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**Subject: State Aid SA.38348 – Germany
NGA Germany**

Sir,

I. SUMMARY

- (1) I am pleased to inform you that the European Commission has assessed the measure "Scheme of the Federal Government in support of the expansion of comprehensive next generation broadband access (NGA)", as laid down in the "Rahmenregelung der Bundesregierung zur Unterstützung des Aufbaus einer flächendeckenden Next Generation Access (NGA)-Breitbandversorgung" (hereafter: "the measure") and decided not to raise objections as the State aid contained therein is compatible with Article 107(3)c of the TFEU.

II. PROCEDURE

- (2) After pre-notification discussions, Germany notified the measure to the Commission on 18 February 2014 pursuant to Article 108 (3) of the TFEU. The German authorities replied to the Commission's request for information of April 16 2014 by letter registered on May 13 2015 and there have been numerous informal information exchanges and coordination meetings in course of 2014.

III. CONTEXT

- (3) In line with "Digital Agenda for Europe" and in frames of the German Federal Broadband Strategy, Germany aims at improving broadband supply throughout the country wherever private investment has failed to provide it. The aim is to

Herrn Dr. Frank-Walter STEINMEIER
Bundesminister des Auswärtigen
Werderscher Markt 1
D - 10117 Berlin

provide Germany with full NGA coverage while minimising the necessary State aid contribution.

IV. DESCRIPTION OF THE MEASURE

- (4) **Objective:** Purpose of the measure is to promote the development of NGA broadband networks with fibre or equivalent backhaul and access networks close enough to the subscribers in order to provide reliable high speed internet services and thus support a variety of modern digital and interoperable applications including IP based services. Provided download speeds shall preferably be 50 Mbit/s, but at least 30 Mbit/s, while upload capacity needs to be at least the doubled compared to basic broadband.
- (5) **The measure** is a federal State aid scheme for NGA deployment encompassing a multitude of different aid instruments on municipal level. These measures are aligned with the Federal Broadband Strategy and coordinated by the Federal Ministry of Transport and Digital Infrastructure and include:
- (a) Funding gap financing for the construction and operation (with or without aid for operating costs) of an NGA network by a private operator in "NGA-white areas";
 - (b) Financing or support for the construction or use of passive networks (civil engineering works, ducts with or without cabling, and also other necessary infrastructure elements such as splitters, cabinets and network termination equipment) owned by public or private bodies that will subsequently be operated by private entities in "NGA-white" areas;
 - (c) Support for auxiliary measures (civil engineering works, ducts with or without cabling, and also other necessary infrastructure element such as splitters, cabinets and network termination equipment) that feed into the future construction and operation of an NGA-network in "NGA-white areas".

Aid instruments can also be combined.

- (6) Only those measures shall be supported that entail significant new investment into the network while bringing about significant improvement in the supply NGA ("step change"). Such step change can be achieved through different technological solutions or a combination thereof, notably by deploying FTTC¹ alone or by deploying FTTC in combination with vectoring.²
- (7) **Duration:** The measure should enter into force on approval by the European Commission and remain in force until 31.12.2021 at latest.
- (8) **Budget and financing instruments:** Financing instruments can take a variety of forms, including non-refundable subsidies, reduced interest rate loans, guarantees,

¹ Fiber To The Cabinet

² The notified measure does not foresee the mere upgrade of active components of the network (e.g. vectoring alone), which, as indicated in paragraph 51 of the Broadband Guidelines, do not normally ensure a "step change" and are not therefore eligible for State aid..

participations or physically putting at disposal civil or passive infrastructure. A combination of these is also possible.

