



EUROPEAN COMMISSION

Brussels 21.3.2022  
C(2022) 1791 final

PUBLIC VERSION

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**Subject: State Aid SA.63172 (2021/N) – Austria  
RRF – Broadband Austria 2030**

Excellency,

## **1. PROCEDURE**

- (1) Following pre-notification on 27 September 2021, the Austrian authorities notified on 7 February 2022 the European Commission (the “Commission”) of a new measure, *Broadband Austria 2030*, to promote nationwide availability of new fixed access networks by 2030.
- (2) On 7 February 2022, Austria exceptionally agreed to waive its rights deriving from Article 342 of the Treaty on the Functioning of the European Union (TFEU), in conjunction with Article 3 of Regulation No 1/1958<sup>1</sup>, and to have this decision adopted and notified in English.

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<sup>1</sup> Regulation No 1/1958 determining the languages to be used by the European Economic Community, OJ 17, 6.10.1958, p. 385.

Seiner Exzellenz Herrn Alexander Schallenberg  
Bundesminister für europäische und internationale Angelegenheiten  
Minoritenplatz 8  
1014 Wien  
ÖSTERREICH

## **2. DETAILED DESCRIPTION OF THE MEASURE**

### **2.1. Background information on the deployment of fixed access broadband networks in Austria**

- (3) By decision of 17 December 2015 (SA.41175), the Commission approved the Austrian scheme *Broadband Austria 2020*, a federal State aid scheme for Next Generation Access (“NGA”) network deployment bundling several types of interrelated instruments in order to ultimately achieve full NGA coverage with download speeds of 100 Mbps and above throughout the country. The initial aid scheme consisted in particular of three programmes: (i) *Broadband Austria 2020 – Access*, (ii) *Broadband Austria 2020 – Backhaul* and (iii) *Broadband Austria 2020 – Ducts*. It was due to expire on 31 December 2020.
- (4) By decision of 14 December 2020 (SA.58261), the Commission approved a two-year prolongation of a modified version of *Broadband Austria 2020*. The modified scheme is due to expire on 31 December 2022.
- (5) In Austria, coverage of networks supporting download speeds of at least 30 Mbps currently stands at 87%, having increased by eight percentage points compared to 2019. However, network coverage in rural areas remains far below the EU average with only 38% of households covered by such speeds.
- (6) Coverage and take-up of networks supporting download speeds of at least 100 Mbps is still particularly low in Austria if compared to other EU states. Although Austria’s coverage rate for such networks has increased from 14% in 2019 to 39% in 2020, it is still below the EU average of 59%. In rural areas, in particular, coverage of networks supporting download speeds of at least 100 Mbps remains low, with only 12% of households covered (compared to 28% at EU level). The coverage rate of Fibre-To-The-Premises networks supporting download speeds of at least 1 Gbps stands at 37% in Austria overall but at only 11% in Austria’s rural areas.

### **2.2. Objective, characteristics and design of the measure**

- (7) The notified measure is called *Broadband Austria 2030*.
- (8) The notified measure contributes to addressing the Austrian backlog in the nationwide deployment of networks capable of supporting the provision of fixed broadband services at gigabit speeds for households and for socio-economic drivers, such as public institutions and enterprises, by 2030. The notified measure also aims to address the digital divide by focusing in particular on the digital inclusion of rural regions.
- (9) The notified measure will support the deployment of passive infrastructure that will be used to provide to end users fixed broadband access with speeds of at least

100 Mbps download and 100 Mbps upload<sup>2</sup>, under usual peak time conditions,<sup>3</sup> as of the start of operation of the new network (“new networks”). The passive infrastructure supported and deployed under the notified measure must also be capable of supporting the provision to end users of fixed broadband services of at least 1 Gbps download and 1 Gbps upload under usual peak time conditions with a mere upgrade of active equipment and, if necessary, the replacement or upgrade of passive elements not supported by the notified measure. These upgrades may take place at a later stage and are not part of the notified measure.

- (10) The notified measure will support the rollout of passive infrastructure (e.g. ducts, cabinets, exchanges, and dark fibre, as well as masts and towers if fixed wireless access solutions are envisaged). The notified measure will support the deployment of such infrastructure (i) in areas with no present or credibly planned network providing under usual peak time conditions download speeds of at least 30 Mbps; and (ii) certain areas with one present or credibly planned network providing under usual peak time conditions download speeds of at least 30 Mbps but less than 100 Mbps where there is market failure as described in section 2.7 below. Priority will be given to areas where end users do not yet have broadband access at download speeds of at least 30 Mbps under usual peak time conditions.
- (11) The rollout of passive infrastructure for backhaul networks serving the access networks supported by the notified measure can also be funded to the extent necessary to ensure that the notified measure results in the provision to end users of fixed broadband access with speeds of at least 100 Mbps download and 100 Mbps upload, under usual peak time conditions. Any support to the deployment of passive infrastructure for backhaul networks will only be of accessory nature and its necessity and justification will have to be outlined in the respective funding application for a specific target area. Existing backhaul networks that are already able to support the provision of the targeted speeds by the access networks in the target areas will not be overbuilt. Funding applicants will therefore have to provide well-founded explanations for why the requested support for the deployment of passive infrastructure for a backhaul network is strictly necessary and indispensable in order to achieve the target speeds in the target areas concerned.
- (12) The notified measure has two support options: an “Access” support programme and an “OpenNet” support programme. The “Access” support programme will support beneficiaries in all possible network business models, including the vertically integrated network business model, where the beneficiary is active on all three layers of the broadband value chain, combining the roles of physical infrastructure provider (owning and maintaining the passive infrastructure), network provider (operating the active equipment) and service provider

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<sup>2</sup> Subject to the step-change requirement (see at recital (14)) and depending on the existing network in the target area concerned, the minimum target speeds to be provided to end users from the start of operation of the new fixed network may be higher than 100 Mbps download and 100 Mbps upload.

