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C(2017) 9116 final

<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.46203 – Poland
Modifications in the aid scheme the Broadband network project in Eastern Poland (SA.33438, SA.33439, SA.33441, SA.30851 and SA.33440)**

Sir,

1. PROCEDURE

- (1) Following pre-notification discussions, by letter registered on 12 September 2017, pursuant to Article 108(3) of the TFEU, Poland notified the modification of the State aid measure concerning broadband network project in Eastern Poland. The original aid measure was approved by the Commission on 10 November 2011 as State aid case SA.33438, SA.33440, SA.33441, SA.33439, SA 30851¹ (the “2011

¹ State aid case SA.33438, SA.33440, SA.33441, SA.33439, SA 30851 - Broadband network project in Eastern Poland.

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Decision”). The Commission requested additional information from Poland on 11 and 12 October 2017, on 28 November 2017, on 8 December, 12 December and 15 December 2017. Poland submitted the requested information on 31 October 2017, 30 November 2017, 6 December 2017, 11 December 2017, 13 December and 15 December 2017.

2. CONTEXT

- (2) In 2011, based on the *Community Guidelines for the application of State aid rules in relation to rapid deployment of broadband networks*² in force at the time, the Commission approved the aid scheme "*Broadband network project in Eastern Poland*". The aim of the scheme was to develop next generation backhaul networks (NGN – backhaul networks capable of sustaining speeds above 30 Mbps) and, as a consequence, to provide access to the subsidised infrastructure and to create incentives for private investment in next generation access (NGA) networks. The second objective of the scheme was to allow the use of the new NGN to eliminate the "digital divide" in traditional basic broadband in areas where there was no adequate broadband infrastructure.
- (3) The construction works of the NGNs terminated in 2015 as a result of which more than 10,500 km of the backhaul fibre optic networks as well as 1065 nodes were deployed. The public funding covered only the deployment of the backhaul networks, including passive elements indispensable for installation and running of broadband access to Internet (such as ducts, cables, optical fibres, manholes, telecommunications racks, or other locations of telecommunications nodes, etc.) as well as active elements (backhaul routers, distribution routers, DWDM devices³).
- (4) The selection procedures for the management of the network were carried out between 2012 and 2015. However, in one⁴ out of the five voivodships covered by the scheme, (and despite a tender procedure conducted three times) no infrastructure operator has been selected for a lack of interest of private operators. In two other voivodships⁵, although the infrastructure operators were selected, the contracts have been eventually terminated for non-fulfilment of the contractual obligations by the operators. In the context of the pre-notification contacts, Poland noted that the public authorities have taken over the operation of the network in these three voivodships in order to ensure the operation of the network and the continuity in the provision of services. In two other voivodships⁶ the NGN backhaul network has been operated by private operators since 2015. Consequently, the notified modifications to the original aid scheme aim at addressing problems and risks identified in the operation of the network and to better implement the scheme.

² OJ C 235 of 30.9.2009, p.7.

³ Dense wavelength-division multiplexing (DWDM) is a technology which multiplexes a number of optical carrier signals onto a single optical fibre by using different wavelengths of laser light. This technique enables bidirectional communications over one strand of fibre, as well as multiplication of capacity. Also allows for transmitting signals over long distances.

⁴ Podlaskie voivodship.

⁵ Lubelskie and Warmińsko-Mazurskie voivodships.

⁶ Świętokrzyskie and Podkarpackie voivodship.

3. DESCRIPTION OF THE MEASURE

- (5) **Objective:** The objective of the now notified modifications to the aid scheme, as the one approved in 2011, is to provide residential customers, business users, government 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 services provided on NGA networks. The measure is focused on white NGA areas and, as a secondary objective, on white basic areas (i.e. areas where currently there is no coverage of broadband basic and NGA infrastructure and where private investors do not plan to build such infrastructure in the next three years). By granting access to the subsidised backhaul to third party NGA operators, the measure aims to facilitate and encourage investments in NGA networks. The overall objective of the measure is to ensure that access areas are covered via wholesale access to the subsidised NGN network: thus, NGA white areas would be covered with NGA connections and basic white areas would be covered at least with basic broadband connections, but also possibly NGA (as described in recitals 21 and 22).
- (6) Given the problems encountered in the past implementation of the measure, the now notified modifications consist of (i) an amendment aiming to better identify access areas, based on a much improved mapping methodology (at the level of individual premises); (ii) an amendment of the selection criteria of the competitive selection process for granting the management of the network to a private operator; (iii) an amendment allowing vertically integrated private operators to participate in the selection process for the management of the network; (iv) an amendment of the operation models allowed under the scheme by introducing, as an alternative, the public model of operation of the subsidised infrastructure; (v) an amendment allowing access seekers / services providers from other regions in Poland to connect to the newly built public backhaul infrastructure to serve white areas in Poland; and (vi) an increase in the budget of the scheme by an additional estimated maximum budget of EUR 156 million to cover the costs related to network functioning, maintenance and management for the entire duration of the scheme.
- (7) Apart from the above mentioned changes, the scheme remains in substance the same as the scheme approved by the Commission in 2011. Following a request of the Commission, Poland confirmed that the scheme will be brought in line with the new *EU Guidelines for the application of State aid rules in relation to rapid deployment of broadband networks* (the "Broadband Guidelines")⁷, as explained in this decision.
- (8) **Project design:** As under the original measure, the project is performed by regional public authorities (the "implementing bodies") of five voivodships of Eastern Poland identified in the original and now notified scheme (i.e. Lubelskie, Podkarpackie, Podlaskie, Świętokrzyskie, Warmińsko-Mazurskie).
- (9) Depending on the situation in the given region, the implementing bodies will choose the most appropriate operation model to, on the one hand encourage effective competition and, on the other hand, deliver efficient and sustainable broadband infrastructure for the benefit of residential and business consumers. Consequently, the operation of the network will proceed according to public or private operation models (e.g. the operation of the network could be either done

⁷ Communication from the Commission - EU Guidelines for the application of State aid rules in relation to the rapid deployment of broadband networks, OJ C 25, 26.1.2013, p.1.

directly by the public authorities – public model, or granted to a private operator - including possibly a vertically integrated operator, as described in this decision-private model). In both cases, the infrastructure deployed under the scheme will remain in public ownership and will be made available at wholesale level to operators wishing to connect to it on non-discriminatory terms.