- (9) ***Aid amount and intensity:*** The measure covers the funding gap over seven years for construction and/or operation of a network.
- (10) ***Beneficiaries:*** Depending on the type of the intervention, private operators and service providers on the publicly established networks, private network owners or infrastructure providers not operating the network themselves can all be beneficiaries.
- (11) ***Target areas:*** Support can be granted in any "NGA-white" area where private investment into NGA is not planned over the coming three years. The target area must benefit from near complete coverage (95%) with reliable connections of at least 30 Mbit/s. Support measures shall demand however 50 Mbit/s download speeds for at least 75% of subscribers in the target area. As a general rule, download speeds have to be at least doubled by the intervention and upload speeds need to increase at least by the same proportion as download speeds. The individual aid measures can require higher standards.
- (12) ***Public consultation:*** The granting authority must conduct a public consultation to identify if there is private interest in developing NGA in the target area over the coming three years. The consultation must be published on the central website www.breitbandausschreibungen.de. It must contain a description of the intended measure, the target area and the current service levels in the target area. Operators active in the target area must be contacted individually and asked to provide detailed contribution on the available services they offer (up- and download speeds) and their intentions to cover the target area or part of it with NGA services over the next three years.
- (13) The consultation must be open for at least 4 weeks and results will be published on www.breitbandausschreibungen.de. In case no private interest was manifest, the tendering process for the public project must begin within 12 months.
- (14) So that the public measure does not get held up by unimplemented private deployment plans, the granting authority may require specific commitments from the operator declaring interest in developing NGA; including contractual agreements, milestones to be achieved and reporting on progress. Overall, a significant part of the target areas shall be covered within three years. Shall a milestone not be achieved by the private operator, the public project can step in place.
- (15) In addition to the formal public consultation, the granting authority is advised to first launch an informal call for expression of interest in order to delineate the public intervention that will be necessary. Responding potential bidders can thus describe in their indicative offers the kind and size and location of public intervention they see necessary.
- (16) ***Mapping and coverage analysis:*** The public body granting the aid must, in frames of the public consultation, publish on www.breitbandausschreibungen.de the currently available supply of broadband services.

- (17) All participants to the public consultation must declare their available infrastructures to the granting authority for use in the planning of the intervention and for use in the tendering process. Participants to the public consultation are also required to communicate their infrastructures to the Regulatory Authority "Bundesnetzagentur" for inclusion into the "Infrastrukturatlas".
- (18) Providers with significant market power subject to regulation on wholesale access services are required to provide timely access to relevant information on demand of the granting authority for the sake of planning of a measure.
- (19) All participants to the tendering process must provide relevant information about their available infrastructures in the target area to other bidders in a timely manner, in a way that they can include these into their respective bids.
- (20) On basis of the gathered information, target areas must be defined the way that they cover the "NGA-white" areas without causing overlaps of infrastructure unless, under exceptional circumstances it cannot be avoided in order to ensure the coverage of the targeted "NGA-white" areas.
- (21) **Open tender:** The construction and operation of the passive infrastructure must be tendered in an open and transparent process that is in line with the EU public procurement principles and German Budgetary and Procurement Law. In frames of the tendering process the most economical offer for the execution of the project shall be selected on the basis of pre-defined objective criteria.
- (22) The call for tender and its results must be published on the central online portal www.breitbandausschreibungen.de. Award criteria and their weighting in the evaluation must also be published. Minimum requirements to submit offers must encompass the:
 - (a) Reliability and quality of the planned solution (e.g. longevity, upgradeability, also number of connections);
 - (b) Amount payable for the use of the passive infrastructure;
 - (c) Obligation of open and non-discriminatory wholesale access; its implementation modalities and prices if available;
 - (d) Description of additional needed investment (location, nature and size), – and their costs.
- (23) Technology-neutrality must be respected.
- (24) All beneficiaries (be infrastructure providers only or network operators) must commit in their offers to providing open and non-discriminatory access to the network.
- (25) In case ducts are laid, they need to be large enough to host several network providers and to cater for point to point architectures. Existing infrastructures must be included into the planning. Subscribers must be free to choose their network equipment between computer and broadband termination point (e.g. set top box) and shall not be obliged to employ company specific equipment.