<sup>3</sup> Speed under usual peak time conditions is understood as the speed that end users are expected to achieve during the entire peak-hour period. This represents the real capacity of the network irrespective of the retail electronic communications access services offered to end users.

(delivering services to end users). The “OpenNet” support programme will only support beneficiaries in an open network business model, thus ensuring that beneficiaries are only active at wholesale level, acting as physical infrastructure provider (also as owner of the infrastructure) only, or possibly in combination with the role of network provider, but in any case excluding the provision of services at retail level in the target areas.

- (13) In all network business models, including in an open network business model, the granting authority has to ensure that, regardless of which network business model is used in the individual case and under which support programme (“Access” or “OpenNet”), effective and comprehensive wholesale access will be granted at all layers of the broadband value chain. Effective and comprehensive wholesale access to the passive infrastructure will thus be offered to wholesale access seekers at both the passive and active layer (see for more details under section 2.14 below).
- (14) Under both support options, in order to be eligible for support, the funding applicant must ensure that the passive infrastructure supported and deployed under the notified measure will result in the provision of a fixed broadband access service that at least doubles the existing download and upload speeds provided under usual peak time conditions to end users in the target areas and ensures in all cases, irrespective of the existing speeds, the provision, under usual peak time conditions, of speeds of at least 100 Mbps download and 100 Mbps upload. This obligation applies also to business models where the funding applicant will not be active at the retail level.
- (15) Funding will be granted by means of funding agreements. The funding agreements will explicitly note that the notified measure’s legal bases and their annexes form an integral part of the contracts.
- (16) The duration of the projects supported under the notified measure, *i.e.* the deployment of the passive infrastructure, should in principle be limited to three years. In the case of projects with eligible project costs of more than EUR 10 million (major projects), a project duration of up to five years may be agreed in the funding agreements.<sup>4</sup>
- (17) Networks supported under the notified measure through the deployment of passive infrastructure must be deployed as “premises passed”. This means that the supported new networks must reach at least up to the boundaries of private

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<sup>4</sup> Eligible costs include, among others,: investment costs for the passive infrastructure supported and deployed under the scheme, including where existing infrastructure has been used (*e.g.* civil engineering works such as excavation works including restoration; preparation of documentation to obtain the necessary permits; ducting, including sub-ducts, microtubes, etc., and their installation; fibre cables including inlets and splicing; fibre distribution panels, including their installation; and passive equipment in distribution and local centres); investment-related own services in the form of work and material used for the project (if demonstrated by the submission of appropriate records); costs of investment-related planning and project management services (up to an amount of 10 % of the overall eligible project costs but only up to a maximum of EUR 500 000). The latter includes costs for activities directly related to the implementation of the project, such as ground and fine-planning, project management, construction planning, construction supervision.

properties in order to allow a physical connection to the buildings located on private properties and the activation of the service for the end user within a reasonable time against a normal market activation fee. The activation of the service should be possible for premises within four weeks from the date of the request of the end user, without any additional or exceptional cost and, in any case, not exceeding the average activation fee in Austria. Sufficient capacity will have to be reserved for further potential connections.

- (18) All beneficiaries have to commit to operate and maintain the supported and deployed passive infrastructure for at least seven years. This commitment will be implemented irrespective of any change in ownership of the infrastructure within this timeframe.
- (19) The Austrian authorities consider the proposed public sector intervention as justified in the target areas, in order to make networks available that support the notified measure's objectives. These objectives are: (i) contributing to achieving nationwide availability of gigabit-capable access networks, especially in rural areas, by 2030; (ii) stimulating the wholesale market while ensuring competition on the retail market. They argue that the passive infrastructure to be supported and deployed under the notified measure is not being delivered by commercial operators without support in the target areas. The cost of deploying such passive infrastructure in the notified measure's target areas is, according to the Austrian authorities, on a per premises calculation basis, significantly higher than the cost of connecting urban and densely populated areas, because the target areas are often located in topographically difficult and mountainous parts of Austria with often significant distances between individual premises. Moreover, the Austrian authorities take the view that the achievable revenue base is more limited in the notified measure's target areas due to low population density. Pursuant to the Austrian authorities, this impediment cannot be addressed by other less distortive measures, such as *ex-ante* regulation.
- (20) The Austrian authorities also consider that without further public intervention, reducing the "digital divide" will not be possible. The Austrian authorities see no alternative but to grant public financial support for extending the coverage of new networks in the target areas defined pursuant to the detailed mapping and market consultation exercises (see section 2.8 below). With the notified measure, the Austrian authorities intend to accelerate the rollout of passive infrastructure for new networks and help drive further economic growth, producing further economic and social benefits, especially in the rural areas. The Austrian authorities expect that the notified measure will also indirectly serve to accelerate the upgrade through private investments of existing networks to networks capable of providing gigabit speeds, via the possibility to connect to the new supported and deployed passive infrastructure by purchasing effective and comprehensive wholesale access.

### **2.3. Granting authority and beneficiaries**

- (21) The granting authority is the Austrian Federal Ministry of Agriculture, Regions and Tourism (BMLRT). The BMLRT entrusts the implementation of the funding

to an appropriate legal entity — the *Abwicklungsstelle* — by means of an implementation contract.

