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| <p>In the published version of this decision, some information has been omitted, pursuant to articles 30 and 31 of Council Regulation (EU) 2015/1589 of 13 July 2015 laying down detailed rules for the application of Article 108 of the Treaty on the Functioning of the European Union, concerning non-disclosure of information covered by professional secrecy. The omissions are shown thus [...]</p> | | <p style="text-align: center;">PUBLIC VERSION</p> <p>This document is made available for information purposes only.</p> |
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**Subject: State Aid SA.46613 (2017/N) – The Netherlands
Broadband Rivierenland Region**

Sir,

1. PROCEDURE

- (1) Following informal pre-notification contacts, the Netherlands notified the Commission of the proposed aid measure by letter dated 11 July 2017. It provided the Commission with further information by letters dated 9 October 2017 and 7 February 2018, as supplemented on 9 March 2018 and 5 April 2018.

2. DETAILED DESCRIPTION OF THE MEASURE

2.1. The measure

- (2) The Dutch authorities notified individual aid to a newly established public entity (a so-called Joint Arrangement, hereinafter referred to as "JA") of the Rivierenland Region¹ for the procurement of an open passive broadband

¹ The Rivierenland region is located in the Province of Gelderland in the Netherlands. It comprises ten municipalities: Buren, Culemborg, Geldermalsen, Lingewaal, Maasdriel, Neder-Betuwe, Neerijnen, Tiel, West Maas en Waal en Zaltbommel.

His Excellency Minister Stef BLOK
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network². The future network will only cover "NGA white areas" where there is no next generation access (NGA) broadband infrastructure at present nor in the foreseeable future³. The JA will only provide the passive infrastructure and not offer active services (such as Internet access). Access to the passive network will be offered to all network providers and service providers on equal and non-discriminatory terms. The intended investment model is a publicly run regional network model (also referred to as 'direct investment model')⁴.

2.2. Objective

- (3) The primary objective of the measure is to ensure that by 2020 all citizens within the geographical boundaries of the 10 municipalities which are part of the Rivierenland Region are connected to (NGA) broadband facilities which guarantee actual download speeds of at least 30 Mbps (in line with the Digital Agenda for Europe target⁵) and actual upload speeds of at least 15 Mbps. The secondary objective, closely related to the primary, is to close a rural digital divide, caused by stagnating broadband speeds and a lack of competition in rural areas. The third objective of the measure is to stimulate the proliferation and adoption of ultra fast broadband speeds of at least 100 Mbps by 2020, and lay the necessary foundations to meet the EU strategic objectives for 2025⁶.

2.3. Recipient

- (4) Beneficiary of the aid is a joint public body established under the Dutch act for 'joint arrangements' (*Wet Gemeenschappelijke Regelingen*), hereinafter referred to as "JA" (Joint Arrangement).

² The elements to be constructed and owned by the JA as part of the measure are: (i) an access network: fibre connections between Points-of-Presence (PoPs) and the end-user premises, i.e. Fiber Termination Units, via Distribution Points; and (ii) backhaul network: a regional fibre ring, interconnecting the POPs within the region.

³ As defined in the EU Guidelines for the application of State aid rules in relation to the rapid deployment of broadband networks ('the Broadband Guidelines'), 2013/C 25/01, point 75.

⁴ According to the Dutch authorities, the publicly run regional model can be characterised as a publicly run municipal model, as described in the Broadband Investment Guide, p. 22, on a larger scale. <https://ec.europa.eu/digital-single-market/en/news/broadband-investment-guide>

⁵ In 2010, the Digital Agenda for Europe defined objectives for connectivity by 2020: universal availability at 30 Mbps, to ensure territorial cohesion, and subscriptions at 100 Mbps by at least 50% of European households, to anticipate future competitiveness needs.

⁶ The Commission strategic connectivity objectives for 2025 foresee: i) access by all European households to Internet connectivity offering a downlink of at least 100 Mbps, upgradable to Gigabit speed; ii) Gigabit connectivity for all main socio-economic drivers such as schools, transport hubs and main providers of public services as well as digitally intensive enterprises (understood as cost-effective symmetrical Internet connectivity offering a downlink and an uplink of at least 1 Gbps); and iii) uninterrupted 5G coverage in all urban areas and all major terrestrial transport paths. See Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, Connectivity for a Competitive Digital Single Market - Towards a European Gigabit Society (COM(2016) 587 final).