- (26) Shall less than three candidates participate in the tender, costs or funding gap may be verified by an external independent expert audit. In exceptional cases this external audit can be performed by the regional Broadband Competence Centres. The independence of the auditor must be demonstrated on request of the granting authority.
- (27) In case the subsidy is required to close a funding gap, which is a one-off lump sum payment, the tender must provide the following specifications additionally to the aforementioned:
- (a) Specifications of the NGA infrastructure to be built
 - (b) Costs calculated for the construction and operation including financing costs
 - (c) Expected customer; acquisition and revenue plan
 - (d) Expected revenues from providing wholesale access
 - (e) Description of the offered products
- (28) The granting authority selects the most economic offer (best value for money) based on objective award criteria.
- (29) ***Obligations imposed on the network owner and operator:*** The selected network operator must provide open and non-discriminatory wholesale access to the subsidized infrastructure; including access to ducts, dark fibre, bitstream access³, unbundled local loop and street cabinets⁴.
- (30) A subsidy for the construction and operation of an infrastructure where physical unbundling is technically or economically not feasible (for instance due to the vectoring technology) is conditional to the availability of a virtual unbundled local access product ("VULA") that is functionally equivalent to physical unbundling based on the relevant Commission criteria⁵.
- (31) This VULA product at the time of this decision is not defined yet and therefore will have to be examined by the Commission at a later stage. In such a situation, the German authorities committed not to allow the actual implementation with public funds of technological solutions not supporting physical unbundling funds before the approval of VULA by the Commission.⁶ For this purpose, Germany

³ Except in case of the subsidization of a passive infrastructure only.

⁴ See access products specified in Annex II of the Broadband Guidelines.

⁵ These characteristics are described in the Explanatory Note of the Commission (SWD(2014) 298) Accompanying the document Commission Recommendation on relevant product and service markets within the electronic communications sector susceptible to ex ante regulation in accordance with Directive 2002/21/EC of the European Parliament and of the Council on a common regulatory framework for electronic communications networks and services. Point 4.2.2.1 describes when a virtual access product can be considered as functionally equivalent to physical access.

⁶ However, tendering and award of projects may precede the Commission decision on VULA under the condition that the implementation of the technological solutions not supporting physical unbundling (e.g. vectoring) only occurs once the Commission has approved VULA as functionally equivalent to physical unbundling.

will specifically notify VULA to the Commission (the auxiliary "VULA Notification"). This notification will contain the detailed description and pricing of this virtual unbundling product (or products) and the demonstration of its similar characteristics with physical unbundling. The "VULA Notification" will also include the reasoned opinion of the "Bundesnetzagentur" concerning the virtual unbundling product or products and the results of a public consultation among network operators and service providers.

- (32) Moreover, the German authorities committed to notify to the Commission together with the auxiliary "VULA Notification" an evaluation plan according to the requirements of the European Commission on evaluation⁷ with special attention on the competitive impact of vectoring deployment.
- (33) The scheme shall be subject to a time limitation of 4 years after the approval of VULA by the Commission with the evaluation report to be presented by the end of the fourth year at latest and before the notification of the follow up scheme.
- (34) As soon as physical unbundling becomes technically and economically feasible – provided that technological products necessary for unbundling are commercially available and standardised - the network operator will offer physical unbundling. In areas with low population density, where there are limited broadband services, or for small local companies, the obligation to offer physical unbundling will only apply in case of reasonable demand⁸.
- (35) The owner of a subsidized infrastructure must provide accurate information to all interested network operators about the physical infrastructure – e.g. ducts, street cabinets, fibre, within four weeks from the access request.
- (36) Wholesale access shall be ensured for a period of seven years while access to the passive infrastructure shall be unlimited in time. In case the network operator also provides retail services wholesale access to competitors needs to be granted at least 6 months before starting the provision of retail services in order to ensure a level playing field for competition.
- (37) Wholesale access conditions must not vary within the subsidized network, whereas conditions of existing wholesale access conditions in the target area shall not be affected through the measure. A change in ownership of a subsidized infrastructure cannot affect the conditions for wholesale access.
- (38) Wholesale access prices need to be oriented along the regulated and approved prices of the "Bundesnetzagentur" or be benchmarked on the basis of comparable wholesale access products in competition-intensive regions. The draft agreement between the municipality and the private network operator must be submitted to the "Bundesnetzagentur" for approval. Unless the "Bundesnetzagentur" raised objections within 8 weeks, the agreement can be signed and must subsequently be communicated to the Federal Broadband Office and be published on www.breitbandausschreibungen.de.

⁷ http://ec.europa.eu/competition/state_aid/modernisation/state_aid_evaluation_methodology_en.pdf

⁸ See point 80(a) of the Broadband Guidelines on reasonable demand.

