selection procedure (see also recital (10)). In case there are less than 3 bidders, external auditors will be instructed to select the most economical offer or to estimate the profitability gap and to mediate between the municipality and the bidder in negotiations concerning this profitability gap.
- (22) **Use of existing infrastructure:** Existing infrastructure of the incumbent can be used via detailed regulatory access rights¹². To ensure the use of existing infrastructure to the maximum extent possible, the municipality shall publish in the tender notice any known infrastructure that can be used for the project and any work that it may intend to perform itself in that respect. To that effect, it can refer to publicly available information, supplemented, where appropriate, with any relevant information the municipality has gathered during the market consultation (see recital (13)). Moreover, in the tender, bidders are explicitly requested to use as much as possible existing infrastructure.
- (23) **Wholesale access:** the network owner must provide effective wholesale access to the subsidized network (including its existing infrastructure used for the project) for a period of at least 7 years. The NGA network architecture that will benefit from the support must thus support effective and full unbundling and satisfy all different types of network access that operators may seek (including but not limited to access to ducts, dark fibre, street cabinets, and bitstream, unbundled access to fibre, access to backbone and backhaul cables and installation of switches at main cable systems)¹³. If at the end of the 7 year-period, the network operator is designated by the Bundesnetzagentur as having significant market power, the access obligations may be extended as appropriate pursuant to the regulatory framework. Furthermore, full access, without limitation in time, is to be guaranteed to any new passive infrastructure elements.
- (24) The Bundesnetzagentur is consulted on the contract to be concluded between the municipality and the operator, thus including on the proposed conditions for wholesale network access (see recital (17)). Moreover, in case of conflicts relating to access conditions, independent experts or the Bundesnetzagentur are immediately to be requested to settle the conflict.
- (25) **Pricing:** The network operator is obliged to base the wholesale price for network access on the average published wholesale price that prevails in more competitive regions for the same or comparable access services or on the price set or approved by the Bundesnetzagentur for the same or comparable access services. The wholesale access

¹² See e.g. Commission Decision N53/2010 – Germany – Federal framework program on duct support, point 35.

¹³ Proposals which are based on technological solutions which cannot provide full and effective unbundling therefore have to be excluded. *For any technological solution to be considered, it is the bidder's responsibility to ensure (at its own cost) that it can offer full and effective unbundling at the latest six months before the publicly funded infrastructure is put into operation.*

price should be set taking also into account the aid received by the network operator. In case of conflicts, the municipality sets the price on the basis of the opinion of an independent expert, appointed in consultation with the licensing authority. Also, prior to setting the price on the basis of the expert opinion the municipality must seek advice on the proposed price from the Bundesnetzagentur with the objective to keep prices at a reasonable and non-discriminatory level (see recital (17)).

- (26) **Beneficiaries:** The recipient of the aid will be the selected operator of the network. Indirect beneficiaries will be electronic communication operators utilising the new network for offering retail services to end users, and (business) end users.
- (27) **Transparency, Monitoring, and Control:** For all projects benefiting from state funding under the measure, utmost transparency is ensured by publishing each milestone of the procedure on the central online portal. Also, for every project benefiting of aid under the measure, the following information is published on the central online portal immediately after the licencing authority approves the aid: the identity of the aid beneficiary, the aid amount and intensity, the area concerned, the technology used, the wholesale access products and prices for these products. This information, as well as the full text of the approved aid scheme and its implementing provisions, shall be kept available without restrictions for the general public on the central online portal for at least 10 years.
- (28) The municipalities are assisted by a "**broadband competence centre**": regional technical experts advise the municipalities on procurement decisions, construction process and on the verification of the functionality and efficiency of the new network. They are assisted by the "co-ordination task force Sachsen-Anhalt" ("Steuerungskreis Breitband Sachsen-Anhalt") with representatives of the relevant ministries, which coordinates regional information events with local initiatives. Moreover, the municipalities co-ordinate with regionally certified consultancy firms in the planning, follow-up and review of the planned investment projects.
- (29) Before any aid can be granted, the municipality must moreover submit documents to the responsible licencing authority establishing that the conditions for the grant are fulfilled. This includes, inter alia, an explanation of the market failure and absence of willingness of operators to invest without aid; a detailed broadband-map and analysis, including the infrastructure survey for the area concerned; proof that possible synergies prior to the measure were examined and realized where possible (e.g. by installing ducts in the context of communal infrastructure works); a representative demand estimate on the basis of a survey with potential end customers; the results of the selection procedure; the level of the profitability gap; and the draft contract between the municipality and the operator. The licensing authority can moreover require any other documents regarding the planned project. The grant is only paid out upon submission of documentary evidence (report and numerical evidence) of use of the funds in compliance with the measure.
- (30) The licensing authority and the Regional Court of Auditors ("Landesrechnungshof") have the right to verify that all conditions regarding the grant are respected, by inspecting books, records and other documents and request information of the municipality.
- (31) The maximum amount of aid under each project being 10 Million EUR, no **claw-back** mechanism is foreseen. Before the aid is granted, the municipality must however provide information to the granting authority on possible refinancing of the investment by contributions of possible consumers.

