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Subject: **State aid SA.37558 (2013/N) – Romania**
 Ro-NET project

Sir,

I. SUMMARY

- (1) I am pleased to be able to inform you that the European Commission has assessed the measure "*Ro-NET project*" and decided not to raise objections because the measure is compatible with the internal market, pursuant to Article 107(3)(c) of the Treaty on the Functioning of the European Union (TFEU).

II. PROCEDURE

- (2) Following pre-notification contacts, by letter of 23 October 2013 the Romanian authorities notified, pursuant to Article 108 (3) of the TFEU the above mentioned measure.

III. CONTEXT

- (3) The Europe 2020 Strategy ("EU2020") and the Digital Agenda for Europe have underlined the importance of broadband deployment to promote competitiveness, social inclusion and employment in the EU and defined the aim to bring basic broadband access to all Europeans by 2013 and to ensure that, by 2020, (i) all Europeans have access to much

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higher internet speeds of above 30 Mbps and (ii) 50% or more of European households subscribe to internet connections above 100 Mbps.

- (4) In this context, in order to bring broadband access for all, the aim of the Ro-NET project is to support the deployment of a backhaul network in white areas of Romania where broadband is currently not available and where there are no plans for broadband rollout by market players over the next three years. To ensure the gradual achievement of the ambitious targets set in the EU2020 Strategy, the backhaul network built under the Ro-NET project should allow over time the deployment and take-up of next generation access networks (NGA).

III.1. Target areas

- (5) According to the data sent by the Romanian authorities, 8.989.000 inhabitants, meaning 47.2% of the population, live in rural areas. The very low population density in rural areas makes it difficult to attract investments in the development of the electronic communications networks, which are usually more profitable in urban areas. Although the economic context of the country is generally improving, large discrepancies continue to exist between urban and rural areas, as a consequence of lower GDP and GDP growth rates. Lower level of income of the potential clients of telecommunications services in the rural areas is another factor discouraging investments in the development of broadband networks in the concerned areas.
- (6) The variety of landscape and soil is not favourable to civil works (digging trenches, erecting towers), as more complex analysis and design as well as additional technical equipment/machinery are needed.
- (7) The Romanian authorities identified 2.287 rural localities where there is no backhaul and no local loop available now or projected in the next three years, as reflected by the current investment intentions of the operators who responded to the public consultation.

Shortage of infrastructures from commercial operators to offer broadband services

- (8) The development of broadband communications in rural areas in Romania is hampered by the lack of infrastructure to deliver the services required by the public authorities and by the citizens.
- (9) The reasons for the significant broadband infrastructural gap separating Romania from the rest of Europe, principally in the rural regions, relate, in general, to the complex topography of the country, economic factors (low GDP/capita, low ARPU etc.) and low PC penetration rate and, in particular, to the rural areas' reduced attractiveness for investment, as a consequence of the low population density, low income per capita and difficult socio-economic context of these areas. These features turn rural regions into high-risk areas from an investor's point of view and lead to a situation where broadband is inaccessible to a larger share of the population as compared to most of the EU Member States
- (10) In 2010, Romania ranked the fourth lowest as far as rural fixed broadband coverage is concerned, with 60% of the rural population covered by fixed broadband, compared to 82.5% at the level of EU27. The most recent household coverage data provided by ANCOM¹ (at the level of 2012) show a marked gap between urban and rural areas on all

¹ *Autoritatea Nationala pentru Administrare si Reglementare in Comunicatii* (ANCOM) is the Romanian National Regulatory Authority for electronic communications.

major fixed broadband technologies: DSL (67.2% urban, 53.1% rural); VDSL (17.4% urban, 0.9% rural); FTTP (54.7% urban, 18.7% rural); cable, i.e. cable modems and DOCSIS3 (26.4% urban, 1.8% rural).

- (11) The Romanian authorities contended that there are large disparities between urban and rural areas in terms of availability and use of electronic communications networks and services, which reflect the general economic and social development gap separating these areas. Advanced broadband services and the infrastructure required for their provision are generally available in the most densely populated areas, while the areas considered by the electronic communications operators as commercially unattractive suffer from absent or inadequate infrastructure.
- (12) The lack of broadband infrastructure in Romania and in particular in the areas covered by the notified measure was highlighted further to the study performed by the Romanian authorities concerning existing infrastructure and credible investment plans. In as many as 2,287 rural localities (villages) (out of a total number of 12,487 villages existing in Romania) (i) no operator has an access (local loop) or distribution (backhaul) electronic communications network which can support the provision of broadband electronic communications services at fixed locations, with a minimum transfer speed of 1 Mbps (shared) for residential users, and 4 Mbps (shared) for business users (corresponding to broadband speeds under the current National Broadband Strategy); and (ii) no operator has documented plans to develop such infrastructure over the next three years. As a result, citizens and businesses in such areas don't enjoy adequate broadband access and services.

III.2. The rationale for rolling out a new network

- (13) According to the Romanian authorities, the main reason for the low level of accessibility of the broadband infrastructure in the rural areas, both at backhaul and last mile levels, is the lack of adequate infrastructure (as described above).
- (14) Consequently, in order to address this infrastructural gap, the Romanian authorities decided to support the roll out of a new backhaul infrastructure (consisting of 7 regional networks), which should secure meeting current and future demand for broadband access.