- (10) **Role of the National Regulatory Authority (NRA):** The NRA was consulted by the Polish authorities and has not raised any objection to the proposed modifications (<https://www.uke.gov.pl/opinia-prezesa-uke-ws-projektu-zmiany-decyzji-notyfikacyjnej-dla-sspw-22636>). In addition, in line with point 42 of the Broadband Guidelines, Poland will seek the technical advice of the NRA in relation to the notified measure, including in respect of: the wholesale-access pricing and conditions as well as dispute resolution regarding wholesale-access.
- (11) **Duration:** The now notified modifications to the scheme will take effect with the approval by the Commission. The project implementation period corresponds to the lifetime of the contracts between the voivodships and the infrastructure operators. The duration of the contracts will be ultimately determined in the course of respective tender procedures and will be up to 20 years starting from the approval by the Commission. In regions where contracts with private operators were signed under the previous 2011 Decision or where the public operators have taken over the operation of the network on the basis of agreements with regional authorities, as explained in recital (4), the starting point is the date of the signature of the aforesaid contracts or agreements. The Polish authorities have confirmed that should the estimated maximum budget indicated in recital (13) below be exceeded, such modification in the budget will be notified to the Commission in accordance with Council regulation (EU) 2015/1589⁸ and the Commission Regulation (EU) 2015/2282⁹.
- (12) **Legal basis:** The legal basis of the scheme is unchanged: Act on the rules governing the development policy of 06 December 2006 (Dz. U. of 2016, item 383 consolidated text)¹⁰, Act on supporting the development of networks and telecommunication services of 07 May 2010 (Dz. U. of 2016, item 1537 consolidated text)¹¹, Act on the procedure in the cases related to public aid of 30 April 2010 (Dz. U. of 2016 item 1808 consolidated text)¹², Act – Telecommunications Law of 16 July 2004 (Dz. U. of 2016, item 1489, consolidated text)¹³, Act on concession agreement for construction works and services of 21 October 2016 (Dz. U. of 2016, item 1920)¹⁴, Regulation of the Minister of Regional Development on the granting by the Polish Agency for Enterprise Development of financial aid for the deployment and providing access

⁸ 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, OJ L 248, 24.9.2015, p. 9 (which replaces as of 14.10.2015 Council Regulation No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article 108 of the Treaty on the Functioning of the European Union, OJ L 83, 27.03.1999, p. 1, as amended).

⁹ Commission Regulation (EU) 2015/2282 of 27 November 2015 amending Regulation (EC) No 794/2004 as regards the notification forms and information sheets, OJ L 325, 10.12.2015, p. 1–180.

¹⁰ <http://www.dziennikustaw.gov.pl/DU/2016/383/1>

¹¹ <http://www.dziennikustaw.gov.pl/DU/2016/1537/1>

¹² <http://www.dziennikustaw.gov.pl/DU/2016/1808/1>

¹³ <http://www.dziennikustaw.gov.pl/DU/2016/1489/1>

¹⁴ <http://www.dziennikustaw.gov.pl/DU/2016/1920/1>

to broadband network under the Operational Programme Development of Eastern Poland 2007-2013 of 21 March 2013 (Dz. U. of 2014 item 1754 consolidated text)¹⁵, C(2007) 4568 - Commission Decision adopting the operational programme "Development of Eastern Poland" for Community assistance from the European Regional Development Fund under the Convergence objective in Poland¹⁶, as amended.

- (13) **Budget and financing instruments:** Poland informed that under the present measure no new backhaul infrastructure will be deployed and thus no additional resources will be granted for the roll-out of the infrastructure. The Polish authorities have indicated that the budget approved by the Commission Decision of 2011 (as specified in recital (30) of the 2011 Decision) was already spent to cover investment costs of rolling-out the backhaul infrastructure and a new budget is needed to cover costs related to network functioning, maintenance and management. Due to the contractual obligations/tender conditions on cost distribution, the public owner of the new backhaul network has to cover, in part, ongoing costs of network functioning, maintenance and management. As indicated above in recital (4), the public authorities have taken over the operation of the network in three voivodships and operation has started in two other voivodships with private operators since 2015. The Polish authorities have already started disbursing money to cover the costs of network functioning, maintenance and management in the five voivodships. The Polish authorities consider that this amounts to new aid not covered by the 2011 Commission decision and therefore have notified as part of the modified scheme an additional estimated maximum budget of EUR 156 million for the total duration of the scheme. The Polish authorities confirmed that should further budget be necessary (e.g. due to possible replacement and repairs of the infrastructure), such modification in the budget (and any other modifications) will be notified to the Commission in accordance with Council Regulation (EU) 2015/1589¹⁷ and the Commission Regulation (EU) 2015/2282.¹⁸
- (14) **Mapping and analysis of coverage and public consultation:** The NGN backhaul network has already been deployed. As concerns access areas, which are served either by private or by public¹⁹ investments, a detailed mapping exercise is carried out every year. Due to the fact that there is no further deployment of publicly financed infrastructure, Poland considers that a yearly update of access areas is

¹⁵ <http://www.dziennikustaw.gov.pl/DU/2014/1754/1>

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<http://ec.europa.eu/transparency/regdoc/?fuseaction=list&n=10&adv=0&coteId=3&year=2016&number=1297&version=ALL&dateFrom=&dateTo=&serviceId=&documentType=&title=&titleLanguage=&titleSearch=EXACT&sortBy=NUMBER&sortOrder=DESC>

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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, OJ L 248, 24.9.2015, p. 9 (which replaces as of 14.10.2015 Council Regulation No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article 108 of the Treaty on the Functioning of the European Union, OJ L 83, 27.03.1999, p. 1, as amended).