- (32) **Reporting:** Germany will report to the Commission on all cases supported under the measure on a two-yearly basis, including at least information (for each project under the measure) on selected bids, names of the aid beneficiaries, aid amount and intensity, date when the network is put into use, technology used, wholesale access products and prices, number of access seekers and service providers on the network, the number of houses passed and the take-up rates.
- (33) **Public consultation and opinion of the NRA:** the German authorities consulted relevant stakeholders about the measure. Also the Bundesnetzagentur (NRA) was consulted on the draft legislation and it issued a positive opinion on the notified project by letter dated 15.07.2013. Moreover, as the measure is a framework programme, a consultation will take place in each geographic area for which the public support is envisaged under the framework in order to establish demand and investment plans of the operators within a three year planning perspective. Results are published on the central online portal (see recitals (12) to (15)).

V. STATE AID ASSESSMENT OF THE MEASURE: PRESENCE OF AID

- (34) 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 support measure to be qualified as State aid, it has to be granted out of State resources, confer a selective economic advantage to undertakings, and it has to be capable to distort competition and affect trade between Member States.
- (35) As described in recital (9), the measure is financed by resources of the German 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.
- (36) The scheme results in a selective economic advantage for both the electronic network operators selected in the tendering procedure and for third parties who gain wholesale access to the subsidised network and can consequently offer their services on conditions not otherwise available on the market.
- (37) Finally, the measure is liable to distort competition. 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. In such situation, the intervention of the State is liable to alter existing market conditions by strengthening the position of the selected infrastructure operator and the service providers which will use the subsidised network. The state support may also encourage local undertakings to take advantage of services offered in the subsidised network rather than more expensive market solutions. In so far as the intervention is (at least potentially) liable to affect providers of electronic communications services from other Member States, the measure has an effect on trade. Therefore this support is also likely to affect trade between Member States.
- (38) The Commission therefore concludes that the notified aid measure constitutes state aid within the meaning of Article 107(1) TFEU.

VI. COMPATIBILITY ASSESSMENT

- (39) The Commission has assessed the compatibility of the scheme according to Article 107(3)(c) of the TFEU and in the light of the *EU Guidelines for the application of State aid rules in relation to rapid deployment of broadband networks*¹⁴ (the "Broadband Guidelines") which contain a detailed interpretation of Article 107(3)(c) of the TFEU for this kind of state aid.
- (40) As explained in paragraphs 33 and following of the Broadband Guidelines, for aid to be found compatible with the Broadband Guidelines (and thus with Article 107(3)(c) of the TFEU), the following conditions must be fulfilled:
1. The aid must contribute to the achievement of objectives of common interest
 2. Absence of market delivery due to market failures or important inequalities
 3. The aid must be appropriate as a policy instrument
 4. The aid must have an incentive effect
 5. The aid is limited to the minimum necessary
 6. Negative effects must be limited
 7. The aid measure must be transparent
- (41) If these conditions are fulfilled, the Commission balances the positive effects of the aid measure in reaching the objective of common interest against the potential negative effects.

