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Subject: **State aid SA.35949 (2012/N) – Poland**
 Regional broadband network of Łódź-2nd stage

Sir,

I. SUMMARY

- (1) I am pleased to inform you that the European Commission has assessed the measures "*Regional broadband network of Łódź-2nd stage*" (hereafter: "the measure") and decided not to raise objections as the State aid contained therein is compatible with the internal market, pursuant to Article 107(3)(c) of the Treaty on the Functioning of the European Union (TFEU)¹.

II. PROCEDURE

- (2) Pursuant to Article 108 (3) of the TFEU the Polish authorities notified to the Commission, by letter registered on 20/12/2012, the measure for supporting the deployment of broadband network in Łódź region. The Commission requested additional information on the measure by letters registered on 20/02/2013 and 14/05/2013. The Polish authorities provided the requested information on the measure

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

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by letters registered on 15/03/2013, 18/06/2013 and submitted additional information by letters registered on 26/07/2013 and 20/09/2013.

III. CONTEXT

III.1. The target region

- (3) The project targets five administrative districts located in Łódzkie Voivodeship² where no or insufficient broadband services are available to citizens and businesses³ and where currently no NGA network is in place or being deployed in the coming three years.
- (4) The target areas are mainly rural areas characterised by below-average of local inhabitants' (and thus potential clients of electronic communication services) income (75.4% of the national average). The population densities in the target areas are low (approx. 48 people/km²), which makes it difficult to attract investments in the development of broadband networks, the latter being usually more profitable in areas featuring higher density of population and where the potential demand is higher and more accumulated.

III.2. The rationale for public intervention

- (5) According to the Polish authorities, the development of broadband networks in the target areas faces two key problems: (1) the lack of infrastructure to deliver the services required by the public authorities and by citizens; and (2) the lack of adequate competition reflected in high prices or inadequate services.

Shortage of infrastructures from commercial operators to offer broadband services

- (6) As regards the first concern, similarly to other regions in the European Union, also in the case of the Łódzkie Voivodeship, advanced broadband services and the infrastructure required to support them are available for citizens and businesses in more densely populated areas, whereas broadband infrastructure is inadequate in areas which are not commercially attractive to electronic communication operators. This leaves citizens and businesses in such areas without the possibility of access to adequate broadband services.
- (7) According to the statistic provided by the Polish authorities, currently in the localities covered by the measure the penetration rate of Internet access services is one of the lowest in Poland and amounts to 26.5%⁴, taking into account all technologies, including services with bandwidth below 2 Mb/s (see table 1 below). The penetration of broadband services (i.e. above 2 Mbit/s) reaches the level of 0.15%, which means that only 108 households have access to broadband services. This is much below the EU average.

² I.e. opoczyński, radomszczański, pajęczański, wieluński, wierzuszowski districts.

³ The Polish authorities consider insufficient broadband coverage if a minimum bandwidth above 2 Mb/s for basic broadband and 30 Mb/s for NGA services is not available.

⁴ Existing technology at the access level and its penetration rate: Ethernet 0.13%; xDSL 18.96%; wireless: WiMax 0.06%, WLAN 7.35%; FTTH 0%; LLU 0%.

Table 1 - Breakdown of broadband services (by connection speed) in target areas

Maximum speed connection	Penetration of services for a given speed
< 256 kbps	2,21%
257 < 1024 kbps	21,63%
1 Mbps < 2 Mbps	2,53%
2 Mbps < 6 Mbps	0,13%
6 Mbps < 16 Mbps	0,02%
=/> 16 Mbps	0%

- (8) The lack of broadband infrastructure in the areas covered by the measure emerged clearly during the preparation of the inventory. Only 11 localities out of 1227 in total have optical backhaul nodes and in the majority of localities there is no broadband access to Internet that would guarantee 2 Mbit/s download speed to end-users. Over 30% of the localities have no access to the fixed Internet.

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

- (9) As regards the second concern, there is a lack of competition as regards wholesale and retail bandwidth services in many parts of the target areas. With regard to the wholesale market, over 95% of distribution nodes belong to one operator that competes at the same time on the retail market with "last mile" operators. The Polish authorities argue that there is a low degree of competition also at the retail level where the market is dominated by one operator which holds around 40% of the Internet access share and where broadband services are available in less than 8% of the target localities.