- (22) The beneficiaries of the measure are electronic communications network operators, which have an establishment in Austria at the time of payment of the support under the notified measure and municipalities in Austria as well as Austrian regions' specialized in-house companies (*Landesgesellschaften*). Co-operations in the form of consortia for the joint implementation of a project are also permitted. The Austrian authorities clarified, however, that an undertaking in difficulty, *i.e.* an undertaking that, without intervention by the State, would likely go out of business in the short or medium term,<sup>5</sup> will not be eligible for support under the notified measure.
- (23) The Austrian authorities further committed to suspend the award and/or payment of any support under the notified measure to any undertaking that has benefited from earlier unlawful aid declared incompatible by a Commission decision (either as an individual aid or an aid under an aid scheme being declared incompatible), until that undertaking has reimbursed or paid into a blocked account the total amount of unlawful and incompatible aid and the corresponding recovery interest.<sup>6</sup>

#### **2.4. National legal basis**

- (24) The notified measure's legal bases are (i) *Sonderrichtlinie "Breitband Austria 2030: Access"* and (ii) *Sonderrichtlinie "Breitband Austria 2030: OpenNet"*. These directives have been enacted on the basis of the Austrian Telecommunication Act 2021<sup>7</sup> as well as the "*Allgemeine Rahmenrichtlinien für die Gewährung von Förderungen aus Bundesmitteln (ARR 2014)*"<sup>8</sup>.
- (25) The two *Sonderrichtlinien* contain each a stand-still clause, whereby the granting authority can only grant support under the scheme after the notification of the Commission's decision approving it.
- (26) The Austrian authorities confirmed that the present State aid decision is an integral part of the legal bases.

#### **2.5. Budget, duration, type of aid and aid intensity**

- (27) The notified measure will be implemented as a new scheme. It is the successor scheme to the measure *Broadband Austria 2020*, which was approved by State

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<sup>5</sup> In line with the definition in the Guidelines on State aid for rescuing and restructuring non-financial undertakings in difficulty (OJ C 249, 31.7.2014, p. 1).

<sup>6</sup> See for more details RIS – Allgemeine Rahmenrichtlinien für die Gewährung von Förderungen aus Bundesmitteln (ARR 2014) – Bundesrecht konsolidiert, Fassung vom 20.09.2021 (abka.gv.at) and the notified measure's legal bases.

<sup>7</sup> RIS – Telekommunikationsgesetz 2021 – TKG 2021.

<sup>8</sup> RIS – Allgemeine Rahmenrichtlinien für die Gewährung von Förderungen aus Bundesmitteln (ARR 2014) – Bundesrecht konsolidiert, Fassung vom 20.09.2021 (abka.gv.at).

aid decision of 17 December 2015 (SA.41175). *Broadband Austria 2020* was originally due to expire at the end of 2020 but has been prolonged in an amended version until 31 December 2022, as approved by State aid decision of 14 December 2020 (SA.58261). The notified measure will replace *Broadband Austria 2020* with effect of the date of notification of the Commission's decision approving the notified measure. Payments for projects granted under *Broadband Austria 2020* until the date of notification of this decision will continue to be made until 31 December 2026 at the latest.

- (28) Individual support may be granted under the notified measure until at the latest 31 December 2026.
- (29) The overall budget of the scheme is EUR 2 billion. EUR 1.28 billion will be provided by authorities at federal level from the general budget (about EUR 389 million) and from subcomponent 2a of Austria's Recovery and Resilience Funds (about EUR 891 million). Authorities at regional level will contribute with further approximately EUR 800 million from the general regional budgets. Any such contributions from regional authorities are made exclusively from the general regional budgets.
- (30) These regional contributions will be used as "top-up" public support in addition to the federal level support under the notified measure and can be proposed by the respective Austrian regions ("Länder") for projects in target areas on their territories. Any regional "top-up" support will complement the federal level support, which is limited at a maximum amount of 65% of the eligible project costs (see at recital (37) below), up to the maximum aid intensity levels foreseen for the two support programmes under the notified measure, *i.e.* 75% and 90% respectively (see at recital (39) below).
- (31) To that effect, funding applicants will be obliged to indicate already in their funding applications from which other sources they intend to receive additional funding for a project proposed under the notified measure. Whilst any expected public "top-up" funding will have no impact on the selection of beneficiaries for federal level support under the notified measure (the selection criteria are neutral in that respect), it is important to know for the granting authority in terms of (i) ensuring that the overall aid intensities under the notified measure are respected, (ii) the application of the claw-back mechanism and (iii) the verification of the compliance of any public "top-up" support with the conditions of this decision.
- (32) The Austrian authorities confirmed that the granting authority will have the responsibility and the final competence for granting, monitoring and verifying such proposed regional "top-ups" added to the federal support, including the payments, in order to ensure the prevention of overcompensation and any negative effects for competition as a result of such proposed regional "top-ups". The procedure foreseen in this regard is the following: after the award of funding to a beneficiary by the granting authority for a project and before the signing of the corresponding funding agreement between the *Abwicklungsstelle* and the beneficiary, the competent authorities at regional level are obliged to inform the *Abwicklungsstelle* about the exact amounts of regional "top-ups" they propose to award for that project. The granting authority will then assess these proposals in

light of the notified measure's conditions and have to give its final approval, which also has to confirm that the regional "top-ups" comply with all the conditions of this decision. If approved by the granting authority, the *Abwicklungsstelle* can sign the funding agreement with the beneficiary, which shall include all public support granted under the notified measure, including the "top-ups".

- (33) In order to ensure the proper functioning of the described mechanism, the *Abwicklungsstelle* will enter into contracts with the competent regional authorities on transparency and data submission obligations for the regional authorities concerning any regional "top ups" under the notified measure.
- (34) The *Abwicklungsstelle*, on behalf of the granting authority, will carry out the payments of federal funds, while the competent authorities at regional level will carry out the payments of regional "top-ups".
- (35) In order to enable the planned contribution to the overall budget by Austrian regional authorities, it is explicitly permitted that federal level support under the scheme can be cumulated with support from other sources to cover the costs eligible under the scheme.
- (36) Support under the notified measure will be granted in the form of individual non-repayable grants.
- (37) The exact amount of the federal level support will be determined by the *Abwicklungsstelle*. The maximum aid intensity for federal level support under the notified measure is, for both support options, in principle 50 % of the eligible project costs. However, if the project will result in the full coverage of the target area, the maximum aid intensity for federal level support may be increased to up to 65 % of the eligible project costs. Full target area coverage within the meaning of the notified measure shall be deemed to have been achieved if the project results in the availability of networks with the characteristics described at recital (9) above for at least 95% of premises in the target area. Where a project does not result in a 95% coverage but in more than 85%, the maximum aid intensity for federal level support shall be calculated in a linear ratio.
- (38) The *Abwicklungsstelle*, in consultation with the granting authority, can set the maximum aid intensity for federal level support for a certain project within the limits set out at recital (37) above already in the call for funding applications.
- (39) However, as already indicated at recital (35) above, other public entities may top-up the federal level funding. The overall maximum aid intensities under the notified measure will be 75% in the case of the "Access" support programme and 90% in the case of the "OpenNet" support programme, no matter the financing source.

