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**Subject: State aid SA.34166 (2012/N) - Lithuania
Development of Rural Area Information Technology Network -
Amendment**

Sir,

1. SUMMARY

- (1) I am pleased to be able to inform you that the European Commission has assessed the measure "*Development of Rural Area Information Technology Network*" (hereafter: "the measure" or "RAIN") and decided not to raise objections as the State aid contained therein is compatible with Article 107(3)(c) of the Treaty on the Functioning of the European Union (TFEU).

2. PROCEDURE

- (2) Following pre-notification discussions, by letter registered on 4 January 2012, pursuant to Article 108 (3) of the TFEU, the Lithuanian authorities notified the expansion of geographic scope of the scheme approved by the Commission SA.28192¹ ("initial scheme"). By letter registered on 10 February 2012, the Commission requested additional

¹ State aid SA.28192; C(2009)5808 final of 17 July 2009;
http://ec.europa.eu/competition/state_aid/cases/230497/230497_978155_39_1.pdf

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information on the proposed measure, to which the Lithuanian authorities submitted answers by letter registered on 8 March 2012.

3. DESCRIPTION OF THE MEASURE

- (3) **Objectives:** The project aims to develop an infrastructure of electronic networks offering wholesale broadband services in rural areas of Lithuania which are currently not served and where there are no plans for coverage in the near future.
- (4) The Lithuanian authorities aim to improve broadband availability for Lithuanian citizens and businesses in rural areas by tackling the lack of necessary broadband infrastructure. They expect that the creation of backhaul (i.e. middle-mile) network² in not served areas will reduce the entry barriers (by lowering investment costs) for commercial operators and thereby will encourage them to extend their broadband network coverage in rural areas. The network will offer open wholesale access basis to third-party operators who will be able to add their access infrastructures (i.e. the last mile network segment) and deliver broadband services to end-users.
- (5) The notification concerns exclusively the expansion of geographic scope of the previously approved measure, with no additional increase of the original budget. The Lithuanian authorities explained that the reason for the scope increase has been a high demand for support for broadband projects since the aid measure was implemented (2010-2011).³ This demand came from the areas that are economically not attractive for private investments, mostly secluded, and the connecting costs for these areas are very high due to the distance to the existing broadband infrastructure. Thus, commercial service providers (operators of electronic communications) are not interested in investing in broadband networks that could provide broadband service to these areas.
- (6) All the remaining provisions of the initial measure remain unchanged.
- (7) **Legal basis:** The notified measure is based on (i) the Law on Electronic Communications⁴, (ii) the Development Strategy of the Broadband Infrastructure of Lithuania for 2005-2010⁵, (iii) the Action Plan for the Implementation of the Development Strategy of the Broadband Infrastructure of Lithuania for 2005-2010⁶, (iv) Operational Program on Economic Growth for 2007–2013⁷, (v) the Complement to Operational Program on Economic Growth for 2007–2013⁸, (vi) the Description of Terms and Conditions of Financing of the Project Implemented under Implementation Measure No. VP2 3.2 IVPK 01 “Broadband Networks” of Priority 3 “Information Society for All”

² Backhaul (or middle mile) networks comprise the intermediate links between backbone (core) networks and access (or last mile) networks.

³ Until the end of 2011, 40 contracts for wholesale broadband services delivery have been signed within the RAIN Project.

⁴ Lietuvos Respublikos Elektroninių ryšių įstatymas (Valstybės žinios: 2004-04-30 Nr.69-2382).

⁵ Dėl Lietuvos plačiajuosčio ryšio infrastruktūros 2005-2010 metų plėtros strategijos patvirtinimo (Valstybės žinios: 2005-11-19 Nr.137-4920).

⁶ Dėl Lietuvos Respublikos Vyriausybės 2005 m. lapkričio 16 d. nutarimo Nr. 1231 "Dėl Lietuvos plačiajuosčio ryšio infrastruktūros 2005-2010 metų plėtros strategijos patvirtinimo" pakeitimo (Valstybės žinios: 2008-10-23 Nr.122-4637).