2.4. Duration

- (5) The individual (ad hoc) aid shall be granted once the measure has been approved by the Commission. The subsidised network is expected to be in place approximately 30-50 years (with reference to paragraph 17 below).

2.5. Legal basis

- (6) The aid shall be conferred on the basis of Article 124 of the Dutch Constitution (*Grondwet*), article 108 of the Municipalities Act (*Gemeentewet*) and the Act on joint arrangements (*Wet gemeenschappelijke regelingen*). The present decision will be an integral part of the legal basis.

2.6. Aid instrument / Budget

- (7) The Dutch authorities notified a guarantee of the municipalities for performance of the JA's payment obligations under a loan to be obtained under commercial terms from a bank (e.g. the Dutch Municipal Bank, '*Bank Nederlandse Gemeenten*', and/or the Water Authorities Bank, '*NWB Bank*') for the construction of the network, for which the JA is not charged any rate or percentage in return.
- (8) According to its communication on guarantees⁷, the Commission considers that guarantees which are given directly by the State including central, regional or local authorities (in the present case the municipalities of the Rivierenland Region) may constitute State aid, corresponding to the difference between the market price and the price effectively paid for the guarantee. According to the same communication, when there is no market price for the guarantee concerned, the aid element should be calculated in the same way as the grant equivalent of a soft loan, namely as the difference between the specific market interest rate this company would have borne without the guarantee and the interest rate obtained by means of the State guarantee after any premiums paid have been taken into account.
- (9) The Dutch authorities specified that the market does not provide guarantees for the type of transaction concerned and that no market price for such a guarantee is available. Consequently, the aid equivalent of the guarantee was calculated in accordance with the Communication from the Commission on the revision of the method for setting the reference and discount rates⁸. The Dutch authorities considered that the JA can be regarded as a special purpose entity without a credit history, and therefore calculated the amount of aid/advantage by applying 400 basis points (i.e. 4%) to the total amount owed by the JA to the base rate considered as zero (-0.18% from 1.01.2018⁹). The aid amount was thus calculated on the basis of a market price of the guarantee evaluated as 4% of the total amount owed by the JA (to the bank and any other creditors) and using the

⁷ Commission Notice on the application of Articles 87 and 88 of the EC Treaty to State aid in the form of guarantees, Official Journal C 155 of 20.06.2008, page 10

⁸ Communication from the Commission on the revision of the method for setting the reference and discount rates (2008/C 14/02), OJ C 14, 19.1.2008, p. 6–9

⁹ See base rates calculated in accordance with the Commission communication of 19.01.2008: http://ec.europa.eu/competition/state_aid/legislation/base_rates2018_03_en.pdf

following projections: (i) the entire investment for construction of the network, estimated at EUR [...](*)¹⁰, is financed for a period of [...] years; (ii) [...] % is paid back linearly, and [...] % at the end of the [...] -year term; (iii) the discount rate is [...] % before tax; the interest advantage after [...] % corporation tax is [...] %.

- (10) On this basis the Dutch authorities calculated an aid amount for the measure at stake of EUR [...], resulting in an aid intensity of 89%.
- (11) The aid cannot be cumulated with aid or *de minimis* aid¹¹ received from other local, regional or national aid¹² to cover the same eligible costs.

2.7. Target areas

- (12) Support shall be granted for deployment of broadband networks exclusively in "NGA-white" areas, that is, areas where next generation access networks are not available and private investment into such infrastructure is not planned over the coming three years.
- (13) The measure is aimed at connecting approximately 12.862 rural addresses in the Rivierenland Region where broadband is only available via the legacy copper networks (twisted pair copper, DSL). This area, covering around 12% of the total number of addresses in the region concerned, is considered "NGA-white", as market providers upon request of the Rivierenland Region have not been willing or able to guarantee that 30 Mbps can actually be delivered on any of the addresses in the target area, now or within the next 3 years¹³.

* Confidential information

¹⁰ The loaned amount is currently estimated at EUR [...]; the definitive amount will depend on the cost of the network, which will be definitively established in a public procurement procedure (see also recital 42 below).

¹¹ Commission Regulation (EU) No 1407/2013 of 18 December 2013 on the application of Articles 107 and 108 of the Treaty on the Functioning of the European Union to *de minimis* aid (OJ L 352, 24.12.2013, p. 1) and Commission Regulation (EU) No 717/2014 of 27 June 2014 on the application of Articles 107 and 108 of the Treaty on the Functioning of the European Union to *de minimis* aid in the fishery and aquaculture sector (OJ L 190, 28.6.2014, p. 45).