IV. DESCRIPTION OF THE MEASURE

- (15) **Objective:** The objective of the project is the construction of several backhaul networks for the use of operators to deliver services to citizens and businesses in areas where adequate services are not available and there are no investment plans to provide such services in the near future.
- (16) First, the project addresses the existing digital divide in the country by stimulating the rollout of broadband networks and provision of access services to end-users in areas that would be unattractive for investment in broadband networks and services in the absence of the necessary backhaul infrastructure. Taking into account the generally recognized importance of broadband networks for the local communities in attracting businesses, distance work, providing health care services and improving education and public services, the Ro-NET project is expected to reduce disparities between urban and rural regions, to increase social cohesion and to contribute to economic growth.
- (17) Second, the measure aims at promoting competition in the broadband electronic communications sector. As the project will develop an infrastructure which will become available to all operators intending to provide services to end-users in the target areas, the

project outputs will contribute directly to the promotion of competition and the development of new business opportunities in the market for electronic communications.

- (18) Ultimately, the project will contribute to the development of the information society. As a consequence of the development of broadband infrastructure in areas where it currently does not exist, it will promote access to eGovernment and Information Society services.
- (19) **Legal basis:** The measure is based on the Law no. 154/2012 regarding the regime of the electronic communications networks infrastructure and the Government Emergency Ordinance no. 111/2011 on electronic communications, approved, with amendments and completions, by Law no. 140/2012.
- (20) **Target Areas:** Following several studies and a public consultation, the Romanian authorities identified a number of areas where there is no distribution network (backhaul) and no access network (local loop) available now or in the next three years, as reflected by the current investment intentions of the operators responding to the public consultation².
- (21) In relation to the classification in white, grey and black areas set forth by the EU Guidelines for the application of State aid rules in relation to rapid deployment of broadband networks (hereinafter: "Broadband Guidelines")³, the Romanian authorities pointed out that the measure will target areas falling in the category of basic broadband "white areas" according to the definition of the Guidelines. The Romanian authorities conducted a detailed mapping and coverage analysis to identify the target areas where state intervention is necessary. In particular, the Romanian authorities identified areas in digital divide, i.e. areas where no operators offer broadband connectivity at speed capacity above 4 Mbit/s for business users (and even less, 1 Mbit/s for residential users). The authorities verified that in such areas broadband infrastructure is currently not available and there are no plans by private investors to rollout such an infrastructure in the next 3 years.
- (22) Furthermore, the decision to invest in backhaul networks was made based on sufficient local demand for last-mile connections by operators. The Romanian authorities selected a number of 783 white localities where the provision of backhaul may result in development and operation of a local loop network sustainable by economic results. Since the "eligible white areas" identified during the above mentioned procedure are scattered across Romania, for efficiency, it was decided to group these areas into 7 balanced areas (hereafter "regions")⁴ and organize a tender, divided into 7 lots (for each region) for the construction of the networks and subsequent operation for each of the resulting regions.
- (23) **Beneficiaries:** The direct beneficiaries of the aid will be the operators selected through the tender to design, build and operate the infrastructure. Indirect beneficiaries will be electronic communication operators utilising the new networks for offering retail services to end users and last mile providers connecting to the infrastructure as well as residential and business users. Whereas residential users are not subject to State aid rules, businesses in the targeted areas will therefore ultimately benefit from the improved broadband

² In March 2013, the regulatory authority for electronic communications in Romania, ANCOM, has completed a study to establish white areas in Romania in respect to the broadband services, in rural areas. The market study was carried out during December 2012 – February 2013 and aimed at identifying the localities – out of a total list of 12.487 rural localities (i.e., villages belonging to communes) – with no broadband services satisfying the parameters referred to in the National Broadband Strategy (speeds of 1 Mbps for residential users and 4 Mbps for business users) and no infrastructure (local loops and backhaul) capable to support such services. This excluded from the research territories belonging to towns vicinities (suburban areas).

³ OJ 2013 C 25/1.

⁴ The seven balanced eligible "regions" are so called for the purpose of the RO-NET Project and differ substantially from official "development regions", which are official entities.

services and coverage in comparison with what would be provided on a purely commercial basis.