- (39) In the case of demand for access products where no price had been determined, the network operator and the access seeker should come to an agreement. In case no such an agreement can be reached, the public authority will set the access conditions upon approval by the "Bundesnetzagentur", which react within four weeks.
- (40) Wholesale access obligations also apply for the exceptional case, where no interested private sector investor is ready to construct the passive network and the public authority is forced to do so.
- (41) In line with the Directive for Cost Reduction for the Construction of High Speed Communications Networks⁹, the established infrastructure must be future proof in a way to allow competitors to connect their active or passive network elements to the subsidized infrastructure.
- (42) **Transparency, Monitoring, and Control:** All projects benefiting from State funding under the measure must be published on www.breitbandausschreibungen.de. Projects have to report yearly, until February 28, to the Broadband Office and fill in the form in the Online Monitoring System on www.breitbandausschreibungen.de. The infrastructure constructed must be documented by the granting authority and communicated to the "Bundesnetzagentur" that updates the "Infrastrukturatlas". The created infrastructure and newly developed aread must also be published on www.breitbandausschreibungen.de and must be included into the "Breitbandatlas" as well. Every project under the measure must establish and keep regular contact with the approving authority, which also controls the compliance with State aid regulation.
- (43) Municipal projects will be coordinated by the Broadband Competence Centres. Every measure under this scheme - together with its responsible programme coordinator - must be reported to the Federal Ministry of Transport and Digital Infrastructure that supervises the compliance with this regulation.
- (44) Every two years, key information (e.g. starting date of operation of the infrastructure, wholesale access products, number of access seekers, service providers on the network potential subscriber numbers and current exploitation levels.) will be communicated to the European Commission.
- (45) For projects exceeding 10 million EUR a clawback mechanism will be put in place; if after a seven year period actual profits exceed expected profits by more than 30% with no reduction in customer prices, the granting authority may introduce a recovery demand.
- (46) **Evaluation:** At latest four years after the approval of VULA by the Commission and before the notification of the follow up scheme, an evaluation report shall be presented to the Commission. It shall be prepared on the basis of the evaluation plan approved by the Commission defining its goals, scope, modalities (methodology, duration, selection of the evaluator, etc.) and allow for targeted

⁹ DIRECTIVE 2014/61/EU OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 15 May 2014 on measures to reduce the cost of deploying high-speed electronic communications networks

data collection from the start. This evaluation plan will be part of the auxiliary "VULA Notification".

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

- (47) According to Article 107 (1) TFEU, “*any aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods shall, in so far as it affects trade between Member States, be incompatible with the internal market*”. It follows that in order for a support measure to be qualified as State aid, it has to be granted out of State resources, confer a selective economic advantage to undertakings, and it has to be capable to distort competition and affect trade between Member States.
- (48) As described in recital (5) and (8) the measure encompasses financing initiatives by the German authorities in regions and municipalities; public funds under the control of these authorities allocated to the beneficiaries with an element of discretion. Hence, State resources are involved and the measure is imputable to the State.
- (49) The scheme results in a selective economic advantage for both the electronic network operators selected in the tendering procedure and for third parties who gain wholesale access to the subsidised network and can consequently offer their services on conditions not otherwise available on the market.
- (50) Finally, the measure is liable to distort competition. At network operator level, State support may deter other operators in the region from setting up or developing their own networks under commercial conditions. The State support may also encourage local undertakings to take advantage of services offered in the subsidised network rather than more expensive market solutions. In so far as the intervention is (at least potentially) liable to affect providers of electronic communications services from other Member States, the measure has an effect on trade. 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. Therefore this support is also likely to affect trade between Member States.
- (51) The Commission therefore concludes that the notified aid measure constitutes State aid within the meaning of Article 107(1) TFEU, as moreover confirmed by the notifying Member State in the notification.

VI. COMPATIBILITY ASSESSMENT

- (52) The Commission has assessed the compatibility of the scheme according to Article 107(3)(c) of the TFEU and in the light of the *EU Guidelines for the application of State aid rules in relation to rapid deployment of broadband*

*networks*¹⁰ (the "Broadband Guidelines") which contain a detailed interpretation of Article 107(3)(c) of the TFEU for this kind of State aid.

- (53) As explained in paragraph 47 and following of the Broadband Guidelines, for aid to be found compatible with the Broadband Guidelines (and thus with Article 107(3) (c) of the TFEU), the following conditions must be fulfilled:
1. The aid must contribute to the achievement of objectives of common interest
 2. Absence of market delivery due to market failures or important inequalities
 3. The aid must be appropriate as a policy instrument
 4. The aid must have an incentive effect
 5. The aid is limited to the minimum necessary
 6. Negative effects must be limited
 7. The aid measure must be transparent
- (54) If these conditions are fulfilled, the Commission balances the positive effects of the aid measure in reaching the objective of common interest against the potential negative effects.