## **2.6. Investment model**

- (40) The notified measure foresees the use of a gap funding model.

- (41) Support under the notified measure may be granted only for projects that would not have been carried out or that would not have been carried out to the necessary extent without support. To that effect, funding applicants must provide appropriate documentation, such as performance, cost, time and financing plans.
- (42) Funding under the notified measure is conditional on an adequate own contribution from the beneficiary, which must amount to at least 25 % of the eligible project costs under the “Access” support programme and to at least 10% of the eligible project costs under the “OpenNet” support programme. The own contribution has to be indicated already in the funding application. Own contributions within that meaning are own financial resources but also own contributions in kind and work (to be demonstrated by the funding applicant, established on the basis of a flat-rate cost model), loans or contributions from third parties not containing any public financial support. When the contribution of the beneficiary is provided through external financing via an investment platform combining different sources of financing, the condition that external financing must not contain any public financial support laid down in the previous sentence is replaced by the requirement of a presence in the platform of at least 30% of private investment.

## 2.7. Target areas

- (43) As was already mentioned above, the notified measure’s target areas are:
- (a) areas where no network exists at present that provides, under usual peak time conditions, download speeds of at least 30 Mbps to end users and where no network providing, under usual peak time conditions, download speeds of at least 100 Mbps to end users is expected to be built within the coming five years.<sup>9</sup>
  - (b) areas where only one network exists at present that provides, under usual peak time conditions, download speeds of at least 30 Mbps to end users but that, at the same time, does not provide, under usual peak time conditions, download speeds of at least 100 Mbps to end users and where no network providing, under usual peak time conditions, download speeds of at least 100 Mbps to end users is expected to be built within the coming five years.<sup>10</sup>
- (44) However, areas will be excluded from funding under the notified measure, if (i) an existing network can be upgraded to gigabit speeds without further investments in the passive infrastructure, or (ii) an existing network has received funding under the predecessor scheme *Broadband Austria 2020* and its deployment was completed less than three years before the market consultation (see section 2.8 below). In the case of (ii) above, it is expected by default that a network providing, under usual peak time conditions, download speeds of at least 100 Mbps to end users will be put commercially in place within three years after

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<sup>9</sup> The relevant point in time for this assessment is the market consultation (see under section 2.8).

<sup>10</sup> The relevant point in time for this assessment is the market consultation (see under section 2.8).

the completion of its deployment. The granting authority will give priority under the notified measure to areas where end users do not yet have fixed broadband access at download speeds of at least 30 Mbps under usual peak time conditions.

- (45) A map with the identified target areas will be published by the granting authority together with all calls for funding applications under the notified measure.

## **2.8. Mapping and public consultation**

- (46) The Austrian authorities have identified the above indicated target areas through detailed mapping and public consultation exercises.
- (47) The Austrian broadband atlas (<https://breitbandatlas.gv.at>) is the central information platform on broadband coverage in Austria. The coverage of all existing fixed and mobile broadband networks as well as all deployment areas under State-funded projects of the various broadband initiatives are made publicly accessible through the available maps. All data from the broadband atlas are available for download on Open Data Austria (<https://www.data.gv.at/breitbandatlas>).
- (48) The data shown in the broadband atlas are also reliable in terms of topicality and completeness, because all electronic communications operators are obliged by law to provide their infrastructure data to Austria's single information point for infrastructure data (*ZIS – Zentrale Informationsstelle für Infrastrukturdaten*) and to transmit their broadband coverage data to Austria's single information point for broadband coverage (*ZIB – Zentrale Informationsstelle für Breitbandversorgung*). Both are established by Austria's National Regulatory Authority (NRA), the Austrian Regulatory Authority for Broadcasting and Telecommunications (*Rundfunk- und Telekom Regulierungs-GmbH – RTR*). In addition to that, information on all construction works that are used or are going to be used for electronic communications network infrastructure must be submitted to the *ZIS*. The data collected by these two information points is regularly fed into the broadband atlas.
- (49) In addition to relying on the mapping information, the Austrian authorities have verified the correct identification of target areas (as indicated at recitals (43) and (44) above) through two public consultations that took place from 22 April 2021 to 21 May 2021 and from 1 October 2021 to 29 October 2021. In the first public consultation, the granting authority had invited all interested parties from the private sector, public authorities as well as citizens to provide feedback on the two *Sonderrichtlinien* as well as on the notified measure's potential target areas and requested the submission of information about any current networks or future network deployment plans (all speeds, no limitation) in these potential target areas for at least the next three years whilst indicating that the duration of major projects under the notified measure may be up to five years. The public consultation thus verified the correctness of data on existing speeds and technology as held by the *ZIB* at the NRA, including download and upload speeds of current and planned networks on a 100m x 100m grid as well as the dates of completion of currently deployed or planned networks. The Austrian authorities received 54 responses from different stakeholders and the two *Sonderrichtlinien* were adjusted in light of the comments received. The Austrian authorities

submitted all responses received from stakeholders in the first public consultation to the Commission. In the second public consultation, the granting authority consulted the market again on the potential target areas and requested the submission of information about any current networks or future network deployment plans in these potential target areas for at least the next three years whilst again indicating that the duration of major projects under the notified measure may be up to five years. The Austrian authorities will carry out public consultations at least annually on the notified measure's target areas and request the submission of information about any network deployment plans in these target areas. The map of target areas will be updated accordingly.