¹⁸

Commission Regulation (EU) 2015/2282 of 27 November 2015 amending Regulation (EC) No 794/2004 as regards the notification forms and information sheets, OJ L 325, 10.12.2015, p. 1–180.

¹⁹

As approved and implemented by the Polish authorities under SA.36917 (2013/X), X280/2009/X427/2010 and SA.43484(2015/X). In accordance with the Commission Regulation (EC) No 800/2008 declaring certain categories of aid compatible with the common market in application of Articles 87 and 88 of the Treaty and the Commission Regulation (EU) No 651/2014 declaring certain categories of aid compatible with the internal market in application of Articles 107 and 108 of the Treaty (the General Block Exemption Regulations), the Commission has taken note of the above measures without assessing their compliance, the correct application of the General Block Exemption Regulations lying with Poland.

well adjusted to prevent any distortion of competition on the market, as supported by the Polish NRA²⁰. Thus, Poland informed that a detailed inventory is held every year by the NRA covering the whole territory of the country. The inventory is based on yearly consultations of operators that have a legal obligation to declare their newly built infrastructure as well as upcoming investments in the next year. The mapping is therefore updated every year (in the light of the investment realised and to be realised in the next year), published by the NRA and available on the official website: <http://uke.gov.pl/wyszukiwarka/>. Operators can continually correct and update the available data. In addition, Poland informed that investment plans for the next three years reported by operators to the NRA will also be taken into account during the mapping and public consultation exercise.

- (15) Poland explained that it is now possible to classify access areas with premise-level mapping (addresses). This detailed mapping has revealed that some of areas classified before the deployment of the public network as grey or black NGA (and which were therefore not connected to the subsidised backhaul network) are in reality largely white NGA areas: approximately 94% of premises in areas initially classified as black NGA and approximately 95% of premises in areas initially classified as grey NGA are in reality white NGA areas. The Polish authorities explained that this is due to the fact that the data collection mechanism available at that time allowed for indication of the areas of intervention with the accuracy only up to specific towns. Therefore, following a new mapping methodology the information on the access areas has been updated and reflects with accuracy the real situation.
- (16) Additionally, Poland informed that the planned modifications to the original scheme, including the updated information on the access areas and their classification (based on the above described mapping) has been published for consultation on the implementing bodies' websites (www.konsultacje.warmia.mazury.pl, <http://www.podkarpackie.pl/index.php/si>, <http://bip.sejmik.kilece.pl/79-ogloszenia-marszka-wojewodztwa-swietokrzyskiego.html>, <https://umwl.bip.lubelskie.pl/index.php?id=88&p1=szczegoly&p2=1171315>, <http://szerokopasmowe.lubelskie.pl/zaproszenie-do-udzialu-w-konsultacjach-spoecznych/>, rssws.umws.pl, www.wrotapodlasia.pl) with reference (links) to the maps of the NRA as well as on the central website at national level (<http://mr.bip.gov.pl/komunikaty/> <https://www.polskawschodnia.2007-2013.gov.pl/Strony/default.aspx>). The public consultation lasted one month during which operators were invited to comment. None of them objected to the planned modifications of the scheme. The results of public consultations have been published on the following websites (<http://mr.bip.gov.pl/articles/index/komunikaty/>, <https://www.polskawschodnia.2007-2013.gov.pl/Strony/default.aspx>).
- (17) **Competitive selection process and most economically advantageous offer:** Poland confirmed that in case that the private model of the operation of the subsidised network is chosen, the management and commercial exploitation of the network will be assigned via open, transparent and non-discriminatory selection procedures in accordance with the EU and Polish procurement rules. Poland confirmed that tenders for the selection of infrastructure operators will be

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NRA opinion available at: <https://www.uke.gov.pl/opinia-prezesa-uke-ws-projektu-zmiany-decyzji-notyfikacyjnej-dla-sspw-22636>.

published either on the central (country-wide) website or in the EUOJ, depending on the value of the tender. If the competitive selection process does not generate at least three bidders, the cost calculation proposed by the winning bidder will be verified by an external auditor. The contract will be awarded to the operator offering the most economically advantageous offer. Selection criteria and their weighting will be specified in advance, in accordance with the public procurement legislation.