¹² Union funding centrally managed by the Commission that is not directly or indirectly under the control of the Member State does not constitute State aid. Where such Union funding is combined with other public funding, only the latter will be considered for determining whether notification thresholds and maximum aid intensities are respected, provided that the total amount of public funding granted in relation to the same eligible costs does not exceed the maximum funding rates laid down in the applicable Union legislation.

¹³ In 2015, there were approximately 330 000 premises in the whole of the Netherlands without fast Internet access (at least 30 Mbps):
<https://www.rijksoverheid.nl/documenten/kamerstukken/2016/05/19/kamerbrief-ontwikkelingen-omtrend-snel-internet-in-het-buitengebied>

2.8. Mapping and Public consultation

- (14) The Dutch authorities have carried out a detailed mapping exercise, in line with point 78(a) of the Broadband Guidelines. The infrastructure mapping was first completed in Q3/2014 and updated in Q2/2017. The public consultation with respect to the mapping of existing and definitively planned infrastructure ran from Q3/2014 to Q4/2015. An updated consultation was subsequently conducted in Q2/2017.
- (15) The public consultation, published on the website of the Rivierenland Region and also sent by registered mail to the market providers known to be active in the region, has made clear that no operator has any concrete, definitive or guaranteed plans to expand physical broadband infrastructure beyond their current coverage or upgrade existing infrastructure in the region.

2.9. Technological neutrality

- (16) The measure is technologically neutral considering that it supports the rollout of any type of open passive network infrastructure which (i) is capable of guaranteeing at least 30 Mbps of download and at least 15 Mbps of upload speed, (ii) is capable of supporting active equipment of multiple network providers (NPs) and service providers (SPs) simultaneously (to maximise openness), and (iii) has the physical capacity capable of supporting the future development of active networks providing speeds of 1 Gbps and beyond, in line with the objectives stated in paragraph 2.2) with extremely low latency. The JA will be free to choose any type of technology capable of meeting these objective and technologically neutral requirements.

2.10. Wholesale access

- (17) The network is a wholesale only network, as the JA will not provide any electronic communications services. The subsidised network will offer passive access under fair and non-discriminatory conditions to all operators who request it and will provide them with the possibility of effective and full unbundling. Optical Distribution Frame (ODF) access will be the main product offered by the new network, which will also provide wholesale access to any ducts, poles, dark fibre and street cabinets. The wholesale access obligations will be maintained indefinitely. The network is expected to be in operation under the JA's ownership for approximately 30 to 50 years.
- (18) The pricing of the use of the passive infrastructure will be based on the prices as set forth by the National Regulatory Authority (NRA) for wholesale access services for the regulated incumbent, unless either (a) the NRA has not regulated the prices for the particular services, or (b) the regulated maximum prices would be higher than the prices actually charged in the market on average, or (c) the regulated maximum prices would be higher than the best price which the Rivierenland Region could charge while still fully covering costs. The JA will explicitly be required to implement cost-based prices, in order to avoid

overcompensation, and to maximise the utility, accessibility and openness of the network¹⁴.

2.11. Monitoring and clawback mechanism

- (19) The participating municipalities will monitor the annual reports of the JA, as verified by a certified accountant. The following items will be verified as part of the monitoring exercise: the number of NPs and SPs active on the passive network; the number of customer premises connected to the passive network; the number of customer premises subscribing to services delivered via the passive network; and the prices of the wholesale access products to make use of the passive network; and any other aspects which are normally included in annual reports, as decided by a qualified accountant.
- (20) There will not be a clawback mechanism, as the necessary safeguards against undue distortions of competition shall be implemented¹⁵.

2.12. Transparency

- (21) The Dutch authorities confirmed that the transparency requirements set forth in point 78(j) of the Broadband Guidelines shall be complied with.

2.13. Reporting

- (22) The Dutch authorities confirmed, furthermore, that the State aid granting authority shall, every two years, report key information on the measure, starting from the date when the network is put into use, for the duration of the aid measure (in conformity with point 78(k) of the Broadband Guidelines)¹⁶.

2.14. Language waiver

- (23) The Netherlands provided a language waiver and agreed that the decision would be adopted and notified in English as the authentic language.