The rationale for rolling out a new network

- (10) According to the Polish authorities, the existing backhaul infrastructure does not provide services able to meet the growing expectations of citizens and businesses and to satisfy the connectivity needs of the public administration. The main reason for the low level of accessibility of the broadband services is the physical absence of sufficient broadband distribution infrastructure and the lack of competition.
- (11) Consequently, in order to address these problems and to increase current broadband capacity and connectivity, the Polish authorities decided to roll out a new public broadband backhaul infrastructure to bridge the infrastructural gap in the region.
- (12) The planned network will be open to private operators to obtain access to connect the 'last mile' infrastructure. Through the construction of such a regional broadband backhaul network open for electronic communication operators, the Polish authorities intend to create open access to the broadband services which in turn will stimulate development of the modern electronic economy in the region. The Polish authorities expect that the construction of such a network will enable distance education and professional activation; it should also facilitate the implementation and use of e-services as well as permit to level disparities in locations of firms. In addition, the construction of new backhaul infrastructure will allow third party operators to enter

the market, which will have a positive impact on the supply of retail services and competition in the areas covered by the notified project.

IV. DESCRIPTION OF THE MEASURE

- (13) **Objective:** The objective of the project is the construction of a backhaul network to provide residential customers, business users, and public administration bodies with the ability to access the electronic communication operator and technological platform of their choice and to have access to the broadband services.
- (14) The project concerns the construction of a backhaul network in 'white' NGA areas (i.e. areas where currently there is no coverage of NGA infrastructure and where private investors do not plan to build such infrastructure in the next three years). According to the Polish authorities, providing access to the subsidised backhaul infrastructure to electronic communication operators will create incentives for investments in basic and NGA 'last mile'⁵ segments and accelerate the supply of broadband services to end-users. The other objective of the project is to allow the use of the new network to eliminate the "digital divide" in areas where currently adequate services are not available and where there are no investment plans to provide such services in the near future. In this respect the measure aims at strengthening the territorial and social cohesion by closing the gap in access to affordable broadband services between rural and urban areas.
- (15) **Legal basis:** The measure is based on the Act of 6 December 2006 on rules of carrying out the development policy (consolidated text: Journal of Laws of 2009, No.84, item 712, as amended), the Act of 7 May 2010 on support for the development of telecommunication networks and services (Journal of Laws No.106, item 675), the Act of 30 April 2004 on conduct in matters concerning State aid (consolidated text: Journal of Laws of 2007, No.59, item 404, as amended), the Regional Operational Programme for the Łódzkie Voivodeship 2007-2013 (10 June 2009), adopted by the Commission Decision of 2 October 2007.
- (16) **Design of the project:** The project will be performed by the regional public authorities of the Łódzkie Voivodeship that received funding under the Regional Operational Programme. The project envisages development of a backhaul⁶ network. The subsidy will cover passive as well as active elements.
- (17) The Łódzkie Voivodeship will first launch a public procurement procedure for the design and construction of backhaul infrastructure and will subsequently, in a different procedure, select a private partner (the infrastructure operator), to whom it will lease and entrust the operation of the subsidised network.
- (18) The infrastructure operator will pay the rent to the Voivodeship for leasing the constructed broadband infrastructure and will have the right to retain revenues from managing and operating the network. The rent is likely to be lower than that which a private investor would expect for the comparable services. The infrastructure operator will not provide any services to end-users, but will have an obligation to provide other third party operators with effective wholesale access to the subsidised network during

⁵ According to the paragraph 57 of the Broadband Guidelines, NGA networks are access networks which rely wholly or partly on optical elements and which are capable of delivering broadband access services with enhanced characteristics as compared to existing broadband networks.

⁶ Backhaul networks comprise the intermediate links between backbone networks and access (last mile) networks.

the lifetime of the contract with the Voivodeship i.e. for a period not shorter than 7 years. The Łódzkie Voivodeship will remain the owner of the network throughout the life of the contract with the infrastructure operator.