- (18) ***Vertically integrated entities:*** In order to extend the number of entities that may be interested in the management and commercial exploitation of the network, vertically integrated private operators will be allowed to participate in the selection procedures. Poland informed that adequate safeguards will be put in place to prevent any conflict of interest, undue discrimination towards access seekers or content providers and any other hidden indirect advantages potentially linked to the operation of the network by a vertically integrated operator²¹. Additional points will be granted to bidders proposing a wholesale-only model, a passive-only model or both. In case of the selection of a vertically integrated operator, for the provision of retail services a structurally and legally separate unit will be set up within the operator and a separate accounting mechanism will be put in place. The activity of the vertically integrated operator will be subject to the supervision by the NRA, including the control of the framework agreements, wholesale access obligations and wholesale access pricing.
- (19) ***Public operation of the network:*** As an alternative, the implementing bodies may decide to entrust the operation of the network directly either to the public authorities' department or to an entity fully owned and controlled by the public authorities. Poland explained that the Eastern Poland region is unattractive for private operators due to the low density of population and low potential demand. As a result, there is a lack of interest of private operators in the operation of the network. Poland further explained that the public model of the operation of the network aims at ensuring the continuity of services in region where no private infrastructure operator has been selected or where the contract with the selected private operator has to be terminated. The public infrastructure operator will limit its activities to the pre-defined target area and will not expand to other commercially attractive regions. The public infrastructure operator will not provide retail services (services to final users) but will simply organise and manage wholesale access to the backhaul infrastructure. It will not engage in any profit making operation of the network and will not be allowed to generate profits, but has to balance income and expenses and limit its activity to the administrative management of the infrastructure, including maintenance and management of the access requests. It will keep accounting separation between the funds used for the operation of the network and the other funds at its disposal and used for its other activities. Poland confirmed that the public operator of the infrastructure will have the same obligations (in particular regarding the open access to the infrastructure at fair, transparent and non-discriminatory conditions) and will be subject to the same control of the NRA as private infrastructure operators.
- (20) ***Wholesale access:*** Poland explained that the subsidised NGN backhaul constructed has not yet been used to its full extent. This is due to the lack of

²¹ This shall include the requirement to carry out tests of economic and technical reproducibility (narrowing down the margins and prices, TTM procedures), introduction of a KPI monitoring system with regard to non-discrimination, Chinese walls and cost-oriented wholesale prices.

interest of access operators to deploy last mile infrastructure²² and is demonstrated by the following figures: the rate of use of collocation services in distribution nodes range from [...] % to [...] %; the use of dark fibres from [...] % to [...] %; only [...] to [...] %²³ of nodes providing at least one service. As a result, the average penetration rate of services offering min. 30 Mbps in the areas covered by the scheme has increased barely from 30,68% to 32,75% and the coverage (min. 30 Mbps) from 41% to 48%.

- (21) Poland stressed in this respect that Eastern Poland is one of the less developed and competitive region in the EU. At the same time, in Eastern Poland there are still areas with no access to broadband services of min. 30 Mbps, as demonstrated in the mapping exercise. Therefore, to allow more effective use of the subsidised infrastructure and to lower the costs related to its operation and ultimately improve economic efficiency of the scheme, wholesale access to the subsidised backhaul will be offered to private or public networks (operating under separated aid measures as specified in footnote (17)) to serve areas not only in Eastern Poland but also in other regions of Poland. Access to the subsidised backhaul network will be guaranteed under the same non-discriminatory, transparent and open conditions to all, private and public, access seekers. The premises identified as white NGA and white basic will be covered by private or public networks obtaining wholesale access to the NGN network under the modified scheme without any restriction. Areas identified as white NGA but basic grey or basic black will be covered with only NGA connections. No premises in grey or black NGA areas will be covered by the measure. Basic white areas will be covered by either basic broadband connections or NGA connections.
- (22) The access to the subsidised active and passive infrastructure (including but not limited to: the right to use ducts, poles, dark fibre and street cabinets) will be offered in open, transparent and non-discriminatory manner and in respect of the principle of technological neutrality. The Polish authorities have explained that given the architecture of the network as a backhaul network, aimed to serve access areas with low population density, where there are limited broadband services, the imposition of all types of access products, such as local loop unbundling or bitstream access, might disproportionately increase investment costs without delivering significant benefits in terms of increased competition. Therefore, the Polish authorities proposed that access products for local loop unbundling or bitstream access which would require costly interventions on the subsidised infrastructure not otherwise foreseen will be offered only in case of a reasonable demand from a third-party operator. The demand is considered reasonable if (i) the access seeker provides a coherent business plan which justifies the development of the product on the subsidised network and (ii) no comparable access product is already offered in the same geographic area by

²² For example, under operational programme Digital Poland 2014-2020, only 26% of the total number of projects is located in Eastern Poland (30 out of 114). In addition, the planned length of access networks in Eastern Poland amounts only to 7,936 km out of 37,634 km in Poland (which constitutes approx. 20%). Regarding private investment, its size largely depends on the level of development of a given region and other particular conditions such as population density, network coverage, services demand. Consequently, private last mile investments in Eastern Poland are less important than investments in other parts of Poland (e.g. in 2015 the length of the fibre optic network Poland-wise reached 370,000 km, with only 85,000 km in Eastern Poland. In 2016, it was respectively 429,000 km and 88,000 km). This shows that Eastern Poland is less attractive for telecommunication entrepreneurs in terms of new investments in access networks.

²³ Minimum and maximum values in the five regions concerned.

another operator at equivalent prices to those of more densely populated areas. However, vertically integrated operators will have to in any case offer full and effective unbundling as well as bitstream access, as also recommended by the Polish NRA in its opinion of 6 December 2016.