3. ASSESSMENT OF THE MEASURE

- (24) 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*

¹⁴ The NRA in the Netherlands (*Autoriteit Consument en Markt*) has not been given a mandate as intended in the Broadband Guidelines (paragraph 78(h)), concerning wholesale access pricing, but has been consulted by the Dutch authorities informally.

¹⁵ In line with footnote 113 in conjunction with footnote 98 of the Broadband Guidelines, the network owned by the JA will limit its activity on the predefined target areas and will not expand to other commercially attractive regions; (ii) the JA will limit its activity to maintaining the passive infrastructure and to granting access to it, but shall not engage in competition on the retail levels with commercial operators; and (iii) the JA will be a separate entity, and therefore there will be a clear accounting separation between the funds used for the operation of the networks and the other funds at the disposal of the municipalities.

¹⁶ In line with footnote 116 of the Broadband Guidelines, such information should at least include: the date when the network is put into use, the wholesale access products, the number of access seekers and service providers on the network, the number of houses passed and take-up rates (this further to the information to be made public for transparency under paragraph 78(j) – see recital 44 below).

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.

- (25) *State resources*: the guarantee to secure the financial obligations of the JA is to be provided by the municipalities jointly and as such imputable to the State (see also recital (7)).
- (26) *Selective economic advantage*: the ad hoc aid will give rise to a selective economic advantage for the JA (and, indirectly, third parties who gain wholesale access to the subsidised network and can consequently offer their services on conditions not otherwise available on the market).
- (27) *Distortion of competition*: although the Dutch authorities intervene only in areas in which private initiatives are not going to take place in the next three years, it cannot be excluded that commercial operators may find it viable to invest in some of the targeted areas in the longer term. As a result, the aid beneficiary will enjoy a first mover advantage.
- (28) *Effect on trade*: Insofar as the intervention affects providers of electronic communication services from other Member States, the measure will have an effect on trade. The markets for electronic communication services are open to competition between operators and service providers, which generally engage in activities that are subject to trade between Member States.
- (29) The Commission therefore concludes that the notified aid measure constitutes State aid within the meaning of Article 107(1) TFEU.
- (30) The Commission has assessed the compatibility of the measure according to Article 107(3)(c) TFEU and in the light of the EU Guidelines for the application of State aid rules in relation to rapid deployment of broadband networks (the "Broadband Guidelines")¹⁷. As explained in paragraphs 33 and following of the Broadband Guidelines, for aid to be found compatible with Article 107(3)(c) 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. Any negative effects of the aid must be limited

¹⁷ OJ C 25, 26.1.2013, p.1.

7. The aid measure must be transparent.

- (31) If those 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.
- (32) The Commission defined in its Europe 2020 strategy of 3 March 2010 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 ultrafast 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"*.¹⁸ In its Communication "Connectivity for a Competitive Digital Single Market - Towards a European Gigabit Society" the Commission confirmed the importance of Internet connectivity for the Digital Single Market and, building on the Digital Agenda for Europe goals, set out three connectivity strategic objectives for 2025¹⁹.
- (33) By ensuring that all addresses will be equipped with broadband facilities offering actual download speeds of at least 30 Mbps and upload speeds of at least 15 Mbps in currently white NGA areas, the measure will contribute substantially to achieving the objectives of the Digital Agenda and also contributes in setting the path towards the EU broadband strategy for 2025. As such, the measure has an *objective of common interest*.
- (34) As explained in recital (2), the measure targets the deployment of broadband networks solely in 'NGA white areas', where high speed broadband is not available to date and where it is established, by way of detailed mapping exercise and public consultation (see recitals (14) to (15)), that there are no plans by private investors to roll out such infrastructure in the next three years. A *market failure* within the meaning of point 75 of the Broadband Guidelines is therefore deemed to exist.
- (35) The passive infrastructure will only be deployed in those areas where there is insufficient broadband availability to the population and companies (no NGA-supply) to date and the market consultation carried out by the Rivierenland Region has shown that no private telecommunications provider shall ensure NGA coverage within three years. Consequently the planned public intervention is considered to be an *appropriate policy instrument*.
- (36) The results of the public consultation have shown that in the targeted areas, no comparable investment would take place without public funding within three years (see recital (13)). Hence, the investment would not be made within the same timeframe without the aid. The condition of *incentive effect* of the measure is therefore regarded as fulfilled.
- (37) The aid measure is designed in such a way as to *limit any aid to the minimum necessary*.