- (19) **Budget and funding instruments:** The total budget of the project amounts to approx. PLN 25 854 885 (around EUR 6 million). The significant part (85%) of the budget will be funded from European Regional Development Fund. The remaining part of the budget will be financed from budget of Łódzkie Voivodeship which will implement the project.
- (20) **Aid amount and intensity:** The aid intensity and final aid amount will ultimately depend on the outcome of the tender procedure.
- (21) **Duration of the measure:** The project will be implemented following the approval of the Commission. The construction of the broadband network is scheduled for no later than 30 September 2015. The contract lifetime between the Voivodeship and the infrastructure operator will be ultimately determined in the course of tender procedure and will last at least 7 years.
- (22) **Mapping and coverage analysis:** As confirmed by the Polish authorities, the analysis of the status of existing broadband infrastructure and services was made on the basis of the inventory data obtained from the National Regulatory Authority (NRA). The inventory was made in December 2011 and it was subsequently updated in November 2012.
- (23) **Public consultation:** The Polish authorities undertook the public consultation between 28 September 2012 and 29 October 2012 in order to verify the results of its mapping, planned classification of areas eligible for intervention and in order to obtain information from stakeholders about their plans relating to future investments as well as their views on the project. The Polish authorities explained that the notice on the project was published on the local, central as well as on the NRA's websites and the comments submitted by the parties were fully taken into account, which led to reclassification of certain areas with respect to their eligibility for intervention.
- (24) The table below shows the final categories ('white', 'grey', 'black') as regards the basic broadband infrastructure in the area of the project. The target areas for public intervention only include those in categories of 'white' and 'grey'.

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

	Category	Number of localities
1	White (there is no backhaul broadband infrastructure)	1062
2	Grey (only one backhaul broadband infrastructure present)	154
3	Black (more than one backhaul broadband infrastructure present)	11
		Total: 1227

- (25) **Opinion of the National Regulatory Authority:** The National Regulatory Authority issued a positive opinion on the notified project in the letter dated 26 November 2012.
- (26) **Conditional access to planned infrastructure:** The Polish authorities designed a conditional system of access to the planned backhaul network in order on one hand to meet the objectives of the scheme and at the same time to minimise the potential distortion of competition on existing operators and to make sure that the notified measure brings a step change in terms of broadband deployment in all the target areas.

- (27) In view thereof, it is foreseen that in areas where a backhaul broadband network is already in place, the Polish authorities will allow third party operators to connect to the planned backhaul network only if they deploy NGA capable 'last mile' infrastructure. Such limitations in the use of the backhaul network will reduce any potential distortion of competition as regards basic broadband services providers, but at the same time will incentivise NGA network roll-out by developing a capillar and open fibre backhaul network in the region.
- (28) **Open tender process:** The Polish authorities confirmed that the infrastructure operator will be selected by way of an open, transparent and non-discriminatory competitive procedure, in conformity with European and Polish public procurement rules.
- (29) **Award criteria:** The contract will be awarded to the bidder presenting the most economically advantageous offer. In this regard, as confirmed by the Polish authorities the main award criteria will include: the standard and quality of services provided (the technical and quality requirements will be set out in advance in the tender documentation) and, in view of minimising the amount of public aid, the amount of the rent to be paid for the use of the subsidised backhaul infrastructure.
- (30) **Use of existing infrastructure:** The Polish authorities encourage using the entire existing infrastructure in order to limit the aid necessary for the measure as well as to avoid duplication of infrastructures. In this respect, the Polish authorities confirmed that they would ensure that any operator which owns or controls infrastructure (irrespective of whether it is actually used) in the target area and which wishes to participate in the selection to receive the aid, shall meet the following conditions: (i) to inform the aid granting authority and the NRA about that infrastructure during the public consultation; (ii) to provide all relevant information to other bidders at a point in time which would allow the latter to include such infrastructure in their bid. In addition, the authorities stated that a national database operated by NRA provides information on the availability of existing infrastructures that could be re-used for broadband roll-out.
- (31) **Technology:** The goal of the project is to develop a backhaul network that shall support both basic and next generation services mostly in rural localities. At the current stage of development of telecommunications technologies there is no transmission medium for backhaul networks other than optical fibre links that would allow providing next generation services of enhanced capacity and quality. Therefore, the project envisages construction of the backhaul network using fibre-optics links at the passive level of the infrastructure and DWDM technology⁷ at the active level. For every other equipment, as confirmed by the Polish authorities, choice of technology will be based pursuant to technical plans, and in public procurement procedures no technology will be excluded a priori. In addition, the services provided on the wholesale market will be such as to enable the interconnection to the subsidised backhaul network of any possible technology, which operators wish to use for their access infrastructure⁸.
- (32) **Wholesale access:** As confirmed by the Polish authorities the wholesale access will be provided by the infrastructure operator to the subsidised backhaul network (including its existing infrastructure used for the project) on non-discriminatory and open access terms for a period of at least 7 years. Wholesale services will include active access by means of the provision of transport services as well as passive access by providing