- (23) Wholesale access to the active infrastructure will be offered during at least seven years²⁴. If at the end of the seven years period the operator of the infrastructure in question is designated as having significant market power in the market concerned, access obligations will be extended. In line with the requirements of the Broadband Guidelines, full and effective unbundling will be ensured. Full and effective access to the subsidised passive infrastructure (including, but not limited to access to ducts, poles, etc.) will be offered without limitation in time. The type of access obligations have been defined and will be monitored by the NRA²⁵. The same access conditions will apply on the entirety of the network, including the parts where existing infrastructure has been used. The access obligations shall be enforced irrespective of the model of the operation of the network and any changes in management, operation and ownership of the infrastructure. In case of a private operator providing also retail services, the wholesale access to the network will be granted at least six months before the launch of such retail services. The public operator of the network will not offer retail services.
- (24) **Wholesale access prices:** The wholesale access pricing principles are set by the NRA. The prices are based on average published wholesale prices for comparable services in more competitive areas, or, in the absence of such published prices, on prices specified or approved by the NRA. The benchmarking criteria will be clearly indicated in the tender documents. The contract between the public authorities and the infrastructure operator will specify rules for calculation of fees for access to the infrastructure. Additionally, fees charged by the infrastructure operator are approved, monitored and verified by the NRA. Finally, the NRA is also competent to resolve potential dispute between the public authorities and the infrastructure operator.
- (25) **Use of existing infrastructure:** Poland encouraged the use of the existing infrastructure in order to limit the aid as well as to avoid duplication of infrastructures and informed that approximately 105 km of the existing infrastructure has been used under the scheme and become an integral part of the subsidised network. The Broadband Guidelines recommend that Member States should set up a national database on the availability of existing infrastructure that could be reused for broadband rollout (this includes both commercial infrastructure assets and those owned by public bodies etc.). In this respect, Poland clarified that, in addition to the digital maps made available by the NRA, the required transparency has been achieved by placing relevant information at <http://www.polskaszerokopasmowa.pl/mapy-siis/infrastruktura-telekomunikacyjna-na-terenierp-2016.html> .

²⁴ The infrastructure operator, whose contract's duration is shorter than seven years will provide effective, open and non-discriminatory wholesale access in accordance with points 78(g) and 80(a) of the Broadband Guidelines during the whole term of its contract with the public authorities. In case of the infrastructure operator whose contract exceeds seven years, the wholesale access will be offered for a period not shorter than seven years.

²⁵ Poland informed that wholesale services include active and passive access. In particular following wholesale access products are provided under the scheme: lease of dark fibres, lease of ducts, collocation, data transmission services (including Ethernet data transmission, Lambda data transmission, access to the Internet).

- (26) **Monitoring and clawback mechanism:** The implementation of the measure is monitored on a regular basis by the implementing bodies as well as by the Polish Agency for Enterprise Development and by the NRA. The monitoring will be performed during the entire duration of the contract with the infrastructure (private or public) operator. The details of the mechanism will be described in the contract with the operator. As regards the clawback, the calculation of the amount to claw-back depends on the EBITDA²⁶ and comprises the whole lifetime of the measure. According to the Polish authorities, the methodology allows to take into account not only the operator's revenues but also whether the costs really faced are lower than those estimated in the business plan²⁷.
- (27) The public operator will keep separate accounting for all activities related to the implementation of the scheme. The implementing bodies will monitor all expenditure of the public operator related to the operation of the network. Revenues from the public operator activity will be used to maintain the network and ensure the durability of the project. Any surplus will be returned to the granting authorities.
- (28) **Transparency obligations:** The objectives of the measure, the full text of the final aid scheme and the implementing provisions, the beneficiaries of the aid and the amounts of State aid granted to them, as well as the aid intensity and technology used has been published on central websites (https://www.polskawschodnia.2007-2013.gov.pl/wiadomosci/Strony/Decyzja_KE_dot_projektu_SSPW_24112011.aspx and <https://sudop.uokik.gov.pl/home>), will be kept for at least ten years and be available for the general public without restrictions. This website will contain all information related to the implementation of the scheme and will be regularly updated. Poland also confirmed the aid beneficiaries are obliged to provide entitled third parties with comprehensive and non-discriminatory access to information on the infrastructure deployed under the aid scheme, in line with point 78(j) of the new Broadband Guidelines.
- (29) **Reporting:** In line with point 78(k) of the Broadband Guidelines, Poland committed to report every two years and for the duration of the aid measure, all relevant information on the scheme to the European Commission. Such reports will at least contain (i) the information made public in line with transparency obligations (see recital (28) above) (ii) as well as the information on the wholesale access products, the number of access seekers and service providers on the network. Poland also committed to submit to the Commission annual reports, as required under Article 26 of Council Regulation (EU) 2015/1589.

4. ASSESSMENT OF THE MEASURE

- (30) The notified modifications do not alter the previous conclusion of the Commission that the scheme constitutes State aid within the meaning of Article 107(1) TFEU, as described in section V of the 2011 Decision.

²⁶ Earnings before interest, tax, depreciation and amortization - a financial indicator used also in the telecommunication industry.

²⁷ The Polish authorities envisaging the following mechanism: if at the end of the accounting year, the EBITDA of the infrastructure operator exceeds the reference EBITDA (based on average EBITD. As for the companies from the telecommunications listed on the Warsaw Stock Exchange), part of the EBITDA in excess of the threshold difference must be clawed back – the surplus will be divided between a given Voivodship and the Infrastructure Operator pro rata to the level of State aid.