- (24) **Design of the project:** Through the notified project, the Romanian authorities will support the deployment (design and construction) of 7 backhaul networks in the target areas. No aid will be granted for the operation of the networks. No access network will be supported under this project.
- (25) The infrastructure will remain in public ownership. The infrastructure operators (concessionaires) will pay a concession fee for the subsidised infrastructure and will have the right to retain revenues from managing and operating the networks.
- (26) The concession fee is set as follows:
- For the right of exploitation of the backhaul network, the concessionaire shall pay to the Romanian authorities (Ministry for Information Society) a minimum concession fee, of 18% of the investment value (calculated as the amount bid for the investment in the eligible region concerned, i.e. the value claimed for the design and build of the distribution network in question).
 - The concession fee will be payable in several instalments, as follows:
 - o 1% of the investment value, within the first 30 days of the commencement of year 5 of exploitation of the network;
 - o 2% of the investment value, within the first 30 days of the commencement of year 10 of exploitation of the network;
 - o 2% of the investment value, within the first 30 days of the commencement of year 15 of exploitation of the network; and
 - o 13% of the investment value, within the last 30 days before the end of the year 18 of exploitation of the network.
 - The bidders may offer to pay an additional amount to the minimum concession fee, called “supplementary royalty”. Such a supplementary royalty shall be paid “pro-rata” together with the first 3 installments of royalty referred to above, as follows:
 - o 20% of the amount of the supplementary royalty shall be paid within 30 days of the commencement of year 5 of exploitation of the network, together with 1% of the initial investment value;
 - o 40% of the amount of the supplementary royalty shall be paid within 30 days of the commencement of year 10 of exploitation of the network, together with 2% of the initial investment value; and
 - o 40% of the amount of the supplementary royalty shall be paid within 30 days of the commencement of year 15 of exploitation of the network, together with 2% of the investment value.
- (27) The wholesale operators will have to provide open, non-discriminatory access to all third party electronic communication operators for at least 7 years (see point (48) below).
- (28) The infrastructure will include drop/insertion points to backbone networks and local loop access points (also called local distribution points), which will allow the local loop operators the access to the backhaul network without any technological limitations (e.g. cabinet, tower, microwave link or fibre optic link, interconnection and monitoring equipment). Available connectivity will be ensured through standard Ethernet ports.
- (29) The construction of the broadband networks is scheduled for 2014 and 2015.

- (30) Each of the concessionaires will have the option to purchase the respective network and its facilities, subject to a prior Government Decision transferring those assets from public to private property of the State⁵. The sale-purchase transaction can be effected either at the end of the contractual period (i.e. after year 18 of exploitation) or before this date, but no sooner than the end of year 10 of exploitation. In the latter case (sale-purchase occurring in years 10-18) it is required that the following conditions be concomitantly met:
- the payment by the concessionaire to the State of the remaining (unpaid) concession fee, in amount of at least 15% of the initial investment value. In case the purchase takes place after year 15 of exploitation, when supposedly the 2% instalment of the concession fee was paid (see point (26) above), then the early payment of the remaining (unpaid) concession fee will be of 13% of the initial investment value.
 - the payment by the concessionaire to the State of an amount equal to the remaining non-depreciated book-keeping value (at the date of purchase), as compared to the initial book-keeping value of the assets, as recorded for the initial investment.
- (31) If the concessionaire makes additional investments using its own financial resources during the exploitation period of the concession agreement, these will be excluded from the evaluation of the non-depreciated value of assets, should the sale-purchase transaction be requested before year 18 of exploitation.
- (32) The conditions associated to the sale-purchase transaction, as described above, are included in the Technical Specifications of the tender.
- (33) **Budget and funding instruments:** The public support takes the form of grants. The overall amount of the measure is approximately EUR 84 million. A significant part (approximately 82%) of the budget will be funded from European Regional Development Fund (ERDF) (EUR 68.5 million) and the remainder from the State budget (EUR 15.5 million).
- (34) **Duration:** The start of the measure is subject to the present Commission decision concerning the compliance with the State aid rules and to the Commission decision regarding the financial contribution from the ERDF. Aid can be granted under the current measure until at the latest 31 December 2015.
- (35) **Aid amount and intensity:** The aid amounts benefitting to the infrastructure operators to be chosen will ultimately depend on the outcome of the tender procedure. However, the overall budget is estimated at approximately EUR 84 million. The aid intensity will be 100%.
- (36) **Mapping and coverage analysis:** The Romanian authorities carried out a mapping exercise as part of a broader Feasibility Study. On the basis of an ANCOM study carried out during December 2012 – February 2013, a preliminary list of the localities deprived of broadband availability was established and further refined during March – April 2013. Thus, an initial list of 6.155 localities without backhaul facilities for provision of broadband electronic communications services at fixed locations at the level required by the National Broadband Strategy⁶ was identified. Following a second filter, a number of 2.287 were considered as white areas under the Broadband Guidelines definitions. As a third step, the Romanian authorities selected the white areas (localities) where it was deemed that the provision of backhaul may result in development and operation of a local loop network sustainable by economic results (sufficient local demand for last-mile connections to cover the investments). It was found that the net present value (NPV) of the

⁵ Such Government Decision transferring those assets from public to private property of the State would be adopted once the networks are built.

⁶ Minimum 1 Mbps for residential users and 4 Mbps for business users.

last-mile infrastructure investment would be positive for 783 localities. Therefore, these areas were considered suitable for the targeted investment and declared “eligible white areas”.