⁷ Dense Wavelength Division Multiplexing technology.

⁸ In line with the conditions detailed in paragraph 25 and following.

access to dark fibre renting services. The Polish authorities also confirmed that duct and pipes access will be available on the planned backhaul network and will not be limited in time. The winning bidder for the operation of the backhaul infrastructure will not be allowed to provide retail services in order to avoid any concern of possible anticompetitive exploitation of the advantage created by the management of the backhaul network.

- (33) **Wholesale price benchmarking:** As confirmed by the Polish authorities, the wholesale access prices will be based on average (regulated) wholesale prices for comparable services in more competitive areas or on prices set or approved by the NRA. Furthermore, during the term of validity of the contract, the fees charged by the infrastructure operator will be monitored and verified by the NRA. The latter will be also entitled to resolve potential disputes between the infrastructure operator and third party operators.
- (34) **Monitoring and claw-back mechanism:** The compliance of the selected infrastructure operator with the contract obligations will be monitored on a regular basis by the Łódzkie Voivodeship Marshall's Office, the NRA and the Office of Competition and Consumer Protection. The monitoring will be performed during the entire duration of the project and will include among others the regular quarterly reports and the accounting separation obligation. Further details of the mechanism will be described in the contract with the infrastructure operator.
- (35) In order to avoid any overcompensation to the beneficiary of the aid, the Polish authorities envisage also a claw back mechanism. The calculation of the amount to claw-back will be dependent on the EBITDA⁹ and will comprise the whole lifetime of the project¹⁰.
- (36) **Transparency:** The Polish authorities confirmed that they would publish on a central website at least the following information on the State aid measure: the full text of the approved aid scheme and its implementing provisions, name of the aid beneficiary, aid amount, aid intensity and used technology¹¹. Furthermore, the aid beneficiary will be obliged to provide entitled third parties with comprehensive and non-discriminatory access to information on its infrastructure (including *inter alia* ducts, street cabinets and fibre) deployed under a State aid measure.
- (37) **Reporting:** The Polish authorities confirmed that starting from the date when the backhaul network is put into use, for the duration of the aid measure, the State aid granting authority would report every other year the key information on the aid projects to the European Commission.

⁹ Earnings before interest, tax, depreciation and amortization - a widely used financial indicator also in the telecommunication industry.

¹⁰ The Polish authorities envisaging the following mechanism: if at the end of the each financial year, the EBITDA of the infrastructure operator exceeds the reference EBITDA (based on average EBITDAs for the companies from the telecommunications listed on the Warsaw Stock Exchange), part of the EBITDA in excess of the threshold difference must be clawed back – the surplus will automatically increase the fees of the following quarter of the year.

¹¹ Such information will be kept for at least 10 years and shall be available for the general public without restrictions.

V. ASSESSMENT OF THE MEASURE: PRESENCE OF AID

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

State resources

- (39) The measure is financed by resources of the Polish authorities and EU funds, which are allocated under the control of the Member State to the beneficiaries with an element of discretion. Hence, State resources are involved.