- (31) The Commission assessed the compatibility of the original scheme according to Article 107(3)(c) of the TFEU and in the light of the *Community Guidelines for the application of State aid rules in relation to rapid deployment of broadband networks*²⁸. Upon publication on 26 January 2013 in the Official Journal, the new *EU Guidelines for the application of State aid rules in relation to the rapid deployment of broadband networks* (the "2013 Broadband Guidelines") entered into force²⁹. Following the notification of modifications to the scheme, the Commission shall assess whether the approved scheme, as modified, complies with the 2013 Broadband Guidelines.
- (32) The now notified modifications to the original scheme concern: (i) a new mapping methodology to better identify access areas; (ii) an amendment of the selection criteria of the competitive selection process for granting the management of the network to a private infrastructure operator; (iii) the possibility for the vertically integrated private operators to participate in the selection process for the management of the subsidised network; (iv) the introduction of an alternative, public model of the operation of the subsidised network; (v) the possibility for access seekers/service providers from other regions in Poland to connect to the public backhaul infrastructure to serve white areas in Poland.
- (33) Apart from the above mentioned changes and the increase in the budget of the scheme necessary to cover the costs related to network functioning, maintenance and management (described in recital (13) above), the scheme remains in substance the same as the scheme approved by the Commission in 2011.
- (34) The Commission's analysis did not identify any serious difficulties and confirms that the modifications of the measure do not modify the original compatibility assessment regarding the approved measure SA.33438, SA.33440, SA.33441, SA.33439, SA 30851, as the measure fulfils the relevant requirements of the revised Broadband Guidelines.
- (35) In particular, the NGN backhaul network has already been deployed following a mapping and public consultation carried out under the original measure. As concerns access areas, which are served either by private operators or by public operators under separate aid measures³⁰, a detailed inventory covering the whole territory of the country is held once a year by the NRA and its results are constantly available on the official website: <http://uke.gov.pl/wyszukiwarka/>, as described in recitals (14) and following. Thus, as regards these areas operators have a legal obligation to declare their infrastructure as well as upcoming investments in the next year and can continually correct and update the available data. The Commission notes that the Polish authorities will also take into account investment plans for the next three years reported by operators to the NRA during the mapping and public consultation exercise, as described in recital (14). In

²⁸ OJ C 235, 30.9.2009, p.7.

²⁹ OJ C 25, 26.1.2013, p.1.

³⁰ I.e. SA.36917 (2013/X), X280/2009, /X427/2010 and SA.43484 (2015/X). In accordance with the Commission Regulation (EC) No 800/2008 declaring certain categories of aid compatible with the common market in application of Articles 87 and 88 of the Treaty and the Commission Regulation (EU) No 651/2014 declaring certain categories of aid compatible with the internal market in application of Articles 107 and 108 of the Treaty (the General Block Exemption Regulations), the Commission has taken note of the above measures without assessing their compliance, the correct application of the General Block Exemption Regulations lying with Poland.

addition, as explained in recital (15), the new mapping tool allowed the Polish authorities to classify areas at premise-level (addresses). The review of the classification of access areas has permitted to identify with accuracy target areas. This in turn offers the possibility to connect to the public NGN backhaul network areas that were not covered by the original measure due to the imprecise mapping methodology. The Commission agrees that, in the specific context of the case under assessment, as there is no further deployment of publicly financed infrastructure, a yearly update of access areas is well adjusted to prevent distortions of competition on the market, as also supported by the Polish NRA. Additionally, the Commission notes that a public consultation has been conducted as described above in recital (16) and that no operator has objected to the planned modifications of the scheme. Consequently, the Commission considers that the measure will be adjusted to market needs and the subsidised infrastructure will be used in optimal way so as to fulfil the objectives of the Europe 2020 Strategy and the Digital Agenda for Europe (DAE). Therefore, the proposed modification does not affect the compatibility assessment of the 2011 Decision, meeting the compatibility criteria set out in the Broadband Guidelines.

- (36) The Commission is of the opinion that the possibility for the private or public networks to connect to the subsidised backhaul and to serve white areas also in other regions in Poland, as explained in recitals (21)-(22) above, firstly, facilitates and encourages investments in last mile networks and, secondly, will contribute to the achievement of the aforesaid objectives of the DAE. This way the scheme will allow more operators to use the subsidised infrastructure and to compete. The subsidised infrastructure creates broadband service availability and capacity in areas where no adequate services are provided at the moment. The premises identified as white NGA and white basic will be covered by private or public networks obtaining wholesale access to the NGN network under the modified scheme without any restriction. Areas identified as white NGA but basic grey or basic black will be covered only with NGA connections. Basic white areas will be covered by either basic broadband connections or NGA connections. Should operators announce, as part of the ongoing public consultation for access areas, credible investments planned in the next 3 years in any of the white NGA or white basic access areas, the access areas concerned will be considered as grey or black NGA areas or grey or black basic areas, as the case may be. No premises in grey or black NGA areas will be covered by the measure. Premises in grey or black basic areas which qualify as white NGA areas may be covered only by NGA connections.
- (37) Offering wholesale access to all operators in the market will improve the use of passive and active subsidised infrastructure and will contribute to better economic efficiency of the scheme.
- (38) As described in recital (17), in case of the private operation of the network, the operator will be selected on the basis of predefined and published objective criteria by way of open, transparent and non-discriminatory selection procedure in full compliance with Polish and EU public procurement rules, as requested by point 78(c) of the Broadband Guidelines. Vertically integrated private operators will also be allowed to participate in the selection process. In order to reduce the risk of conflict of interest of such operators, in the selection process additional points will be granted to bidders proposing a wholesale-only model, a passive-only model or both, in line point 80(b) of the Broadband Guidelines. The Commission notes also other safeguards proposed by Poland and described in recital (18) and consider them as sufficient to prevent any conflict of interest,

undue discrimination towards access seekers or content providers and any other hidden indirect advantages potentially linked to the operation of the network by a vertically integrated operator.