- (50) In their responses to the first public consultation, stakeholders generally approved the notified measure's objectives and welcomed in particular the envisaged target speeds for the new networks. With a view to rural areas, many stakeholders indicated that the actual speeds delivered by existing broadband networks were not sufficient and that public investment to ensure higher capacity networks was needed. Many respondents expressed regret for the maximum aid intensity thresholds for federal level support of 50% or 65% of eligible project costs, arguing that this would not be enough to overcome market failure in peripheral rural areas. Several stakeholders also requested the eligibility of support for passive infrastructure for backhaul networks if needed to connect supported access networks in the target areas. Stakeholders generally seemed in favour of supporting Fibre-To-The-Home networks and spoke out clearly against supporting Fibre-To-The-Cabinet networks. Some stakeholders suggested that the deployment of ducts as part of municipal civil engineering works and the purchase of such existing ducts should be eligible. Some stakeholders also argued that support to mobile networks should be incorporated in the scope of the scheme. It was also requested to extend the maximum project duration for major projects to five years.
- (51) The Austrian authorities have taken stakeholders' contributions into account and revised the legal bases on the basis of the input received. For instance, the Austrian authorities have introduced the possibility of ancillary support to passive infrastructure for backhaul networks if needed for achieving the scheme's objectives in the target areas. The maximum project duration for major projects was also extended to five years. The Austrian authorities further clarified that all new networks supported under the notified measure through the deployment of passive infrastructure must be deployed as "premises passed". The Austrian authorities also introduced the possibility of supporting the deployment of ducts as part of municipal civil engineering works under the "OpenNet" support programme. However, the calls for increasing the maximum aid intensity thresholds for federal level support have not been taken up and neither have calls for including support to mobile networks, as the notified measure concerns the deployment of fixed networks guaranteeing the provision of 100 Mbps download and 100 Mbps upload connectivity under usual peak time conditions at all fixed locations identified as part of the target areas. However, bids based on fixed wireless access networks able to fulfil the requirements of the notified measure will be taken into account.

- (52) The Austrian authorities have also submitted the opinion of the Austrian NRA on the proposed measure. The Austrian NRA expressed explicit support for the proposed measure's objectives. The Austrian NRA would have however preferred the inclusion of support for mobile networks. The Austrian NRA was fully supportive of limiting support to passive infrastructure elements, excluding support for active infrastructure elements. As regards the role of the Austrian NRA, the NRA was happy to continue the practice established under *Broadband Austria 2020*, which is to check against reimbursement standard offers for access to passive infrastructure.

## 2.9. Competitive selection procedure

- (53) The Austrian authorities submitted that, for the selection of beneficiaries, competitive selection procedures will be carried out in line with the EU Public Procurement Directives<sup>11</sup>.
- (54) Funding will be awarded based on open, transparent and competitive procedures. The selection procedures will be carried out by the *Abwicklungsstelle*. Calls for applications will be launched regularly and will be published on both the website of the granting authority as well as on the website of the *Abwicklungsstelle* in pursuance of the applicable public procurement rules. The calls for funding applications will ensure full transparency for individual applicants. Content and objectives of the individual calls will be published, as well as the modality of funding, the target areas, the assessment criteria and the information concerning the process (e.g. deadlines). To that effect, the *Abwicklungsstelle* will also publish, before the calls for applications, on the above-mentioned websites an evaluation manual containing information on the evaluation and decision-making processes and criteria as well as on the selection of independent experts for the evaluation panels.
- (55) The Austrian authorities commit to ensuring that all selection procedures related to the notified measure will be in line with the spirit and principles of the EU Public Procurement Directives and that they will ensure technological neutrality, transparency for and equal and non-discriminatory treatment of all interested bidders as well as be based on objective evaluation criteria.
- (56) If an individual call does not generate a sufficient number of applicants, the *Abwicklungsstelle* will use the services of an external auditor for the assessment of the bid(s) received, in particular regarding the cost calculations.
- (57) The selection of all beneficiaries under the scheme will be based on the economically most advantageous offer (*i.e.* the funding application).

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<sup>11</sup> Directive 2014/23/EU of the European Parliament and of the Council of 26 February 2014 on the award of concession contracts (OJ L 94, 28.3.2014, p. 1), Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC (OJ L 94, 28.3.2014, p. 65) and Directive 2014/25/EU of the European Parliament and of the Council of 26 February 2014 on procurement by entities operating in the water, energy, transport and postal services sectors and repealing Directive 2004/17/EC, (OJ L 94, 28.3.2014, p. 243).

- (58) For the assessment of bids (*i.e.* the funding applications), an evaluation panel will be established within the *Abwicklungsstelle*. The evaluation panel will consist of at least three independent experts nominated from a pool of experts that has been established in advance by the granting authority. The evaluation panel will carry out the evaluation according to the quality criteria described in the evaluation manual. The evaluation will ensure the compatibility of the proposed projects with the funding objectives and will be used to determine the ranking of funding applications.
- (59) The quality criteria to be used for the assessment are: (i) availability and technology, (ii) socio-economic relevance, (iii) the economic viability of the project and (iv) offers and products. These four groups will be sub-divided into detailed criteria and a points system will be used for the evaluation.
- (60) In the course of the overall assessment, the results of the qualitative evaluation of the funding applications will be weighed against the requested amount of funding for each offer. In order to minimise the amount of funding, at similar or identical quality conditions, the offer requiring the lowest amount of funding will be selected.
- (61) At the end of the process, the *Abwicklungsstelle* will submit a reasoned funding proposal to the granting authority and the granting authority will make a final decision.