Selective economic advantage

- (40) The measure results in a selective economic advantage for the electronic infrastructure operator that will be selected in the tender procedure and will provide broadband services on conditions not otherwise available on the market. Third party operators who will gain wholesale access to the subsidised network might also benefit from the measure at hand as well as undertakings that exercise an economic activity in the target areas.

Distortion of competition

- (41) The intervention of the State alters existing market conditions by deploying new backhaul infrastructure and allowing the provision of enhanced wholesale broadband services by the selected infrastructure operator and third party operators that would not be available under normal market conditions. In this respect, the measure will alter the conditions of competition between wholesale operators who are likely to use the services offered by the planned backhaul network in the targeted areas and wholesale operators elsewhere in Poland and the EU. Therefore, the fact that an improved broadband service and additional (wholesale) capacity becomes available has the effect of distorting competition.

Effect on trade

- (42) Insofar as the intervention is liable to affect providers of electronic communications services from other Member States, the measure has an effect on trade. The markets for electronic communications services are open to competition between operators and service providers, which generally engage in activities that are subject to trade between Member States. Moreover, the measure has the potential to distort competition between business users located in Poland and those located elsewhere in the European Union.

Conclusion

- (43) In view of the above, the Commission concludes that the notified measure "*Regional broadband network of Łódź-2nd stage*" constitutes State aid within the meaning of Article 107 (1) TFEU.

VI. ASSESSMENT OF THE MEASURE: COMPATIBILITY

- (44) The Commission has assessed the compatibility of the scheme according to Article 107 (3) (c) TFEU and in the light of the *EU Guidelines for the application of State aid rules in relation to rapid deployment of broadband networks*¹² (the "Broadband Guidelines") which contain a detailed interpretation of Article 107 (3) (c) TFEU in this area of State aid law.
- (45) As explained in paragraph 33 of the Broadband Guidelines, every aid measure has to comply with the below necessary prerequisites in order to be possibly declared as compatible with the internal market:

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

- (46) The Commission defined in its Europe 2020 strategy of 3 March 2010¹³ 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.*"
- (47) The project is focused on "white NGA areas" (i.e. areas where currently there is no coverage of NGA infrastructure and where private investors do not plan to build such infrastructure in the next three years) and aims to ensure the widespread availability and use of broadband services by citizens and business. By providing access to the subsidised backhaul network to electronic communication operators, the Polish authorities intend to encourage investments in basic and NGA last mile networks. The measure intends also to bridge the "digital divide" that sets apart areas where currently there is no adequate broadband infrastructure.
- (48) By extending broadband coverage to areas where private operators have no commercial interest to invest in the near future and promoting the development of NGA networks with download speeds of at least 30 Mbit/s in such areas, the Polish authorities pursue genuine cohesion and economic development objectives which is in line with the Digital Agenda.

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

- (49) As illustrated in section III.2 above, the availability of the broadband services in the project area is very low, whereby in most of the target localities there is currently no backhaul infrastructure at all and in the target areas where there is one backhaul infrastructure in place, only some of its parts are available for use by the third party operators. Furthermore, the public consultations revealed that no NGA networks exist

¹² OJ C25, 26.01.2013, p.1.

¹³ EUROPE 2020 - A strategy for smart, sustainable and inclusive growth, COM(2010) 2020, page 12.

nor are planned in these areas in the near future in view of their low commercial attractiveness for private operators. This clearly demonstrates the absence of the market delivery due to market failures/important inequalities in the target areas.

(3) Appropriateness of State aid as a policy instrument

- (50) In the case at hand, due to the economics of broadband networks, the problem of the lack of supply of high speed broadband networks cannot be solved by measures involving demand stimulation or regulatory interventions (including *ex-ante* regulation). Despite its crucial role in ensuring competition and supply in the market for electronic communications, in target region regulation has not been able to ensure effective competition and has not led to sufficient investments to bridge the "digital divide" affecting certain areas. The efforts from alternative instruments have not solved the problems related to the lack of broadband infrastructure in the target areas. Regulation is, indeed, a necessary, but not a sufficient instrument for the development of broadband services. In order to ensure the supply of broadband services to all its citizens, the Polish authorities see no alternative but to grant public aid to the deployment of backhaul network in the targeted areas of the Łódź region and then to open this backhaul network for the commercial use by third party operators.
- (51) Consequently, the Commission recognises that without further public intervention, it would seem impossible to avoid the emergence of a new "*digital divide*" between different areas of the country, which could lead to the economic and social exclusion of the local citizens and undertakings. Hence in the situation under assessment, State aid is an appropriate instrument to achieve the set objectives.