- (39) With regard to the public model of the operation of the network as presented in recital (19), to guarantee that this model does not disproportionately distort competition but, to the contrary, ensures a pro-competitive use of the subsidised infrastructure, Poland confirmed that the following safeguards have been put in place and will be respected by the public operator. The network will remain in public ownership. The public operator (a public authority's department or an entity fully owned and controlled by the public authorities) will manage the subsidised public network and offer wholesale services to the access seekers on non-discriminatory, open and transparent terms but will not provide retail services to end users. The public infrastructure operator will limit its activities to within the pre-defined target area and will not expand to other commercially attractive locations. The public infrastructure operator will balance income and expenses and limit its activity to the administrative management of the infrastructure. It will keep accounting separation between the funds used for the operation of the network and the other funds at its disposal and used for its other activities. The Commission considers therefore that the proposed safeguards are in line with point 78(c) of the Broadband Guidelines and guarantee that the attribution of the operation of the network directly to the public operator and without selection procedure does not disproportionality distort competition. The alternative, public model of the management of the backhaul network will therefore ensure a pro-competitive and optimal use of the subsidised infrastructure and guarantee the effective and continuing operation of the network also in case of lack of private interest.
- (40) Consequently, the Commission is of the opinion that overall the proposed modifications contribute to the objectives sought under the original scheme and do not affect the original compatibility assessment of the 2011 Decision, meeting the compatibility criteria set out in the Broadband Guidelines.
- (41) The Commission has assessed whether the whole scheme, as modified, complies with the 2013 Broadband Guidelines.
- (42) Regarding technological neutrality, the subsidised backhaul deployed under the original scheme is fibre based. As regards the provision of retail broadband services, the design of the measure has not favoured any particular technology or network platform, leaving it to commercial operators to come up with the most appropriate technological solutions to provide broadband services to end users, in line with point 78(e) of the Broadband Guidelines.
- (43) In accordance with point 78(f) of the Broadband Guidelines, Poland encouraged the use of the existing infrastructure and informed that approximately 105 km of the existing infrastructure has been used under the scheme and become an integral part of the subsidised network.
- (44) The Commission considers that the aid measure ensures a "step change" within the meaning of point 51 of the 2013 Broadband Guidelines. In terms of broadband availability, significant new investments in the broadband network have been made throughout the deployment of more than 10 500 km of fibre based backhaul infrastructure. The subsidised backhaul has brought significant new capabilities to the market as it has provided 1065 distribution nodes in areas where there was nearly no optical distribution node and no broadband access. Thanks to the public

investment 10 Gigabit services can be provided on the wholesale market and new technological solutions can be connected to the network. The subsidised backhaul infrastructure has produced positive effects on the competitiveness in the market as it allowed operators to compete at infrastructure level and increased the quality and availability of services to end-users. Indeed, the measure supports only white basic or white NGA areas where either no basic broadband or no NGA broadband connection is available and where without the public support the investment would not take place.

- (45) Regarding wholesale access requirements, as described in recitals (21)-(23), the infrastructure operator (private or public) will offer wholesale access to the subsidised NGN backhaul network to interested operators in an open, transparent and non-discriminatory manner, respecting the principle of technological neutrality. All operators will be able to use such wholesale access in order to serve white basic and white NGA areas in Poland. In areas identified as white NGA but basic grey or basic black, only NGA capable operators will be allowed to offer broadband services. No premises in grey or black NGA areas will be covered by the measure. In basic white areas, connections will be allowed for operators proposing either basic broadband connections or NGA connections. Such limitations will reduce any potential distortion of competition as regards the existing basic broadband services providers (where present, in basic grey or basic black areas that are otherwise NGA white), and at the same time will incentivise NGA network roll-out by contracting a capillar fibre backhaul network in the region. Coverage of basic white areas with at least basic connections will also be possible, and NGA connections in such areas will also be incentivised.
- (46) Furthermore, the Commission notes that Poland has committed that all requirements of points 78(g) and 80(a) of the 2013 Broadband Guidelines have been and will be fulfilled and, in particular that (i) full open access to the subsidised infrastructure on equal and non-discriminatory terms will be offered (ii) active access products will be offered for at least seven years; (iii) access to passive infrastructure will not be limited in time; (iv) the same access conditions will apply on the entirety of the network, including the parts where existing infrastructure has been used and that (v) access obligations will be enforced irrespective of any change in ownership, management or operation of the subsidised infrastructure. Access products for local loop unbundling or bitstream access which would require costly interventions on the subsidised infrastructure not otherwise foreseen will be offered only in case of a reasonable demand from a third-party operator, in line with point 80(a) of the Broadband Guidelines. The demand is considered reasonable if (i) the access seeker provides a coherent business plan which justifies the development of the product on the subsidised network and (ii) no comparable access product is already offered in the same geographic area by another operator at equivalent prices to those of more densely populated areas. However, vertically integrated operators will have to in any case offer full and effective unbundling as well as bitstream access, as also recommended by the Polish NRA in its opinion of 6 December 2016.
- (47) In line with point 78(h) of the Broadband Guidelines, the wholesale prices are based on average published wholesale prices for comparable services in more competitive areas, or, in the absence of such published prices, on prices specified or approved by the NRA. The benchmarking criteria have been clearly indicated in the tender documents. The contract between the public authorities and the infrastructure operator will specify rules for calculation of fees for access to the

infrastructure. Additionally, fees charged by the infrastructure operator are approved, monitored and verified by the NRA.