#### **2.10. Technological neutrality**

- (62) The Austrian authorities confirmed that the notified measure is technologically neutral. The notified measure concerns the market for fixed broadband services, which is considered to be distinct from the market for mobile broadband services. The Austrian authorities will ensure that competitive selection procedures conducted under the scheme will not favour a particular technology or network platform (or a mix of these). All technologies that can achieve the speed requirements specified under section 2.2 above are eligible. Irrespective of the ultimate choice of technology, the Austrian authorities have committed to ensure that the chosen network topology will ensure the technological neutrality of the supported new networks. Several alternative platforms/technologies will be able to utilise the new passive infrastructure via effective and comprehensive wholesale access in order to offer their own services to end users. Effective and comprehensive wholesale access will be offered to all access seekers who request it on open, fair and non-discriminatory terms in line with the principle of technological neutrality (see section 2.14 below).

#### **2.11. Role of the National Regulatory Authority (NRA)**

- (63) The Austrian NRA has advised and will continue to advise the granting authority regarding mapping and market consultation, wholesale access, conditions and pricing before the granting authority decides on an individual award of funding. This will include advice on the compliance of the wholesale access prices proposed in funding applications with the agreed methodology concerning the effective and comprehensive wholesale access. Furthermore, the *Telekom-*

*Control-Kommission – TKK*, the dispute resolution body under the Austrian Telecommunication Act 2021, can be called upon to solve such disputes.

## **2.12. Use of existing infrastructure**

- (64) As the reuse of existing infrastructure is one of the main factors that can contribute to reducing the cost of broadband network deployment, the Austrian authorities have committed to encourage funding applicants to include existing broadband infrastructure where possible in their projects. The mapping and market consultation processes (see section 2.8 above) contribute to the identification of existing infrastructure that could be reused in funding applicants' projects.
- (65) In addition, all operators participating in the market consultations and/or submitting a funding application will be required to provide data on the available existing infrastructure that may be used for building the new networks, including conditions and prices for access to such infrastructure. Funding applicants may decide to use regulated access products when available or request access to existing physical infrastructure based on the Austrian Telecommunication Act 2021.
- (66) In their funding applications, beneficiaries will be encouraged to take into account for the planning and implementation of the projects (i) the use of existing infrastructure of third party owners or holders of rights of use in the target areas, and (ii) their own existing infrastructure, insofar as this is economically and technically justifiable.<sup>12</sup>
- (67) Funding applicants are required to provide all relevant information about existing infrastructure to other bidders at a point in time that would allow the latter to make an access request in order to include such infrastructure in their bid. Where a funding applicant does not provide this information, it will be excluded from the procurement procedure. The funding award procedure will be conducted in accordance with a timetable that allows sufficient time for funding applicants to compile bids on the basis of information provided by other suppliers on their existing infrastructure.

## **2.13. Step change**

- (68) The Austrian authorities confirmed that the notified measure will ensure a "step change". It means that the public investments in the deployment of passive infrastructure will bring significant new capabilities to the market in terms of broadband service availability, capacity, speeds and competition if compared to existing and concretely planned commercial network rollouts. The achievement of a step change as a result of the public intervention will always be verified by the

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<sup>12</sup> This may include: use of suppliers' own infrastructure; use of other suppliers' infrastructure (including regulated products as available); use of other existing utilities' infrastructure (including, for example, water and sewerage pipes and relevant electricity infrastructure); ease of access rights; public infrastructure such as public buildings (e.g. schools) or network assets, if any; and coordination of civil works.

granting authority against current and planned private investments. As explained (see section 2.2 above), the notified measure requires that the supported new networks are used to provide, under usual peak time conditions, speeds of at least 100 Mbps download and 100 Mbps upload and represent at least a doubling of download and upload speeds compared to the situation before the public intervention.

#### **2.14. Wholesale access and pricing**

- (69) All new networks supported under the notified measure will be subject to an obligation to offer effective and comprehensive wholesale access to the infrastructure under open, transparent, fair and non-discriminatory conditions. That applies also in the case of projects using any kind of open network business model, as effective and comprehensive wholesale access will have to be granted also in these cases at all layers of the broadband value chain (see at recital (13) above).
- (70) Wholesale access to the supported passive infrastructure (irrespective of whether this infrastructure was deployed under the notified measure or existed already and was reused) will have to be offered to access seekers for an unlimited time (lifetime of the said infrastructure). The Austrian authorities will impose an obligation on the successful funding applicants to grant also or to ensure the granting of active wholesale access for ten years. Furthermore, wholesale access to the supported passive infrastructure has to be comprehensive and effective. To that effect, beneficiaries have to deploy sufficient capacity as well as access points to make the access by third parties possible. In the case of deployment of fixed-wireless access networks, this applies also to masts and towers. The Austrian authorities have specified that the relevant elements of passive infrastructure financed under the notified measure have to be large enough to cater for at least three access seekers and to host point-to-multipoint as well as point-to-point solutions. To provide enough capacity on the last mile, funding applicants are obliged to guarantee sufficient capacities already in their funding applications (in the wholesale access offer). Wholesale access offers in the funding applications must contain all conditions for the provision of wholesale access, including the prices.
- (71) Effective and comprehensive wholesale access to infrastructure includes, but is not limited to, access to ducts, dark fibre, masts/towers, street cabinets and exchanges, including full and effective unbundling, bitstream access and virtual unbundled local access (“VULA”). The granting authority will clearly define the wholesale access conditions and ensure that the wholesale access obligations will be outlined in a transparent manner in the procurement documents and clearly mentioned in future access agreements. In the vertically integrated network business model, the beneficiary will be required to grant wholesale access at least six months before the launch of its own retail services on the downstream market of broadband services to end users.
- (72) In order to foster effective competition in the target areas and in view of the principle of technological neutrality, the beneficiaries will have to offer effective and comprehensive wholesale access to all access seekers who request it, in line

with the requirements of this decision. This includes wholesale access for wireless broadband technologies. Wholesale access to the supported passive infrastructure will thus be available for third party access seekers as well as for the beneficiary itself or an affiliated entity (subject to any restrictions following from the application of an open network business model)<sup>13</sup> under the same open, fair and non-discriminatory conditions and at the prices set according to the wholesale access pricing methodology.