(4) Existence of incentive effect

- (52) As set out in paragraph 45 of the Broadband Guidelines, regarding the incentive effect of the measure, it needs to be examined whether the broadband network investment concerned would not have been undertaken without any State aid. According to the results of the public consultation and market research referred to above in paragraph (23) and following, in the targeted areas no broadband network investment would take place without public funding. By granting access to the public network to third party operators, the measure facilitates and encourages investments in last mile networks. Therefore, the aid shall provide a direct and appropriate investment incentive for the selected operator and for third party beneficiaries and produce a change in their investment decisions.

(5) Aid limited to the minimum necessary

- (53) In assessing the proportional character of the notified measures, the Commission has examined in paragraph (70) and following a number of necessary conditions to minimise the State aid involved and the potential distortions of competition.

(6) Limited negative effects

- (54) The significance of the distortion of competition has been assessed in terms of effects on competitors in paragraph (70) and following. Given the design of the project, it is unlikely to have a crowding out effect on potential future investments of private operators.

(7) Transparency

- (55) As further explained in paragraph (78) below, the aid will be awarded in a transparent manner and it will be ensured that the public authorities, economic operators, the interested public and the Commission have easy access to all relevant acts and pertinent information about the aid.

(8) The overall balancing exercise and the compatibility conditions

- (56) The measure under assessment has been carefully designed to ensure that the overall balance of the effects of the measure is positive.
- (57) The Polish authorities explained that there are altogether 165 localities (out of 1227) in which some limited backhaul infrastructure exist (92 distribution nodes based on the fibre optic technology, all of them belonging to the one operator). However, advanced services (above 16Mb/s) able to meet the growing expectations of citizens and businesses are not offered. Indeed, while there is a significant unsatisfied demand for Internet services (22%), the penetration of broadband services (i.e. equal or above 2 Mbit/ is very low (0.15%) and Internet access penetration rate amounts only to 26.5%. Moreover, the existing backhaul infrastructure in some of its parts is not open for access by third party operators. Alternatives to the services of the dominant operator could be mobile¹⁴ or satellite networks. However, according to the Polish authorities, these technologies offer services of limited bandwidth for the significantly higher prices compared to the fibre technology.
- (58) As mentioned above, the objective of the project is to bridge the "digital divide" and provide access to broadband services where they are currently unavailable or not sufficient. For this purpose, the project will promote the rollout of an open¹⁵ and modern backhaul network infrastructure (a fibre optic backhaul network¹⁶ based on DWDM optical multiplex technology characterised by enhanced capacity¹⁷ and speed¹⁸) which will allow the deployment of access networks in traditional white areas where no broadband networks exist or the deployment of an NGA network in NGA white areas¹⁹. In this way, the notified project will bring significant new capabilities to the market, for which there is a potential unsatisfied demand. In particular, around 156 000 citizens will benefit from the new backhaul infrastructure according to the analysis carried out by the Polish authorities. Moreover, the subsidised backhaul network will promote the development of 'last mile' NGA networks in areas where no such networks exist or are planned in the near future. This in turn will provide further condensation of distribution nodes, shorten 'the last mile' to end-users and allow for competition between operators which is expected to have a positive impact on prices.
- (59) Consequently, such investment ensures a "step change" in terms of broadband availability for the target areas, in line with the requirements of paragraph 51 of the Broadband Guidelines.

¹⁴ LTE services are not available in the target areas.

¹⁵ Subject to the conditions specified in paragraph 26 and following.

¹⁶ Including approximately 550 km of fiber optic network and 13 distribution nodes.

¹⁷ The increase in network capacity is expected to stimulate market entry by service providers and provision of a larger variety of advanced services, such as point-to-point or transit IP services.