⁷ Adopted by the Commission's Decision of 30 July 2007 No K(2007)37407

⁸ Dėl Projekto, vykdomo pagal Ekonomikos augimo veiksmų programos 3 prioriteto "Informacinė visuomenė visiems" įgyvendinimo priemonę Nr. VP2-3.2-IVPK-01 "Plačiajuosčiai elektroninių ryšių tinklai", finansavimo sąlygų aprašo patvirtinimo Valstybės žinios: 2008-04-19 Nr.45-1717.

of the Economic Growth Operational Program approved by Order No T-66 dated 15 April 2008 of the Director of the Information Society Development Committee under the Government of the Republic of Lithuania.⁹ According to Council Regulation (EC) No 1083/2006¹⁰ RAIN project is qualified as a major project.

- (8) **Target areas:** The Lithuanian authorities made a detailed mapping of coverage areas identifying the new target areas where state intervention is necessary. The notified expansion will cover 180 additional rural areas. The measure will cover only areas where no adequate broadband infrastructure is available ("white areas"). As in the previous decision, backhaul fibre lines will only be placed as a result of the notified measure where no such infrastructure is available of other private operators.
- (9) **Consultation with stakeholders:** The Lithuanian authorities conducted a public consultation with major stakeholders on the new areas to be covered under the notified scheme. A detailed list of planned infrastructure nodes together with relevant maps was published on the public institution's "*Plačiajuostis internetas*" website¹¹. During the consultation phase, no concerns were raised by the existing operators. Indeed, they have not presented any investment plans which would duplicate RAIN fibre lines to be constructed under the notified measure.
- (10) In the letter of 8 September 2011– submitted to the Commission -the National Regulatory Authority has not raised any objection to the scope increase of RAIN project as long as it is compatible with the State Aid Decision of EC N 183/2009 i.e. initial scheme. The Project has been also endorsed by the Competition Council of the Republic of Lithuania.
- (11) **Project design:** The project is composed of two layers: (I.) broadband connection networks will be built by creating a ring infrastructure in the form of six regional distribution rings. The construction works (civil works, ducts, dark fibre, etc.) will be carried out by private operators selected by means of an open tender in line with the relevant national and EU Procurement Directives. The newly created RAIN network will remain in the ownership of the state. (II.) The management of the RAIN network and offering of wholesale services to the third party service providers will be carried out by a public non-profit legal entity, called the "*Plačiajuostis internetas*". The maintenance and support of the RAIN network will be carried out also by private operators selected by means of an open tender.
- (12) **Wholesale access:** Following the requirements of Article 51 (f) of the Community Guidelines for the application of State aid rules in relation to rapid deployment of broadband networks¹², the Lithuanian authorities have confirmed that the new network will offer wholesale backhaul access on an open, non-discriminatory basis to electronic

⁹ Dėl Informacinės visuomenės plėtros komiteto prie Lietuvos Respublikos Vyriausybės direktoriaus 2008 m. balandžio 15 d. įsakymo Nr. T-66 "Dėl Projekto, vykdomo pagal Ekonomikos augimo veiksmų programos 3 prioriteto "Informacinė visuomenė visiems" įgyvendinimo priemonę Nr. VP2-3.2-IVPK-01 "Plačiajuosčiai elektroninių ryšių tinklai", finansavimo sąlygų aprašo patvirtinimo" pakeitimo Valstybės žinios: 2008-12-30 Nr.149-6074.

¹⁰ Council Regulation (EC) No 1083/2006 of 11 July 2006 laying down general provisions on the European Regional Development Fund, the European Social Fund and the Cohesion Fund and repealing Regulation (EC) No 1260/1999. OJ L210 of 31.7.2006.

¹¹ Direct link: http://www.placiajuostis.lt/index.php?option=com_content&view=article&id=75&Itemid=43

¹² Community Guidelines for the application of State aid rules in relation to rapid deployment of broadband networks, OJ C 235, 30.9.2009, p.7.

communication operators wishing to connect end users. The wholesale operator of the network, *Plačiajuostis internetas* will not offer retail services.