6.1 The aid contributes to the achievement of objectives of common interest

- (42) In its Europe 2020 strategy¹⁵ the Commission defined 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." In pursuing this aim, "at EU level, the Commission will work ...to facilitate the use of the EU's structural funds in pursuit of this agenda", and "at national level, Member States will need ... to draw up operational high speed internet strategies, and target public funding, including structural funds, on areas not fully served by private investments." Key Action 8 of the Digital Agenda calls Member States "to use public financing in line with EU competition and State aid rules" in order to meet the coverage, speed and take-up targets.
- (43) A well targeted State intervention in the broadband field contributes to bridge the '*digital divide*' that sets apart areas or regions within a country where affordable and competitive broadband services are on offer and areas where they are not. One of the purposes of the measure is thus to reduce social and regional disparities (see recital (6) above).

¹⁴ OJ C 25, 26.1.2013, p.1.

¹⁵ EUROPE 2020 - A strategy for smart, sustainable and inclusive growth, COM(2010) 2020, 3.3.2010, page 12.

- (44) By promoting the development of NGA networks with download speeds of at least 50 Mbit/s and upload speed that are significantly higher than those of basic broadband networks in “NGA white” spots/areas (see recital (6)), the measure will contribute greatly to achieve the objectives of the Digital Agenda and therefore contribute to the achievement of an objective of common interest.

6.2 Absence of market delivery due to market failures or important inequalities

- (45) Because telecom undertakings are not willing to invest in NGA-networks in sparsely populated areas or in deprived areas in cities, only around 10% of households and undertakings in the region of Sachsen-Anhalt benefit from connections with download speed of 50 Mbit/s so far (see recital (4)).
- (46) As explained in recitals (11)-(15), the measure targets only so called “NGA white” spots/areas, where very high speed broadband is currently not available and where it is established, by way of detailed market consultation, that there are no plans by private investors to roll out such infrastructure in the near future.

6.3 The aid is appropriate as policy instrument

- (47) In the situation currently under assessment, efforts from alternative instruments (e.g. demand side measures, such as grants or tax incentives to end users) do not solve the problems related to the lack of supply (non-existence of infrastructure) of high speed broadband in the targeted areas and would fail to deliver the wider economic benefits of a widespread next generation broadband network comprehensively covering the target areas. The German authorities see no alternative but to grant public aid to the deployment of NGA broadband networks in the targeted areas of the Region of Sachsen-Anhalt.
- (48) In line with points 40 and following of the Broadband Guidelines, the measure is designed as a (regional) scheme – ensuring consistency and coordination of local initiatives at regional level, and it is consistent with the previously approved scheme supporting the development of NGA networks in the Region of Bavaria¹⁶. Moreover, a high degree of transparency is secured (see recital (27)). Also the Bundesnetzagentur (the NRA) was involved in the design of the measure (see recital (33)), will be consulted with regard to determining the wholesale access prices and conditions and can be requested to solve disputes between access seekers and the subsidised infrastructure operator (see recitals (17) and (24)).
- (49) Finally, the Commission recognizes that without further public intervention, it would seem impossible to prevent the emergence of a new “*digital divide*” between areas that benefit from high speed broadband connections and sparsely populated or deprived areas that do not. Hence in the current situation, State aid is an appropriate instrument to achieve the set objectives.

¹⁶ See footnote 1.

6.4 The aid has an incentive effect

- (50) 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 be undertaken within the same timeframe without any State aid. The scheme ensures that aid can only be provided if it is established that in the targeted areas no comparable investment would take place without public funding within three years (see recitals (12) to (15)). Hence the investment would not be made within the same timeframe without the aid, which thus produces a change in the investment decisions of the operators and therefore has an incentive effect.