- (73) Wholesale access will be unrestricted for the provision of services in the target areas or for connecting other networks for the purpose of providing electronic communications services in the target areas. In the case of access seekers seeking to connect a mobile network, this encompasses mobile services provided to end users in the target areas including technically unavoidable spill-overs<sup>14</sup> into adjacent areas on a very limited scale. In addition, the Austrian authorities will ensure that wholesale access under the notified measure shall not be granted or used to meet legal obligations, such as coverage obligations attached to spectrum rights of use. Supported infrastructure will not be taken into account to meet any coverage obligations attached to the relevant spectrum rights of use. Access seekers seeking to connect a mobile network to the supported infrastructure must commit in this regard and confirm in writing, to the beneficiary who must in turn submit this to the granting authority, that they will not declare areas covered with the support of the notified measure for the purposes of fulfilling any coverage obligation. This written commitment will include information and evidence of (i) the current situation, and (ii) the planned situation following connection of the mobile network to the new passive infrastructure and activation of stations in the target areas.
- (74) If the beneficiary uses one of the open network business models, *i.e.* the beneficiary is active only at wholesale level, effective and comprehensive wholesale access to the network supported under the notified measure is mandatory and must be ensured at all layers of the broadband value chain (see at recital (13) above). The Austrian authorities confirmed that they will observe that the conditions for wholesale access in the different open network business models are indeed fair and non-discriminatory.
- (75) Beneficiaries under the notified measure will also have to offer effective and comprehensive wholesale access to all existing and privately funded infrastructure used for the deployment of the subsidised network in the target areas. The same access conditions will apply on the entirety of the network including on the part where existing infrastructure will be used.

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<sup>13</sup> For instance, if a beneficiary in an open network business model is only allowed to be active at wholesale level, acting as physical infrastructure provider only, or possibly in combination with the role of network provider, access to the supported passive infrastructure will not be available for the beneficiary itself for the provision of end user services at the retail level.

<sup>14</sup> A spill-over is technically unavoidable if it is necessary in order to allow for a fluent handover between cells and a sufficient quality at the periphery of cells.

- (76) All beneficiaries are required to publish a reference wholesale offer describing all supported wholesale products, conditions and prices.
- (77) Wholesale access to active infrastructure elements (bitstream and VULA) will be ensured under all investment models. The conditions for providing such access shall be considered in the quality assessment of the bids in the course of the selection procedure.
- (78) The wholesale access obligations under the notified measure shall be enforceable irrespective of any change in ownership, management or operation of the supported passive infrastructure.
- (79) Wholesale access prices (including prices for access to backhaul) are to be based on the prices set or approved by the Austrian NRA and benchmarked against average published wholesale prices of comparable access and backhaul services in other, more competitive parts of the country or the Union. If there are no published or regulated prices available for certain wholesale access products to benchmark against, the pricing should follow the principles of cost-orientation or the methodology mandated in accordance with the sectorial regulatory framework. The Austrian authorities will indicate the wholesale access products, the terms and conditions and the prices or pricing methodology in the calls for applications and will publish that information on a comprehensive State aid website at national level (<https://info.bmlrt.gv.at/themen/telekommunikation-post/breitband/breitbandfoerderung/breitbandaustria2030.html>). In the competitive selection process, funding applicants will propose pricing for all relevant access products. In doing so, bidders must observe the pricing methodology, which will be verified by the Austrian authorities in consultation with the NRA. In case of disputes between the beneficiaries and service providers, including situations where the prices are not regulated under the legal framework applied by the NRA, *Telekom-Control-Kommission – TKK* will solve disputes between parties.

### **2.15. Claw-back mechanism**

- (80) The Austrian authorities also submitted that a claw-back mechanism will be applicable to projects implemented under the notified measure.
- (81) The applicants will have to submit in their funding applications a financial model with a detailed description of the costs and revenues associated with the deployment and operation of the supported passive infrastructure at wholesale and retail level in the target area over the lifetime of the supported passive infrastructure. The plan will be taken into account in awarding the funds and will be used to apply the claw-back mechanism.
- (82) The claw-back mechanism will apply if the eligible project costs exceed EUR 10 million at the time of final account. Based on the above, the Austrian authorities will claw back the difference between the costs estimated by the beneficiary in the funding application and the actual costs of deployment of the passive infrastructure. Moreover, if, three years after the final account, the beneficiary achieves a higher equity Internal Rate of Return (“IRR”) plus 3% (efficiency incentive) than that which has been set on the basis of the financial model that

was submitted in the funding application as verified at the final account (base case IRR), the Austrian authorities will claw back the excess IRR, taking into account the overall aid intensity of each project. The Austrian authorities will recover excess IRR proportionally to the Net Present Value ("NPV") of the investment costs. For example, if the NPV of the investments sustained by Austria amounts to EUR X million and the investments sustained by the beneficiary amount to EUR Y million, the state will recover  $X/(X+Y)$  of the excessive IRR, taking into account the overall aid intensity of the project.

- (83) Following this first comparison of the IRR with the base case IRR three years after the final account, the Austrian authorities will monitor the IRR annually for the entire duration of the measure. It will end seven years after the completion of the deployment of the passive infrastructure. In order to allow the Austrian authorities to perform such checks, the beneficiaries must ensure accounting separation between the costs and revenues related to the deployment and operation of the passive infrastructure supported under the notified measure and any other funds at their disposal.