The aid contributes to the achievement of objectives of common interest

- (55) In its Europe 2020 strategy¹¹ the Commission defined the Flagship Initiative "A Digital Agenda for Europe", which has the "aim to deliver sustainable economic and social benefits from a Digital Single Market based on fast and ultra fast internet and interoperable applications, with broadband access for all by 2013, access for all to much higher internet speeds (30 Mbps or above) by 2020, and 50% or more of European households subscribing to internet connections above 100 Mbps." In pursuing this aim, "at EU level, the Commission will work ...to facilitate the use of the EU's structural funds in pursuit of this agenda", and "at national level, Member States will need ... to draw up operational high speed internet strategies, and target public funding, including structural funds, on areas not fully served by private investments." Key Action 8 of the Digital Agenda calls Member States "to use public financing in line with EU competition and State aid rules" in order to meet the coverage, speed and take-up targets.
- (56) By promoting the development of NGA networks in "NGA white" areas with download speeds of at least 30 Mbit/s for 95% of the population and 50 Mbit/s for 75% of the population with upload speeds increasing at least with the same proportion (see recitals (4) and (11)) the measure will contribute greatly to achieve the objectives of the Digital Agenda and therefore contribute to the achievement of an objective of common interest.

Absence of market delivery due to market failures or important inequalities

¹⁰ OJ C 25, 26.1.2013, p.1.

¹¹ EUROPE 2020 - A strategy for smart, sustainable and inclusive growth, COM(2010) 2020, 3.3.2010, page 12.

- (57) As explained in recital (11), the measure targets only so called “NGA white” areas, where very high speed broadband is currently not available and where it is established, by way of detailed market consultation (see recital (12), that there are no plans by private investors to roll out such infrastructure in the next three years.

The aid is appropriate as policy instrument

- (58) Upgrading broadband in "NGA white" areas requires significant upfront investments that are amortised over a long period of time. Alternative instruments alone, such as demand side measures in the form of grants, vouchers or tax incentives to end users, do not provide the critical mass to remedy the lack of supply (namely non-existence of the infrastructure). Ex ante regulation is serving the effectiveness of the scheme but is in itself not sufficient to entail large scale network deployment.
- (59) The present federal scheme is the continuation of a previous previously approved scheme. In line with points 40 and 41 of the Broadband Guidelines, the federal scheme allows putting coherent requirements on all local initiatives; coordination and transparency are designed from the start into the measure. This implies the systematic involvement of the central platform www.breitbandausschreibungen.de, the Federal Broadband Office and the "Bundesnetzagentur". All municipal projects are coordinated by the regional Broadband Competence Centres. (See recitals (38), (39), (42) and (43).

The aid has an incentive effect

- (60) As set out in paragraph 45 of the Broadband Guidelines, regarding the incentive effect of the measure, it needs to be examined whether the broadband network investment concerned would not be undertaken within the same timeframe without any State aid. The scheme ensures that aid can only be provided if it is established that in the targeted areas no comparable investment would take place without public funding within three years (see public consultation in recital (12)). Hence the investment would not be made within the same timeframe without the aid, which thus produces a change in the investment decisions of the operators and thus has an incentive effect.

The aid is limited to the minimum necessary

- (61) Germany has designed the measure in such a way as to minimise the State aid involved and potential distortions of competition arising from the measure. In this respect, the Commission notes the following positive elements in the design of the measure (paragraph 78 of the Broadband Guidelines):
- (a) *Detailed mapping and coverage analysis, public consultation:* as described in recital (15), the granting authority is invited to launch an informal consultation to better delineate the target areas and the kind and size of public intervention needed. Public bodies must publish, in frames of the public consultation, existing broadband infrastructures on www.breitbandausschreibungen.de. Participants to the public consultation must also disclose their available infrastructures and include them into the "Infrastrukturatlas". This manner it will be ensured that public funds will be used only in "NGA white" areas and no overlapping infrastructures are created. The public consultation must also ensure that only those areas are developed where no interest for commercial NGA deployment is

present. This will limit the possibility of crowding out private investments and distorting competition vis-à-vis existing operators to a minimum (see recitals (12) (17) and (20)).