6.5 The aid is limited to the minimum necessary

- (51) Germany has designed the measure in such a way as to minimise the State aid involved and potential distortions of competition arising from the measure. In this respect, the Commission notes the following positive elements in the design of the measure (paragraph 78 of the Broadband Guidelines):
- (a) *Detailed mapping and coverage analysis, public consultation:* as described in recitals (12) to (15), municipalities must prove their thorough analysis of the existing broadband infrastructures (as well as investment plans for the next three years) in order to identify the areas where public intervention is necessary. This analysis and its results must be based on a public consultation involving all stakeholders and are published on a central online portal, ensuring a high degree of transparency. Therefore it will be ensured that public funds will be used only in (NGA white) areas/spots where it is necessary because no interest for commercial NGA deployment is present. This will limit the possibility of crowding out private investments and distorting competition vis-à-vis existing operators to a minimum.
 - (b) *Competitive selection process:* as described in recitals (16) to (20), the network operator is selected by way of an open, transparent and non-discriminatory selection procedure in full compliance with German and European public procurement rules. All notices regarding selection procedures under the measure are moreover published on a central, regional and local online portal, thus allowing all potential bidders to be easily aware of all on-going tender procedures.
 - (c) *Most economically advantageous offer:* On the basis of predefined and published technical specifications, the network operator requesting the lowest aid amount is in principle to be selected (see recital (20)).
 - (d) *Technological neutrality:* The tender documents must be technology and provider neutral, leaving it to commercial operators to propose the technological solutions they find most suitable (see recital (17)). On the basis of objective tender criteria, the municipality is then entitled to select the most suitable technology/mix of technologies.
 - (e) *Use of existing infrastructure:* as explained in recitals (13) and (22), the municipality will encourage bidders to have recourse to existing infrastructure (including that of other bidders) by publishing in the tender notice any known infrastructure that can be used for the project and any work that it may intend to perform itself. Unnecessary

and wasteful duplication of resources should in this way be avoided and the profitability gap (and hence the funding) should thus be minimised.

- (f) *Wholesale access*: in line with points 78(g) and 80(a) of the Broadband Guidelines, the selected operator must ensure full and effective unbundling and provide full open access to the subsidised network (including but not limited to access to ducts, dark fibre, street cabinets, and bit-stream and unbundled access to fibre) on fair and non-discriminatory terms for at least 7 years. The access must be granted as early as possible and at the latest 6 months before launch of the services concerned (see recitals (17) and (23)-(24)). If at the end of the 7 years period, the operator of the infrastructure in question is designated as having significant market power in the market concerned, the access obligation may be extended. Furthermore, full access, without limitation in time, is always to be guaranteed to any new passive infrastructure elements (such as ducts and poles). Finally, independent experts or the Bundesnetzagentur settle any conflict regarding access conditions (see recital (24)).
- (g) *Wholesale access pricing*: Access wholesale prices are to be based on the average wholesale prices which prevail in other, more competitive, parts of the country for the same or comparable access services or on the price set or approved by the Bundesnetzagentur for the same or comparable access services (benchmarking). The wholesale access price should be set taking also into account the aid received by the network operator. In the absence of published or regulated prices, the pricing should follow the principles of cost orientation pursuant to the methodology established in accordance with the sectorial regulatory framework. In case of disputes between the network operator and access seekers and where the price is not regulated, the municipality sets the price at the level suggested by an independent expert appointed in consultation with the licensing authority. Also the Bundesnetzagentur must be consulted with the objective to keep these prices at a reasonable and non-discriminatory level (see recitals (17) and (24)-(25)).
- (h) *Monitoring and clawback*: All milestones of the project are documented and published on a central online portal. Moreover, before any aid can be granted under the measure, the municipality must submit documents to the licensing authority establishing that the conditions for the grant are fulfilled. The licensing authority and the Regional Court of Auditors moreover have the right to verify that all conditions of the measure are respected. Furthermore, the Bundesnetzagentur will continue to regulate ex ante or monitor very closely the competitive conditions of the overall broadband market and impose, where necessary, regulatory remedies. This does not only apply to firms with significant market power, the German telecommunications law also foresees possibilities for the German regulator to intervene for companies without such significant market power. As the maximum funding per project is EUR 10 million, no claw-back mechanism is provided for (see recitals (27)-(31) and point 78(i) of the broadband guidelines).
- (i) *Transparency*: in line with point 78(j) of the broadband guidelines, all relevant information regarding any aid granted will be published on a central online portal and remain available for at least 10 years. Also, the aid beneficiary will be obliged to provide entitled third parties with comprehensive and non-discriminatory access to information on its infrastructure deployed under the measure (see recitals (17) and (27)).