- (13) **Technology:** As specified in the initial measure, the chosen network topology ensures the technological neutrality of the measure: several alternative platforms will be able to utilise the new network as a backhaul connection to offer their own services to end users.
- (14) **Pricing:** The tariffs of the wholesale service will be determined by the Ministry of Transport and Communications. The objective of the Lithuanian authorities is to provide retail broadband services in the targeted areas at a price similar to urban areas, hence wholesale tariffs will be determined by also taking into account average retail prices paid by end-users in urban areas that do not benefit from State funding. Wholesale prices will be set in coordination with the National Regulatory Authority.
- (15) **Beneficiaries:** The direct recipient of the aid will be the wholesale operator of the network, *Plačiajuostis internetas*. *Plačiajuostis internetas* is a non-profit public legal person owned by the State. Indirect beneficiaries will be electronic communication operators utilising the new network for offering retail services to end users.
- (16) **Budget and financing instruments:** The aid takes the form of direct grants. The overall amount of the RAIN Project remains unchanged¹³ and is approximately LTL 209 million (approximately €60.5 million). The project is financed from resources of the European Regional Development Fund (ERDF) amounting to EUR 51.4 million¹⁴ and from resources of Lithuania amounting to EUR 9.1 million. The Lithuanian authorities have confirmed that there is no cumulation possible with aid received from other local, regional, national or Community schemes to cover the same eligible costs.
- (17) **Duration of the measure:** The RAIN Project is planned to finish by 31 December 2014. The notified expansion of geographic scope will only be implemented after the Commission's approval, respecting the stand still clause. The Lithuanian authorities confirmed that they will implement any changes that may be required by any amendments to the Community Guidelines for the application of State aid rules in relation to rapid deployment of broadband networks¹⁵ before 31 December 2014.
- (18) **Procurement:** The Lithuanian authorities envisage three phases of the tender procedures. During the first phase, the construction of the networks will take place selecting the lowest price offer. During the second phase, technical support of the network will be tendered out selecting the most economically advantageous offers. During the third phase, network equipment will be tendered out selecting the lowest price and the most technically advantageous offers. All tender procedures will be conducted in full compliance with the EU and national public procurement rules.
- (19) **Monitoring:** As stipulated in the Law on Electronic Communications, the beneficiary of the measure, *Plačiajuostis internetas* is obligated to publish access-related information

¹³ The Lithuanian authorities have explained that they will cover the additional white areas from the previous budget as the amount notified in 2009 was calculated with VAT included. However, as the Project is considered to be a major project by the regulation set by European Commission, the VAT should not be part of the budget.

¹⁴ ERDF resources consist of the resources intended for the Measure "Broadband Electronic Communication Networks" of Priority "Information Society for All" of the Operational Programme for Economic Growth.

¹⁵ Community Guidelines for the application of State aid rules in relation to rapid deployment of broadband networks, OJ C 235, 30.9.2009, p.7.

(*inter alia*, technical specification, terms and conditions) for interested parties and to provide open access to all electronic communication operators. Compliance with the obligations will be supervised by a Supervisory Committee based on annual reports submitted by the company. According to the information provided by the Lithuanian authorities, any potential surplus generated by the *Plačiajuostis internetas* through the operation of the network will be used to maintain the network or for rural broadband development.

4. ASSESSMENT OF THE MEASURE

4.1. Existence of aid within the meaning of Article 107(1) of the TFEU¹⁶

- (20) The changes introduced to the notified measure do not alter the prior conclusion of the Commission in the case SA.28192 that the measure constitutes State aid within the meaning of Article 107(1) TFEU, as moreover confirmed by the notifying Member State during the notification.