¹⁸ With bandwidth of at least 30Gbps at the backhaul and 30Mbps at the access level.

¹⁹ In areas where a backhaul network already exists, only NGA capable networks can be connected to the subsidized backhaul network.

- (60) Furthermore, the funding of backhaul network open for access to all operators and technologies, as confirmed in the paragraph 81 of the Broadband Guidelines, exhibit especially pro-competitive features.

Pro-competitive nature of the project

- (61) The notified measure is not aimed to develop an access network but only a transport "backhaul" network. Such a network is a necessary input for the deployment of access networks with which retail electronic communication operators can provide (high speed and very high speed) services to the end users. The operator of the new network will offer access to wholesale products on a commercial basis. Construction of backhaul networks is generally a measure that fosters competition and investment and, for NGA networks, encourages third party operators to roll out last mile infrastructures capable of supplying advanced connectivity services to end-users. Backhaul networks have the potential to stimulate competition on all access technologies, while leaving the bulk of the investments to connect end-users to private operators.
- (62) However, the backhaul networks are "hybrid networks" in the sense that they are able to sustain both basic and NGA types of networks: it is the (investment) choice of the electronic communication operators what type of 'last mile' infrastructure they wish to connect to the backhaul network. In particular, operators could decide to use ADSL or wireless solutions (i.e. basic broadband infrastructures), but they could also opt for rolling out, for example, an FTTH architecture.
- (63) Hence from a competition point of view, the possible distortion resulting from the deployment of subsidised backhaul networks shall be assessed on two levels: (1) the level of basic broadband networks and (2) the level of NGA networks, in line with the distinction made in the Broadband Guidelines.
- (64) With respect to (1), the measure could cause distortion of competition in those localities in which market forces seem to work adequately to provide basic broadband services to citizens. In these areas, public intervention would not be justified, since it would not address a market failure (as competitive broadband providers exist), it would not bring any significant benefits for the targeted areas (as citizens would receive the same level of services), state aid would not have any incentive effect and it could crowd out private investments. By contrast, in localities where a market failure exists with regards to basic broadband, the provision of subsidies to backhaul services has a pro-competitive character.
- (65) As regards point (2), i.e. concerning the level of NGA networks, according to the information submitted by the Polish authorities, the whole target areas have to be considered a "white NGA areas": even where the backhaul infrastructure is present, the access infrastructure is not yet upgraded nor will it be in the next three years (in the target areas no "credible investment plans" have been reported in the public consultation).

The system of conditional market access to the planned network

- (66) To alleviate these different concerns, the Polish authorities have proposed a system of conditional market access to the planned backhaul network infrastructure, depending on the existing market situation in the various municipalities.

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

- (67) In the target areas where there is no backhaul infrastructure at all and where there are no plans to develop such infrastructure in the near future, there is no need to impose restrictions on the type of 'last mile' infrastructures allowed to use the planned backhaul network, provided that the conditions indicated in paragraph 78 of the Broadband Guidelines are respected (see below in paragraph (70) and following).

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

- (68) The notified measure covers also traditional "grey" areas, where one backhaul network is already in place, but no NGA access network is connected to it or likely to be in the next three years (which means that such areas are white from an NGA point of view). In such areas, the Polish authorities will allow third party operators to connect to the subsidised backhaul only if they deploy NGA networks.
- (69) This will ensure that, at the level of basic broadband, the subsidised backhaul will not be used to unnecessarily duplicate existing networks. However, it will be possible to connect to the subsidised backhaul to deploy NGA networks, thereby ensuring a step change in term of broadband coverage, by encouraging the roll-out of NGA networks in areas where no such networks exist or are planned.