- (37) **Public consultation:** To ensure transparency of the project, the Romanian authorities undertook three public consultation rounds: i) November 2011 – January 2012, ii) August – September 2012 and iii) March – August 2013. During these consultation rounds, several meetings were held between the Ministry for Information Society (MIS) and market players. The consultation rounds concerned in particular the identification of the white areas, the intention of the operators to invest in these areas, their views on the current project and the award criteria considered for the tender. The Ministry for Information Society also created on its official website a section dedicated to the public consultation⁷, where minutes of the various meetings with stakeholders and documents subject to the consultation were made available to the public. Invitations to public consultation sessions were also sent directly and individually, via e-mail, to a large number of operators and their business associations. According to the Romanian authorities, the comments received further to the public consultation were positive. The various rounds of consultation did not reveal any plans on future investments in the target areas or any comments which would make necessary to change the assumptions or the design of the Ro-NET project.
- (38) **Opinion of the National Regulatory Authority:** ANCOM was consulted on the project from an early stage, with particular attention to specific issues: selection of the eligible areas, terms and conditions of the concession contracts, wholesale access conditions and pricing, monitoring of the project. The relevant input offered by ANCOM has been taken into account in the project.
- (39) By letter dated 28.10.2013, ANCOM delivered its opinion ("avis conforme") concerning wholesale access conditions and pricing⁸. ANCOM approved the economic and technical conditions of the Ro-NET project. In particular, by this opinion, it approved the conditions to be fulfilled as regards the open access to the subsidised networks and to the new passive infrastructure as well as the maximal prices for the wholesale access services to be charged by the concessionaires. In addition, ANCOM requested that the tender documents and/or concession agreements to be completed with some supplementary specific conditions⁹.
- (40) **Open tender process:** An open tender process divided into 7 lots corresponding to the balanced regions has been organised to select the relevant infrastructure operators. The draft tender documentation was provided to the Commission and the Romanian authorities confirmed that the tender will comply with the fundamental principles of openness, competition and transparency of the national and EU procurement rules.
- (41) **Award criteria:** Further to the tender, the contracts will be awarded to the applicants presenting the most economically advantageous offer (for each lot). The award criteria are: i) the lowest amount of public aid requested - weight: at least 60%; ii) ensuring supplementary bandwidth ("asigurarea largimii de banda suplimentare") - weight: 20%; iii) ensuring mean packet delivery time ("asigurarea timpului de livrare mediu al pachetelor") - weight: 10% and iv) ensuring deviation of packets delivery under a certain limit ("asigurarea abaterii de întârziere a pachetelor", so-called "jitter") - weight: 10%.

⁷ <http://www.MSI.ro/Minister/Proiect-RO-NET/Proiecte/Proiectul-RO-NET>.

⁸ The opinion was published by ANCOM on its Internet site at the following address: http://www.ancom.org.ro/uploads/links_files/Aviz_RoNET_28_10_2013.pdf

⁹ For instance, ANCOM requested that the tender documents/concession agreements include provisions on the obligations of the concessionaires to respect the quality requirements for the services provided, to give access to operators which are not part of the same group of companies as well as a better description of tariffs for collocation services.

- (42) **Use of existing infrastructure:** The Romanian authorities indicated that the measure supports only white areas where no broadband infrastructure is available. However, the RoNET project embraces the use of existing infrastructure wherever possible, in order to avoid unnecessary and wasteful duplication of resources. For this purpose, existing infrastructure and its availability was identified as much as possible during the Feasibility Study (e.g. towers, overhead optic fibre, roads, ducts, roofs of existing buildings, other infrastructure, etc).
- (43) The Romanian authorities also indicated that they will ensure that any participant to the selection who owns or controls infrastructure (irrespective of whether it is actually used) in the target area will have to provide all the relevant information on the existing infrastructure within at most 2 weeks as of the publication of the tender documents.
- (44) The Romanian authorities also stated that ANCOM is competent, according to the law no 154/2012, to require, in some circumstances, shared access to any existing infrastructure.
- (45) In addition, the authorities confirmed that ANCOM is preparing a national database on the availability of existing infrastructures that could be re-used for broadband roll-out. The database is expected to be available as of 2014.
- (46) **Technology:** The tender procedure will not exclude any technology and will not involve any preference for one technology over another in the design and execution of the backhaul networks.
- (47) The measure will enable the interconnection to the subsidised network of any possible technology which the operators at the retail level consider the most appropriate solution.
- (48) **Wholesale access:** Wholesale services are an essential requirement of the project. Wholesale services will include transmission services, as well as collocation services. Access to the backhaul network will be offered on transparent and non-discriminatory terms to all interested third-party operators and the network will be designed to support all different types of access that local loop, electronic communications operators and other third parties may seek, including but not limited to: access to ducts and dark fibre, access to (outdoor) shelters or (indoor) cabinets, access to installed transmission capacity, etc.¹⁰.
- (49) Minimum access conditions to the backhaul network have been endorsed by ANCOM. As concerns the active infrastructure, the obligation to provide effective wholesale access to third parties will apply throughout the entire period of exploitation included in the term of the concession agreement with the infrastructure operators (i.e. a minimum of 10 years and up to 18 years – see also point (30) above). Also, the Romanian authorities confirmed that open access will be available on new passive infrastructure elements such as ducts or poles.