- (b) *Competitive selection process*: as described in recitals (21) to (28), the construction and the operation of the network are selected by way of open, transparent and non-discriminatory tender procedures in full compliance with German and European public procurement rules. All notices regarding selection procedures under the measure are moreover published on a central online portal, www.breitbandausschreibungen.de, thus allowing all potential bidders to be easily aware of all on-going tender procedures.
- (c) *Most economically advantageous offer*: On the basis of predefined and published objective criteria, the network operator offering the best value for money is in principle to be selected (see recital (28)).
- (d) *Technological neutrality*: The tender documents must be technology and provider neutral, leaving it to commercial operators to propose the technological solutions they find most effective and efficient (see recital (23)).
- (e) *Use of existing infrastructure*: as explained in recitals(16), (19) and(20), the tender calls for bidders to have recourse to existing infrastructure. It requires participants to publish information on their infrastructure, which will then be potentially used by any other bidder for the project. Unnecessary and wasteful duplication of resources should in this way be avoided and the funding gap (and hence the funding) should thus be minimised.
- (f) *Wholesale access*: in line with points 78(g) and 80(a) of the Broadband Guidelines, the selected operator must ensure full and effective unbundling and provide full open access to the subsidised network (including but not limited to access to ducts, dark fibre, street cabinets, and bit-stream and unbundled access to fibre) on fair and non-discriminatory terms for at least seven years. As described in recitals (30)-(32), in case physical unbundled access is technically or economically not feasible, it can be substituted by a virtual access product (VULA) to be notified to and approved by the Commission at a later stage. Until that point, only those technologies can be implemented that allow for full physical unbundling. The access must be granted as early as possible and at the latest 6 months before launch of the services concerned in order to ensure level playing field for competitors (see point 78(g) footnote 108 of the Broadband Guidelines). Furthermore, full access, without limitation in time, is always to be guaranteed to any new passive infrastructure elements, such as ducts and poles (see recitals (29) and (36) – (39)).
- (g) *Wholesale access pricing*: As described in point 78(h) of the Broadband Guidelines, wholesale access prices are to be based on the price set or approved by the "Bundesnetzagentur" or benchmarked against average wholesale prices of comparable access services in other, more competitive, parts of the country (benchmarking). In case of disputes between the network operator and access seekers and where the price is not regulated, the "Bundesnetzagentur" must be consulted with the objective to keep these prices in line with the conditions set out in paragraph 78(h) of the Broadband Guidelines (see recitals (38) and (39)).

(h) *Transparency, monitoring and clawback:* In line with point 78(j) of the broadband guidelines, all relevant information regarding any aid granted will be published on a central online portal www.breitbandausschreibungen.de. This also where projects have to report to and publish yearly milestones. The Broadband Competence Centres endure regular monitoring and the Federal Broadband Office supervises State aid compliance. Where the funding of a project exceeds EUR 10 million, a claw-back mechanism is put in place for (see recital (45)). As foreseen in point 78(k) of the Broadband Guidelines, every two years, key information is reported to the European Commission.

The aid has limited negative effects

- (62) Given the design of the measure and its compliance with the conditions of Article 78 of the Broadband Guidelines (see recital (62) above), it is unlikely to have a crowding out effect on private investments.
- (63) In particular, the aid is confined to "NGA white areas", where no operator is willing to invest in NGA infrastructure without State aid in the next three years. Also, where a broadband network already exists, the measure requires that a "step change" be achieved; the public intervention must result in significantly better broadband capacity and thus service availability and the selected bidder must carry out significant new investments in the existing broadband networks (see recitals (4) and (6)). These conditions also ensure that the public intervention does not crowd out comparable private investments.
- (64) Furthermore, the operator is to be selected by open tender; full open access is to be granted to the subsidized infrastructure and there are several mechanisms to prevent wholesale access prices from being excessive.
- (65) Therefore, negative effects of the measure, if any, are expected to be limited.