6.6 The aid has limited negative effects

- (52) Given the design of the measure and its compliance with the conditions of Article 78 of the Broadband Guidelines (see recital (51) above), it is unlikely to have a crowding out effect on private investments.
- (53) In particular, the aid is confined to NGA white areas, where no operator is willing to invest in NGA infrastructure without state aid in the next 3 years. Also, where a broadband network already exists, the "step change" condition of the measure (see recital (11) and footnote 5) ensures that as a result of the public intervention (i) the selected bidder makes significant new investments in existing broadband networks and (ii) the subsidized infrastructure brings about significant new capabilities in terms of broadband service availability and capacity. This "step change" condition also ensures that public intervention does not crowd out comparable private investments, as the subsidized network must provide significantly better broadband quality and availability (faster, reliable download and upload speeds) than existing operators are able to provide in a near future of three years (see recitals (11)-(15)).
- (54) Furthermore, the operator is to be selected by open tender; full open access is to be granted to the subsidized infrastructure and there are several mechanisms to prevent wholesale access prices from being excessive (see recitals (16)-(20), (25)).
- (55) In line with point 80(b) of the broadband guidelines, the selection procedure, the access and pricing conditions and the high level of transparency, monitoring and control (see recitals (13), (16)-(20), (23)-(25) and (27)-(30)) ensure that the subsidised infrastructure will enable the provision of competitive and affordable services to end-users by competing operators. Also, the obligation to immediately request independent experts or the Bundesnetzagentur to settle any conflict on wholesale access (see recital (24)) should solve any conflict of interest or undue discrimination. Any other hidden indirect advantages should further be limited to the maximum possible extent by the high transparency requirements throughout the lifetime of the project (see recital (57)).
- (56) Therefore, negative effects of the measure, if any, are expected to be limited.

6.7 Transparency

- (57) As explained in recitals (27)-(32) and (51)(i), the measure ensures that the interested public and the Commission should have easy access to all relevant acts and pertinent information about the aid awarded thereunder.

6.8 Overall balancing: the positive effects of the aid measure are expected to outweigh its potential negative effects

- (58) The Commission concludes that the notified measure will offset a geographical and commercial handicap and is objectively justified to address the lack of availability of high speed broadband services in the targeted areas.
- (59) In view of the characteristics of the project and of the safeguards applied, the overall impact on competition is deemed to be positive.

- (60) The increase in network capacity is expected to stimulate market entry by service providers and the provision of a larger variety of services. Access of competing operators is ensured by requiring open access to the subsidised network on equal and non-discriminatory terms for at least 7 years, which has a pro-competitive impact, as it allows several network operators to use the subsidized infrastructure and compete. The risk of crowding out private investments and the negative effects of the measure are expected to be limited (see recitals (52)-(56)). On the effect on trade, there does not appear to be any significant negative spill-over for other Member States. Accordingly, the measure is designed in a way that does not distort competition or adversely affect trading conditions to an extent contrary to the common interest and is in line with the objectives of Article 107(3)(c) TFEU.

6.9 Conclusion

- (61) The Commission concludes that the measure notified by Germany meets the compatibility criteria set out in the Broadband Guidelines and is thus compatible with Article 107(3)(c) TFEU.

VII. DECISION

- (62) The Commission has accordingly decided that the aid measure "*Next generation network for commercial and accumulation areas in Sachsen-Anhalt*" is compatible with the TFEU, in accordance with Article 107 (3)(c) TFEU.
- (63) The Commission reminds Germany of the requirement to submit to it two-yearly reports on the application of the aid measure and to inform it pursuant to Article 108(3) TFEU of all plans to amend/extend this measure.
- (64) 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>.
- (65) 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
1049 Brussels
Belgium

Fax No: +32 229 61242

Yours faithfully,

For the Commission

Joaquín ALMUNIA
Vice-President