¹⁰ For instance, backhaul network infrastructure in the local distribution points (see point (28) above) will be accessible to interested third parties (local loop operators) who will seek to acquire to this effect so-called “collocation services” from the operator of the backhaul network (concessionaire). Shelters (for outdoor installed equipment) or cabinets (for indoor installed equipment) will provide spare capacity for collocating third parties equipment. For this purpose access to power (mains) will also be provided. Towers, in case of usage of radio technology to bring connection to local distribution point, will provide spare capacity for third parties’ antennas and/or other necessary equipment for providing radio access networks, as the case may be. Other towers developed through this project will also provide spare capacity for collocating antennas and/or equipment of third parties if requested. In case that optic fibre technology will be involved in the backhaul network design on certain segments, including the last segment to the local distribution point, multi-fibre cables should be installed and dark fibre may be provided to third parties for lease. Single mode fibres will be envisaged only for utilization. In case that ducts should be developed for optic fibre utilization for the backhaul design, such ducts will be designed to include a certain spare capacity to allow interested third parties to deploy their own fibre cable through the said duct.

- (50) The same access conditions as agreed upon by ANCOM (“avis conforme”) shall apply on the entirety of the subsidised network, including on the parts of such network where existing infrastructures have been used by the backhaul network operator (concessionaire) in the target areas¹¹. The access obligations shall be enforced irrespective of any change in ownership, management or operation of the subsidised infrastructure.
- (51) Minimum access conditions to the backhaul network will include the following, but not limited to:
- Transmission capacity (bandwidth, speed) at the local distribution point, in a target area, will be occupied following the principle “first come, first served”.
 - The concessionaire will provide open access to the available transmission capacity to local loop operators and other users that require transport capacity, from the target area to backbone networks.
 - The concessionaire will provide open access to the available infrastructure, within the limits of existing spare capacity for different collocation services.
 - If the service provided by the concessionaire to local loop operators or third parties does not comply with minimal service requirements agreed upon between parties (e.g. availability of 99%), the concessionaire is bound to provide certain compensations to the clients, as included in ANCOM's opinion (“avis conforme”).
- (52) The concessionaires will also have to provide third parties (including access seekers) and the competent authorities with comprehensive and non-discriminatory access to information on the network and infrastructure deployed under the project (including, inter alia, ducts, shelters and cabinets, dark fibre) and to the existing infrastructure used for the purposes of the Ro-NET Project. This information will have to be regularly updated (every 6 months) and be available in non-proprietary formats.
- (53) ANCOM issued an opinion (“avis conforme”) concerning the terms and conditions for wholesale access by third parties to the subsidized broadband infrastructure. According to the Romanian legislation, ANCOM ensures that the wholesale access terms and conditions obey the principles of non-discrimination, proportionality and objectivity as set out in the 2013 Broadband Guidelines.
- (54) MSI and ANCOM signed a Memorandum of Understanding to establish the procedure to supervise the compliance of the technical and economic terms of the open access. ANCOM will have supervision responsibilities and will issue case-by-case opinions to MSI regarding the compliance or non-compliance of the open access conditions. MSI has undertaken to follow the opinions issued by ANCOM. ANCOM will be involved in supervising the compliance of the technical and economic terms of access to networks set out in its opinion over the entire duration of the wholesale access obligations.
- (55) The infrastructure operators are allowed to provide retail access to the end-users, in which case they will be required to maintain accounting separation. The Romanian authorities also indicated that the shareholders of the infrastructure operators may set up a different legal entity providing retail access based on the wholesale access purchased from the infrastructure operators. Where the operator (or a parent/daughter legal entity set up by its shareholders) also provides retail services, access to the subsidized network will be granted at least 6 months before the launch of such retail services. This obligation is included in the Technical Specifications and will be reflected in the concession agreements. The price

¹¹ Considering that further existing infrastructure elements in those areas, which are suitable for use under the Ro-NET Project, may be identified by the concessionaire during the design phase of the project.

levels for the provision of retail services will be set by the market. In case retail services are provided by a parent/daughter legal entity set up by the operators' shareholders, the infrastructure operators and retailer must disclose the transfer pricing data.

- (56) **Price Benchmarking:** Access prices charged by the infrastructure operators will be subject to the requirements of transparency and non-discrimination for all operators interested to deploy access networks (local loop) and offer electronic communications services.
- (57) As confirmed by the Romanian authorities, the wholesale access prices will be based on prices already set by ANCOM for similar regulated services. In the absence of such regulated wholesale prices, the average wholesale prices in more competitive areas of the country will be taken into account. In any case, the benchmark will represent the upper limit of the wholesale access price payable by access seekers to the concessionaires under the project.
- (58) The wholesale access prices endorsed by ANCOM in its opinion will be based on i) tariffs published by operators; ii) tariffs published by ANCOM; iii) tariffs calculated by ANCOM and iv) tariffs observed on the market and communicated by operators within the public consultation.
- (59) The criteria to be complied with by the infrastructure operators when setting their wholesale access prices will be specified in the tender documents, in accordance with ANCOM's opinion.
- (60) ANCOM will subsequently be charged to monitor the prices already established in the opinion.
- (61) **Monitoring and claw-back mechanism:** The Romanian authorities (the Ministry for Information Society) will regularly monitor and review the performance of the contractual obligations by the infrastructure operators, including the obligation to comply with the mandatory terms imposed by ANCOM when giving its assent to the terms of access to networks and infrastructure (i.e. wholesale access conditions and pricing). Monitoring will remain in place throughout the life of the concession contracts concluded with the infrastructure operators. The contracts between the Ministry for Information Society and the infrastructure operators will include the details of the monitoring mechanism, in line with the legal framework and best practices applying to concession contracts.
- (62) ANCOM will support the Ministry for Information Society with its technical, economic and legal expertise in order to prepare coherent, objective and non-discriminatory reasoning needed when (i) reviewing performance of the contractual obligations by the infrastructure operators, as far as the wholesale access conditions and prices are concerned and (ii) addressing disputes arising between the infrastructure operators and the access seekers in connection with such obligations. As regards the conditions imposed within the project, the Memorandum of Understanding concluded by MSI and ANCOM has defined the modalities of cooperation in particular for monitoring the conditions and disputes resolution.
- (63) The tender documents as well as the concession agreements to be concluded with infrastructure operators will include a claw-back mechanism which would prevent the selected private partner from obtaining excessive economic benefits. The final calculation of the amount due by the infrastructure operators will be made after closing of the