Transparency and evaluation

- (66) As explained in recitals (42), (43) and (44) and (62)(h) the measure ensures that the interested public and the Commission should have easy access to all relevant acts and pertinent information about the aid awarded thereunder.
- (67) As stipulated by point 53 of the Broadband Guidelines, a national framework scheme, a scheme with large budget and a scheme containing novel characteristics (e.g. in terms of technology) should be subject to evaluation. Therefore, an evaluation shall be carried out that includes verifying if the set objectives were achieved, if initial assumptions were realised, and assessing the overall effectiveness of the State aid measure in light of its general and specific objectives and the measure's impact on competition. The evaluation shall have a special focus on the impact of the novel technological characteristics. This evaluation is a means to further increase transparency and accountability. Results will feed into the design of the follow up scheme.
- (68) Point 53 of the Broadband Guidelines also state that such aid schemes may be subject to a time limitation of normally 4 years or less. Considering the novel technological characteristics to be deployed within the scheme, the measure shall be limited to 4 years from the time the novel technological elements (e.g. vectoring) are introduced, more specifically from the time the Commission

approves the VULA. 4 years of experience with the new technological environment (e.g. using vectoring with VULA) will also allow the evaluation to be based on sufficient empirical evidence.

- (69) The timeline of the evaluation, the evaluation questions, methodology and the data gathering requirements are to be set out upfront, in an evaluation plan prepared according to the Commission guidance as described in recital (32). This evaluation plan will be subject to approval by the European Commission as part of the auxiliary "VULA Notification".

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

- (70) The Commission concludes that the notified measure will offset a geographical and commercial handicap and is objectively justified to address the lack of availability of high speed broadband services in the targeted areas.
- (71) In view of the characteristics of the project and of the safeguards applied, the overall impact on competition is deemed to be positive. The provision of NGA services by creating a high quality and capacity infrastructure has a pro-competitive impact, as it allows several network operators to use the subsidized infrastructure and compete on services to the end user.
- (72) Moreover, the notified scheme foresees the grant of aid only for measures entailing significant new investment into the network while bringing about significant improvement in the supply NGA ("step change"). Such step change can be achieved through different technological solutions or a combination thereof, notably by deploying FTTC alone or by deploying FTTC in combination with vectoring. On the contrary, the notified scheme does not foresee the grant of aid for marginal investments related merely to the upgrade of active components of the network (e.g. vectoring alone), which, as indicated in paragraph 51 and footnote 64 of the Broadband Guidelines, do not normally ensure a "step change" and are not therefore eligible for State aid.¹²
- (73) The increase in network capacity brought by the notified measure is expected to stimulate market entry by service providers and the provision of a larger variety of services. Access of competing operators is ensured by requiring open access to the subsidised network on equal and non-discriminatory terms for at least seven years. The risk of crowding out private investments and the negative effects of the measure are expected to be limited (see recitals(62)-(65)). The measure does not entail any negative effects on trade, there does not appear to be any significant negative spill-over for other Member States. Accordingly, the measure is designed in a way that does not distort competition or adversely affect trading conditions to an extent contrary to the common interest measure and is in line with the objectives of Article 107(3)(c) TFEU.

Conclusion

- (74) The Commission concludes that the measure notified by Germany, as modified by the commitments referred to above, meets the compatibility criteria set out in the

¹² The notified measure does not foresee the mere upgrade of active components of the network (e.g. vectoring alone), which, as indicated in paragraph 51 of the Broadband Guidelines, do not normally ensure a "step change" and are not therefore eligible for State aid.

Broadband Guidelines and is thus compatible with Article 107(3)(c) TFEU. In particular, the Commission underlines that, while the notified measure is authorised in principle in its entirety, the German authorities committed not to allow the actual implementation of technological solutions not supporting physical unbundling (e.g. vectoring) before the approval by the Commission of VULA with equivalent characteristics to physical unbundling.

VII. DECISION

- (75) The Commission has accordingly decided not to raise objections to the aid on the grounds that it is compatible with the internal market pursuant to Article 107 (3)(c) of the Treaty on the Functioning of the European Union.
- (76) The Commission would remind Germany 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 all plans to amend/extend this measure.
- (77) 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>.
- (78) Your request should be sent electronically to the following address:

European Commission,
Directorate-General Competition
State Aid Greffe
B-1049 Brussels
Stateaidgreffe@ec.europa.eu

Yours faithfully
For the Commission

Margrethe VESTAGER
Member of the Commission