¹⁸ EUROPE 2020 - A strategy for smart, sustainable and inclusive growth, COM(2010)2020 final

¹⁹ Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: Connectivity for a Competitive Digital Single Market - Towards a European Gigabit Society – COM/2016/587

- (38) With reference to recitals (14) to (15), a detailed mapping exercise and a thorough public consultation have taken place. The technological neutrality criterion is regarded as fulfilled (recital (16)). Effective passive wholesale access shall be provided unlimited in time. The access obligations shall be enforced irrespective of any change in ownership, management or operation of the subsidised infrastructure. The network is envisaged to be in operation under the JA's ownership for approximately 30-50 years. Wholesale access pricing will take into account the principles set by the NRA (recital (18)). A monitoring process shall be put into effect, as noted in recital (19). Moreover, every two years, the State aid granting authority shall report to the Commission key information on the aid projects (recital (22)).
- (39) Due to the chosen PLOM model²⁰, allowing for new competition at operator level and more intense competition at service level, *any negative effect of the aid is likely to be limited.*
- (40) Given the characteristics of the project and of the safeguards applied, the *overall impact on competition is deemed to be positive.* In particular, the following is noted in this respect.
- (41) The proposed measure results in a 'step change', in terms of broadband availability in the target areas, in line with the requirements of paragraph 51 of the Broadband Guidelines. In particular, the JA will make significant new investments to create the new broadband network (favouring existing infrastructure to the extent feasible) and the infrastructure will bring significant new capabilities to the market in terms of broadband service availability and capacity.
- (42) As indicated, the measure solely targets NGA white areas, where no other NGA service provider is present and no private investment is planned within the next three years. Due to the design of the measure, a crowding out effect on private investments is considered unlikely. The chosen model minimises the amount of public funding: a publicly owned entity owns and manages the infrastructure, whilst the construction of the network shall be tendered out in line with EU public procurement rules. In line with point 80 of the Guidelines, the new network will ensure effective wholesale access for third party operators on equal and non-discriminatory terms. The wholesale access obligation will include the granting of access to ducts, poles, dark fibre and street cabinets²¹. The access and pricing conditions, and standards applied concerning transparency and monitoring, will ensure that the subsidised infrastructure enables the provision of competitive services at retail level.

²⁰ The business model will be a 'passive layer open model' (PLOM). The advantages of the PLOM model are that it opens up the market to new competition at operator level and leads to more intense competition at service level.

²¹ When the network design has been finalised and the POP locations have been chosen, the Dutch authorities intend to connect the JA's network to another party's existing backbone infrastructure present in the area. To this end, a dark fibre route to a neutral interconnection point (IX) would be established. The authorities confirmed, however, that the notified aid shall not serve to finance any such backbone network that is currently already in existence. Moreover, according to the Dutch authorities such a dark fibre connection to the IX is not an element created or supported under the notified measure.

- (43) An effect on trade, if any, is considered to be limited. 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.
- (44) The Netherlands has confirmed that the *transparency* requirements of point 78(j) of the Broadband Guidelines will be complied with. To this end the Dutch authorities committed to publish detailed information on the notified measure (as set forth under said point 78(j)), on the website of the Rivierenland Region (www.regiorivierenland.nl). The relevant information includes at least the full text of the approved aid measure and any implementing provisions, name of the beneficiary, aid amount and intensity, as well as the technology used. As part of their commitment, the Dutch authorities shall publish this information after the granting decision has been taken and such details shall be kept for at least 10 years, making the information available for the general public without restrictions. Furthermore, the beneficiary will provide third parties with comprehensive and non-discriminatory access to information on its infrastructure as deployed on the basis of the present State aid measure, allowing other operators to easily ascertain the possibility to access the infrastructure. In this context it is recalled that all relevant information about the new broadband network should be provided to the central register of broadband infrastructures, where available, and/or to the NRA.
- (45) The Commission concludes that the measure notified by the Netherlands meets the compatibility criteria set out in the Broadband Guidelines.

4. CONCLUSION

- (46) The Commission has accordingly decided not to raise objections to the aid on the grounds that it is compatible with the internal market pursuant to Article 107(3)(c) of the Treaty on the Functioning of the European Union.

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>.

Your request should be sent electronically to the following address:

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State Aid Greffe
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Yours faithfully
For the Commission

Margrethe VESTAGER
Member of the Commission