accounting year. Corrections of overpayments as a part of the claw back mechanism will be made on the basis of the EBITDA¹².

- (64) The funds collected from the claw back mechanism will be used to fund projects pursuing the same objectives as the proposed intervention (such as providing additional coverage, increasing service level or scope, etc.).
- (65) **Transparency:** The Romanian authorities confirmed that the project will be published on a central website including the full text of the scheme and its implementing provisions, name of the beneficiaries, aid amount, aid intensity and the used technologies¹³. Furthermore, the aid beneficiary will be obliged to provide entitled third parties with comprehensive and non-discriminatory access to information on its infrastructure (including inter alia ducts, street cabinets and fibre) deployed under the current project.
- (66) **Reporting:** The Romanian authorities have undertaken to submit reports on the implementation of the scheme (including the date when the network was put into use, the wholesale access products offered, the number of access seekers and service providers on the network, the number of houses passed and take-up rates) every 2 years since the date the network was put in use and during the whole duration of the concession contracts concluded with the infrastructure operators (minimum 10 years and up to 18 years).

V. ASSESSMENT OF THE MEASURE: PRESENCE OF AID

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

State resources

- (68) As described above, the measure is financed by resources from the state budget and EU funds, which are allocated under the control of the authorities to the beneficiaries with an element of discretion. Hence, State resources are involved.
- (69) In State aid broadband cases, aid amounts and aid intensities are usually known only ex post, i.e. after the tender process ("gap funding"): the Commission requests aid to be granted through an open tender procedure, which guarantees that it will be the minimum necessary. Hence also for this case it is not crucial to quantify the aid amount in advance.

Selective economic advantage

- (70) **Selected operators:** the selected operators will receive financial support which will enable them to enter the market and provide broadband services on conditions not otherwise available on the market. Although a competitive tender procedure tends to reduce the amount of financial support required, the allocation will allow the operator to offer end-to-end services prima facie at lower prices than if it had to bear all costs himself.

¹² Earnings before interest, tax, depreciation and amortization - a widely used financial indicator also in the telecommunication industry.

¹³ Such information will be kept for at least 10 years and shall be available for the general public without restrictions.

- (71) **Third party operators:** the measure will enable third party operators to provide retail broadband services to end users by utilising the new, state-owned infrastructure. The measure will also provide advantage to electronic communication operators that will be able to build and operate their own network infrastructure and provide broadband services by benefitting from the construction of a subsidised infrastructure. Thereby these operators will receive an indirect economic advantage by having access to wholesale services or benefit from the presence of public owned infrastructure at conditions that would not be available under normal market conditions without State support.
- (72) **End users:** the measure aims at providing broadband services to business users. Businesses in the targeted geography will therefore ultimately benefit from the improved service.
- (73) The measure supporting the deployment of a backhaul network is selective in nature in that it targets undertakings that are active only in certain regions or in certain segments of the overall electronic communications services market.

Distortion of competition and effect on trade

- (74) The markets for electronic communications services (including the wholesale markets and the retail broadband markets) are open to competition between operators and service providers, which generally engage in activities that are subject to trade between Member States. By favouring certain operators and service providers, the notified measure is therefore liable to distort competition and affect trade between Member States.
- (75) Moreover, the intervention of the state can alter existing market conditions also in that a number of undertakings could now choose to subscribe to the services provided by the selected suppliers instead of possible alternative market-based solutions.
- (76) Therefore, the fact that an improved broadband service and additional (wholesale) capacity becomes available can distort competition and affect trade between Member States.

Conclusion

- (77) Having established that the measure confers economic advantage to the wholesale operator of the network and electronic communication operators utilising the state funded infrastructure by state resources that distorts competition and has an effect on trade between Member States, the Commission concludes that the notified measure constitutes State aid within the meaning of Article 107 (1) TFEU as moreover confirmed by the notifying Member State during the notification contacts and it is necessary to consider whether the measure can be found to be compatible with the internal market.