- (48) In line with point 78(i) of the Broadband Guidelines, the implementation of the measure is monitored on a regular basis by the implementing bodies as well as by the Polish Agency for Enterprise Development and by the NRA. The monitoring will be performed during the entire duration of the contract with the infrastructure (private or public) operator. The details of the mechanism have been described in the contract with the operator. Finally, the NRA is also competent to resolve potential dispute between the public authorities and the infrastructure operator.
- (49) As regards the clawback, the calculation of the amount to claw-back depends on the EBITDA³¹ and comprises the whole lifetime of the measure. According to the Polish authorities, the methodology allows to take into account not only the operator's revenues but also whether the costs really faced are lower than those estimated in the business plan³².
- (50) The public operator will keep separate accounting for all activities related to the implementation of the scheme. The implementing bodies will monitor all expenditure of the public operator related to the operation of the network. Revenues from the public operator activity will be used to maintain the network and ensure the durability of the project. Any surplus will be returned to the granting authorities.
- (51) Concerning the transparency requirement as defined in point 78(j) of the 2013 Broadband Guidelines, Poland has published all information relative to the notified aid measure on a dedicated central web site (https://www.polskawschodnia.2007-2013.gov.pl/wiadomosci/Strony/Decyzja_KE_dot_projektu_SSPW_24112011.aspx and <https://sudop.uokik.gov.pl/home>). Furthermore, Poland confirmed that the aid beneficiaries are obliged to provide entitled third parties with comprehensive and non-discriminatory access to information on its infrastructure deployed under the State aid measure in conformity with the abovementioned provision.
- (52) Regarding the reporting obligation, in accordance with point 78(k) of the 2013 Broadband Guidelines, Poland will submit reports to the Commission on the implementation of the measure every two years from the date the network is put in use. The specific minimum information to be reported is listed in recital (29) above. Poland will also submit annual reports, as required under Article 26 of Council Regulation (EU) 2015/1589.
- (53) In view of the characteristics of the scheme and of the safeguards applied, as already concluded by the 2011 Decision, the overall impact on competition of the measure is deemed to be positive. The now notified measure complements the original aid scheme and contributes to the achievement of the EU objectives as highlighted in the EU2020 and the DAE. The measure has been designed in such a way as to minimise the State aid involvement and potential distortion of competition. The measure addresses a market failure as it targets only white NGA

³¹ Earnings before interest, tax, depreciation and amortization - a financial indicator used also in the telecommunication industry.

³² The Polish authorities envisaging the following mechanism: if at the end of the accounting year, the EBITDA of the infrastructure operator exceeds the reference EBITDA (based on average EBITD. As for the companies from the telecommunications listed on the Warsaw Stock Exchange), part of the EBITDA in excess of the threshold difference must be clawed back – the surplus will be divided between a given Voivodship and the Infrastructure Operator pro rata to the level of State aid.

areas, where download speeds above 30 Mbps are currently not available and where there are no plans by private investors to roll out infrastructure to support them in the near future.

- (54) Furthermore, as stated in recital (35) above, the targeted areas for the deployment of the subsidised NGN network were checked under the original scheme to ensure that crowding-out of private investment is avoided. As concerns access areas, a continuously updated mapping and public consultations exercise is ongoing, as described in recitals (14) and following above. The results of the recent mapping and the public consultation exercises during which the planned modifications to the original scheme were discussed demonstrate that the measure allows actions which would not be offered by private investments alone and therefore the measure has an incentive effect. The scheme allows several operators to use the subsidised infrastructure and to compete. The subsidised infrastructure creates broadband service availability. The creation of network capacity is expected to stimulate market entry and the provision of services. The Commission considers that the approved aid scheme aims to offset a geographical and commercial handicap of Eastern Poland and that the planned modifications strengthen this effect. Therefore, the measure is objectively justified to address the lack of availability of high speed broadband services in the target areas.
- (55) The Polish authorities have explained that the essential problem in ensuring broadband coverage in Eastern Poland has been the lack of private investments into the necessary infrastructure, as described in section VI of the 2011 Decision. This lack of supply of NGN broadband networks could not be solved by measures involving demand stimulation or regulatory interventions and the public investment in backhaul network under the original measure was necessary. With the notified project the Polish authorities intend to adjust the measure to the current situation on the market by better identifying access areas, as explained in recitals (14-15) above. This in turn will allow the use of the subsidised network to create incentives for investment in last mile segments, as presented in recital (54) above. Therefore, the Commission considers that the scheme is an appropriate instrument to achieve the desired results.
- (56) Finally, with respect to the increase in budget described in recital (13) above, the Commission notes that the Polish authorities have already started disbursing money to cover the costs of network functioning, maintenance and management in the five voivodships. This constitutes new aid which was not covered by the 2011 Commission Decision and which was therefore granted in breach of Article 108(3) of the Treaty on the Functioning of the European Union. However, the Commission has decided, on the basis of the foregoing assessment, 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.
- (57) In view of the foregoing, the Commission sees no reason to depart from its previous positive compatibility assessment in SA.33438, SA.33440, SA.33441, SA.33439, SA.30851. Therefore, the Commission concludes that the modifications notified by Poland meet the compatibility criteria set out in the Broadband Guidelines and the whole measure has been designed in a way that does not distort competition or adversely affect trading conditions to an extent contrary to the common interest.

5. CONCLUSION

- (58) The Commission regrets that the Polish authorities have already granted new aid, which was not covered by the 2011 Commission Decision, in breach of Article 108(3) of the Treaty on the Functioning of the European Union.
- (59) However, the Commission has decided, on the basis of the foregoing assessment not to raise objections to the aid on the grounds that it is compatible with the internal market pursuant to Article 107 (3)(c) on the Treaty on the Functioning of the European Union.
- (60) The Commission would remind Poland to inform it pursuant to Article 108(3) TFUE of all plans to amend/extend this 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/competition/elojade/isef/index.cfm>.

Your request should be sent electronically to the following address:

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Yours faithfully
For the Commission

Margrethe VESTAGER
Member of the Commission