The other proportionality conditions of the Broadband Guidelines

- (70) **Detailed mapping and analysis of coverage, public consultation:** As set out in detail in paragraph (22) and following, the Polish authorities have undertaken an analysis of the existing broadband infrastructure in order to identify the areas where State intervention is necessary. A public consultation has been conducted as described above in paragraph (23) and following. All the relevant stakeholders have had the opportunity to submit their views and the regulatory authority's opinion has been gathered. As confirmed by the Polish authorities, comments from one operator as regards the mapping and investment plans for the near future have been taken into account which led to reclassification of certain areas with respect to their eligibility for intervention. This way, the Polish authorities ensure that public funds are used only in areas where it is necessary and limit the possibility of crowding out private investments and distortion of competition to the minimum possible.
- (71) **Competitive selection procedure:** The Polish authorities will run a selection procedure in line with the principles of openness, competition and transparency of the Polish and European procurement rules, to select the undertaking for the management of the network.
- (72) **Most economically advantageous offer:** The system is designed by the Polish authorities in such a way as to ensure that on the basis of predefined and published technical specifications, the network operator requesting the lowest aid amount receives more priority points within the overall assessment of the bid.
- (73) **Technological neutrality:** The project envisages construction of the backhaul network using optical fibre links. This specification is acceptable because at the current stage of development of telecommunications technologies there is no transmission medium other than optical fibre links that would allow providing basic and next generation

services of enhanced capacity and quality. However, the choice of technology for the relevant equipment will be based pursuant to technical plans and in public procurement procedures no technology will be excluded a priori. Consequently, the services provided on the wholesale market will be such as to enable the interconnection to the subsidised network of any possible technology, which operators wish to use for their access infrastructure.

- (74) **Use of existing infrastructures:** The Polish authorities encourage using the entire existing infrastructure in order to limit the aid necessary for the measure as well as to avoid duplication of infrastructures and confirmed that they will ensure that any operator which owns or controls infrastructure (irrespective of whether it is actually used) in the target area and which wishes to participate in the selection to receive the aid, shall meet the following conditions: (i) to inform the aid granting authority and the NRA about that infrastructure during the public consultation; (ii) to provide all relevant information to other bidders at a point in time which would allow the latter to include such infrastructure in their bid.
- (75) **Wholesale access:** As described in paragraph (32), the selected operator will offer wholesale services and access to the subsidised backhaul network to other operators in an open, transparent and non-discriminatory manner for at least seven years. The access obligations will be supervised by the NRA.
- (76) **Wholesale access pricing:** In line with the provision of the Broadband Guidelines, the price for wholesale access will be based on average wholesale prices for comparable services in more competitive areas or on the prices set or approved by the NRA, as detailed in paragraphs (33) and following.
- (77) **Monitoring and claw-back mechanism to avoid over-compensation:** The project will be examined on a regular basis so to verify that all conditions of the measure are respected. By ensuring that any extra profit generated through the operation of the network will be clawed back as explained in paragraph (34), the Polish authorities ensure that the recipient of the aid will not benefit from overcompensation and will minimise *ex post* and retroactively the amount of aid deemed initially to have been necessary.
- (78) **Transparency:** As described in paragraph (36) above the Polish authorities confirmed that they would publish on a central website at least the following information on the State aid measures: the full text of the approved aid scheme and its implementing provisions, name of the aid beneficiary, aid amount, aid intensity and used technology²⁰. Furthermore, the aid beneficiary will be obliged to provide entitled third parties with comprehensive and non-discriminatory access to information on its infrastructure (including *inter alia* ducts, street cabinets and fibre) deployed under the State aid measure.
- (79) **Reporting:** The Polish authorities confirmed that starting from the date when the network is put into use, for the duration of the aid measure, the State aid granting authority would report every other year the key information on the aid projects to the European Commission.

²⁰ Such information will be kept for at least 10 years and shall be available for the general public without restrictions.

Conclusion

- (80) The Commission concludes that the notified measure "*Regional broadband network of Łódź-2nd stage*" meets the compatibility criteria set out in the Broadband Guidelines, hence the aid involved in the notified measure is compatible with Article 107(3)(c) TFEU.

VII. DECISION

- (81) On the basis of the foregoing assessment, the Commission has accordingly decided that the measure "*Regional broadband network of Łódź-2nd stage*" is compatible with Article 107(3)(c) TFEU.
- (82) The Commission would remind Polish authorities of the requirement to submit to it annual reports on the application of the aid measure and to inform it pursuant to Article 108(3) TFEU of any plan to extend or amend this measure.
- (83) 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 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

Joaquín ALMUNIA
Vice-President