VI. ASSESSMENT OF THE MEASURE: COMPATIBILITY

- (78) The Commission has assessed the compatibility of the scheme according to Article 107 (3) (c) TFEU and in the light of the *EU Guidelines for the application of State aid rules in relation to rapid deployment of broadband networks*¹⁴. The Broadband Guidelines contain a detailed interpretation of Article 107 (3) (c) TFEU in this area of State aid law.
- (79) As explained in paragraph 33 of the Broadband Guidelines, to be considered compatible with the internal market every aid measure has to comply with all the below necessary cumulative conditions:

¹⁴ OJ C25, 26.01.2013, p.1.

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

- (80) The Commission defined in its Europe 2020 strategy of 3 March 2010¹⁵ 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."*
- (81) In particular, a well-targeted State intervention in the broadband field can facilitate the reduction of the '*digital divide*' that sets apart areas or regions within a country where affordable and competitive broadband services are on offer and areas where such services are not available. By extending broadband coverage to unserved areas of Romania the measure contributes to the achievement of greater cohesion and is therefore in line with the common interest.
- (82) In addition, in the context of the financial and economic crisis affecting the European economies, it was further recognised by the Commission¹⁶ that broadband investments can be considered as "*smart investments*" that are able to provide short term (employment) benefits and long term (economic) advantages for the EU economies. Hence, by accelerating broadband deployment, the current measure is also in line with the European interest to support the fast recovery of the European economies.
- (83) With the notified project, the Romanian authorities intend to allow the use of the public network to bridge the traditional digital divide (i.e. as regards basic broadband) wherever necessary. This concerns specifically traditional "white areas" where no broadband infrastructure is present.
- (84) By extending broadband coverage to areas where private operators have no commercial interest to invest in the near future, the Romanian authorities pursue genuine cohesion and economic development objectives, in line with the Digital Agenda.

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

- (85) As indicated in the Section IV of the present decision (Description of the Measure), out of the initially identified 2.287 rural localities without any broadband infrastructure at all, 783 localities have been selected, namely in areas where it was considered that the construction of backhaul networks may result in the development of local loops on a commercial basis. Furthermore, for the selected localities, the public consultations revealed no investment plans in the near future in view of their low commercial attractiveness for private operators. These elements demonstrate the absence of market delivery due to market failures and/or important inequalities in the target areas.

(3) Appropriateness of State aid as a policy instrument

- (86) In the situation currently under assessment, due to the economics of broadband networks, the difficulties resulting from the lack of supply of broadband networks cannot be satisfactorily addressed by measures involving demand stimulation or regulatory interventions.

¹⁵ EUROPE 2020 - A strategy for smart, sustainable and inclusive growth, COM(2010) 2020, page 12.

¹⁶ Brussels European Council, 19/20 March 2009 Presidency Conclusions.

- (87) Demand-side measures in favour of broadband (such as vouchers, tax breaks, awareness-raising measures or demand aggregation) could be an instrument of public intervention. However, such measures would be insufficient to solve the systemic problems illustrated on the supply side in Romania's rural areas.
- (88) Despite the crucial role that regulation plays in ensuring competition and supply in the market for electronic communications, the regulatory measures imposed by ANCOM (obligations on access and use of specific network elements, transparency, non-discrimination and price-control) did not solve the problems related to the lack of broadband infrastructure and services in the targeted areas.
- (89) Without further public intervention, reducing the "*digital divide*" between rural and urban areas seems not possible, which could lead to the economic and social exclusion of the local citizens and undertakings.
- (90) Furthermore, the notified measure was consulted with ANCOM, which issued a positive opinion on the design of the project. As mentioned in the description of the measure, ANCOM is consulted as regards the access conditions as well as for determining the wholesale access prices and solving disputes between access seekers and the infrastructure operators.
- (91) Consequently, the Commission can agree that without further public intervention, avoiding the emergence of a new "*digital divide*" between different areas of the country seems not possible, which could lead to the economic exclusion of the local undertakings. Hence in the current situation, State aid is an appropriate instrument to achieve the set objectives.

(4) Existence of incentive effect

- (92) As set out in paragraph 45 of the Broadband Guidelines, regarding the incentive effect of the measure, it needs to be examined whether the broadband network investment concerned would not have been undertaken without any State aid. According to the results of the public consultation and studies carried out by the Romanian authorities, in the targeted areas no broadband network investment would take place without public funding, hence the aid produces a change in the investment decisions of the operators. Moreover, by granting access to the public network to third party operators, the measure facilitates and encourages investments in last mile networks. Therefore, the aid shall provide a direct and appropriate investment incentive for the selected operator and for third party beneficiaries.

(5) Aid limited to the minimum necessary

- (93) In assessing the proportional character of the notified measures, the Commission has assessed as it follows a number of necessary conditions to minimise the State aid involved and the potential distortions of competition.