4.2. Compatibility of the aid

- (21) The Commission's analysis did not imply any serious difficulties and confirms that the expansion of geographic scope of the measure does not modify the original compatibility assessment regarding the approved measure SA. 28192 since the measure is in line with the Community Guidelines for the application of State aid rules in relation to rapid deployment of broadband networks.¹⁷
- (22) Indeed, the Lithuanian authorities apply the same requirements and principles for the new areas eligible under the support in terms of mapping and coverage analysis, open tender procedure, technological neutrality, public consultation, pricing, obligation of open access, monitoring and others as set in the initial scheme SA.28192.
- (23) However, the Commission notes that *Plačiajuostis internetas* (the beneficiary) has not been selected in an opened tender procedure as required by Article 51 (b) of the Community Guidelines for the application of State aid rules in relation to rapid deployment of broadband networks.
- (24) In the case at hand *Plačiajuostis internetas* will not choose a broadband operator to construct and/or exploit the network on its behalf, but will create and maintain a public infrastructure accessible to any broadband operator which would like to use it. The network will remain in public ownership. The *Plačiajuostis internetas*- public non-profit legal entity - will carry out the administration of that publicly owned network, including the management of the RAIN network and offering of wholesale services to the third party service providers. The maintenance and support of the RAIN network will be carried out also by private operators selected by means of an open tender.

¹⁶ 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.

¹⁷ Community Guidelines for the application of State aid rules in relation to rapid deployment of broadband networks, OJ C 235, 30.9.2009, p.7.

- (25) Paragraph 51 b) of the Guidelines envisages a different situation from the one described above, namely the case in which the State aims to provide support to investors to realise a broadband network, investors being in competition with each other for the State funding. In such a situation of competition between investors, conducting an open non-discriminatory selection procedure (in line with the principles of the public procurement legislation) will guarantee that the State does not disproportionately distort competition by pre-selecting the beneficiary or give preference to one broadband operator over alternative operators.
- (26) The RAIN network configures a different scenario than the one referred to by paragraph 51 b). Indeed, the system does not disproportionately distort competition but, to the contrary, ensures a pro-competitive use of the subsidised infrastructure thanks to the multiple safeguards inherent to the system itself (similar to those specified in the Commission's decision in *case N330/10 Très Haut Debit*¹⁸).
- (27) The first pro-competitive safeguard is represented by the fact that *Plačiajuostis internetas* cannot act as retail broadband operator, and therefore cannot provide broadband services to final users, but simply organises and manages wholesale access to the infrastructure by any third party interested in using it. The *Plačiajuostis internetas* does not engage in any profit making operation of the network, but keeps income and expenses at an equilibrium and limits its activity to the administrative management of a mere passive infrastructure. Moreover, the *Plačiajuostis internetas* is obliged to grant an open access at fair, transparent and non-discriminatory conditions to the infrastructure operated by this public entity. Thus, this system eliminates at the root one of the potential risks for competition deriving from management of the network by operators, i.e. the incentive to exclude or degrade competitors on the same infrastructure. In addition, as indicated above, the contracts for the construction of the infrastructure will be tendered out according to normal public procurement principles.
- (28) The Commission can thus conclude that the safeguard mechanism is sufficient to avoid undue distortions of competition and no additional selection procedure is required.
- (29) Consequently, as the distortion of competition is limited to the minimum and as, besides the geographic scope, there are no other significant amendments to the scheme; the Commission sees no reason to depart from its previous positive compatibility assessment in SA. 28192. However, the Commission's assessment is without prejudice to any further findings regarding the compatibility of the execution of the project with EU public procurement legislation.

5. DECISION

- (30) The Commission therefore finds that the existing measure SA. 28192 as amended by means of the measure notified in case SA.34166 is compatible with Article 107 (3) (c) of the TFEU and has accordingly decided not to raise objections to the notified measure.

¹⁸ State aid SA.31316; C(2011)7285 final of 19 October 2011; OJ C 364, 14.12.2011, p.2, para 65 b) http://ec.europa.eu/competition/state_aid/cases/237100/237100_1268937_108_3.pdf

- (31) The Commission reminds Lithuania to submit annual reports on the application of the aid scheme.
- (32) The Lithuania authorities are reminded that, pursuant to Article 108(3) of the TFEU, they are obliged to inform the Commission of any plan to extend or amend the measure.

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

http://ec.europa.eu/eu_law/state_aids/state_aids_texts_en.htm.

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

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Yours faithfully,

For the Commission

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Vice-President