(6) Limited negative effects

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

(7) Transparency

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

(8) The overall balancing exercise and the compatibility conditions

- (96) The Ro-NET measure has been carefully designed to ensure that the overall balance of the effects of the measure is positive.
- (97) As mentioned above, the objective of the project is to bridge the digital divide and provide access to broadband services where they are currently unavailable by making a significant new investment in sparsely populated areas where the private operators are not planning any investments in the near future.
- (98) Thus, in line with paragraph 51 of Broadband Guidelines, such an open infrastructure brings significant new capabilities to the market as it provides further condensation of distribution nodes, shorten 'the last mile' to end-users and allows for competition between operators which will provide access to final customers. According to the Romanian authorities, as confirmed by the analysis carried out, the project will lead to a significant increase in the penetration rate of broadband services in the target areas. Consequently, such investment ensures a "step change" in terms of broadband availability for the target areas, in line with the requirements of paragraph 51 of the Broadband Guidelines.
- (99) Furthermore, the project aims at the funding of backhaul network open for access to all operators and technologies, which as confirmed in the paragraph 81 of the Broadband Guidelines, exhibit especially pro-competitive features.
- (100) The Romanian authorities have designed the measure in such a way as to minimise the State aid involved and potential distortion of competition arising from the measure. As set out above, the project will only target localities that were classified as traditional "white" areas.

Traditional "white areas"

- (101) As explained in detail above, the target areas include 783 localities in which there is no broadband infrastructure at all and it is unlikely to be developed in the near future. The Commission acknowledges therefore that by providing financial support for the provision of broadband services in areas where broadband is currently not available, Member States pursue genuine cohesion and economic development objectives and thus, their intervention is likely to be in line with the common interest, provided the conditions set out in paragraph 78 of the Broadband guidelines are respected.

The other proportionality conditions of the Broadband Guidelines

- (102) ***Detailed mapping and analysis of coverage, public consultation:*** The Romanian authorities have undertaken an analysis of the existing broadband infrastructure in order to identify the areas where State intervention is necessary. A public consultation has been conducted as described above. All the relevant stakeholders have had the opportunity to submit their views and the regulatory authority's opinion has been gathered. As confirmed by the Romanian authorities, no operator has objected to the project. This way, the Romanian authorities ensure that public funds are used only in areas where aid is necessary and limit the possibility of crowding out private investments.
- (103) ***Competitive selection procedure:*** To minimise the amount of aid involved, the Romanian authorities run a selection procedure in line with the principles of openness, competition and transparency of the national and EU procurement rules, to select the undertakings for the construction and the management of the networks. This procedure has the effect of

maximising the effect of the aid granted while minimising any potential advantage granted for the selected operator.

- (104) ***Most economically advantageous offer:*** The Romanian authorities designed the selection procedure so as to choose the most economically advantageous offer among those presented by the operators. The authorities specified in advance the relative weighting to be given to the key criteria chosen for the selection procedure. The system is designed in such a way as to ensure that the applicant with the lowest amount of aid requested receives more points within the overall assessment of the bid, in line with the provision of the Broadband Guidelines and in line with the principles of the public procurement legislation.
- (105) ***Technological neutrality:*** The Romanian authorities confirmed that no technology will be excluded a priori. Consequently, the services provided on the wholesale market will be such as to enable the interconnection to the subsidised network of any possible technology, which operators wish to use for their access infrastructure.
- (106) ***Use of existing infrastructures:*** The new network will use existing infrastructure wherever it is possible. This way, unnecessary and wasteful duplication of existing networks will be avoided, the overall costs of the project being minimised.
- (107) ***Wholesale access:*** As described above, the selected operators will offer wholesale services and access to the subsidised networks to other operators in an open, transparent and non-discriminatory manner for at least seven years. The access obligations will be monitored by ANCOM (Romanian NRA).
- (108) ***Wholesale access pricing:*** The price benchmarking mechanism will be incorporated in the tender documents. As described above and in line with the provision of the Broadband Guidelines, the price for wholesale access will be based on the prices already set by ANCOM for similar regulated services and, in the absence of such regulated wholesale prices, on the average wholesale prices in more competitive areas of the country.
- (109) ***Monitoring and claw-back mechanism to avoid over-compensation:*** The project will be examined on a regular basis and the monitoring mechanisms implemented will ensure that if the beneficiary fails to comply with the rules, the granting authorities will be in the position to recover the aid granted. By establishing a claw-back mechanism, the Romanian authorities ensure that the recipients of the aid will not benefit from overcompensation and will minimise *ex post* and retroactively the amount of aid deemed initially to have been necessary.
- (110) ***Transparency:*** As described above, the Romanian authorities confirmed that they would publish on a central website the relevant information on the measure at stake. Furthermore, the aid beneficiaries will be obliged to provide entitled third parties with comprehensive and non-discriminatory access to information on its infrastructure (including *inter alia* ducts, street cabinets and fibre) deployed under the measure.

Conclusion

- (111) The Commission concludes that the notified measure meet the compatibility criteria set out in the Broadband Guidelines, hence the aid involved in the notified measure is compatible with Article 107(3)(c) TFEU.

VII. DECISION

On the basis of the foregoing assessment, the Commission has accordingly decided to consider the measure "*Ro-NET project*" compatible with Article 107(3)(c) TFEU.

The Romanian authorities are reminded that, pursuant to Article 108(3) TFEU, they are obliged to inform the Commission of any plan to extend or amend the measure.

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

<http://ec.europa.eu/competition/elojade/isef/index.cfm>.

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

European Commission
Directorate-General for Competition
For the attention of the State Aid Registry
1049 Bruxelles/Brussel
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Yours faithfully,
For the Commission

Joaquín ALMUNIA
Vice-President