## 2.16. Ex-post evaluation

- (84) Being a scheme with a large budget, the notified measure will be subject to an ex-post evaluation.
- (85) The notified measure's predecessor scheme *Broadband Austria 2020* has already been subject to ex-post evaluation. Two interim evaluation reports have so far been published for *Broadband Austria 2020*, each prepared together by *WIK-Consult GmbH* and *Österreichisches Institut für Wirtschaftsforschung (WIFO)*, for the years 2015/2016 and 2017/2018.<sup>15</sup>
- (86) This ex-post evaluation will be extended to cover the present notified measure based on the same ex-post evaluation plan as already approved by the Commission (see at recitals (49) – (65) and (92) – (95) of the Commission's decision of 17 December 2015 in case SA.41175 – *Broadband Austria 2020*, and as modified pursuant to the Commission's decision of 14 December 2020 in case SA.58261 – *Broadband Austria 2020 Prolongation*, at recitals (59) – (63)). The Austrian authorities will submit a final evaluation report for *Broadband Austria 2020* by 30 June 2023. The Austrian authorities will further submit an additional ex-post evaluation report for *Broadband Austria 2020* by 31 December 2025. The evaluation plan has been further adapted to cover also the present notified measure, *mutatis mutandis*. The Austrian authorities will carry out ex-post evaluations of the notified measure by an external contractor, an independent expert who will be chosen in an open and non-discriminatory procedure, once the last payment under the notified measure has been made. Publicity and transparency will continue to be ensured as per the already approved ex-post evaluation plan. The Austrian authorities will submit to the Commission a final

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<sup>15</sup> The reports are available here: <https://info.bmlrt.gv.at/service/publikationen/telekommunikation/evaluierung-der-breitbandinitiative-2015-2016.html> and <https://info.bmlrt.gv.at/service/publikationen/telekommunikation/evaluierung-der-breitbandinitiative-bmlrt-2017-2018.html>.

evaluation report for the notified measure together with the additional ex-post evaluation report for *Broadband Austria 2020* by 31 December 2025 and an additional ex post evaluation report for the notified measure, which will take account of the effects of the notified measure and covering all aid granted under the notified measure by 31 December 2032. The Austrian authorities also committed to communicate to the Commission any difficulties that could significantly affect the agreed evaluation plan in order to work out possible solutions. The Austrian authorities committed to suspend the notified measure should the final evaluation report not be submitted in good time and sufficient quality.

## **2.17. Transparency, monitoring and reporting**

- (87) The Austrian authorities submitted that, in accordance with the Transparency Communication<sup>16</sup>, the following will be published on the granting authority's website <https://breitbandbuero.gv.at> (at federal level): the full text of the approved scheme, or a link to it; the identity of the granting authority; the identity of the individual beneficiaries, the support instrument (non-repayable direct grants), the amount of support and the aid intensity granted to each beneficiary; the technology used; the addresses reached by the supported new networks;<sup>17</sup> the objective of the support, the date of granting, the type of undertaking (for example SME, large company); the Commission's aid measure reference number; the region where the beneficiary is located (at NUTS level 2) and the principal economic sector of the beneficiaries (at NACE group level).
- (88) The granting authority as well as the beneficiaries will provide entitled third parties with comprehensive and non-discriminatory access to information on the supported new networks (including but not limited to ducts, dark fibre, electricity connections, foundations, access routes, masts, towers, manholes, antennas). The granting authority as well as the beneficiaries will also publish detailed information concerning wholesale access conditions and prices.
- (89) Since the amount of the financial support under the notified measure is estimated by the beneficiaries on an *ex ante* basis to cover the expected funding gap over the lifespan of the investment, the Austrian authorities will closely monitor for the entire duration of the notified measure its implementation, including the competitive selection procedures, the deployment and operation of the passive infrastructure and the fulfilment of all requirements under the notified measure.
- (90) In order to enable the Commission to monitor the notified measure and individual support granted under the notified measure, the Austrian authorities committed to annually submit to the Commission the reports provided for by Article 26 of

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<sup>16</sup> Communication from the Commission amending the Communications from the Commission on EU Guidelines for the application of State aid rules in relation to the rapid deployment of broadband networks, on Guidelines on regional State aid for 2014–2020, on State aid for films and other audiovisual works, on Guidelines on State aid to promote risk finance investments and on Guidelines on State aid to airports and airlines (OJ C 198, 27.6.2014, p. 30).

<sup>17</sup> The information will be updated every three months.

Council Regulation (EU) 2015/1589<sup>18</sup>. The Austrian authorities further committed to keep for at least ten years from the dates of award of individual support under the notified measure detailed records containing the information and supporting documentation necessary to establish that all compatibility conditions are met, and provide them, on a written request, to the Commission within a period of 20 working days or such longer period as may be fixed in the request.

- (91) Starting from the date when the new fixed networks are put into operation, for the duration of the notified measure, the granting authority has to report every two years key information on the supported projects to the Commission. This will include, besides the information already made public pursuant to recital (87) above, the sources of public financing, the total cost (or estimated total cost) of the project, the date when the new fixed networks are put into operation, the technology deployed on the publicly funded passive infrastructure; the minimum and average (up- and download) speeds of electronic communications services provided, the wholesale access products (including conditions for access and prices/pricing methodology), the number of access seekers and service providers on the new fixed networks, the number of houses passed and take-up rates prior to, and after, the State intervention (in absolute and in percentage terms). The Austrian authorities shall consolidate the information of the individual measures and report to the European Commission.
- (92) The granting authority, in general, will carry out the monitoring of the notified measure. However, the monitoring of and the reporting on the individual obligations of the beneficiaries and the control of compliance by the beneficiaries with all performance criteria listed in the funding agreements will be carried out by the *Abwicklungsstelle*.

### **3. ASSESSMENT OF THE MEASURE**

#### **3.1. Existence of aid**

- (93) According to Article 107(1) TFEU, "*[s]ave as otherwise provided in the Treaties, 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.*"
- (94) It follows that, in order for a measure to qualify as State aid, the following cumulative conditions have to be met: (i) the beneficiary of the measure has to be an 'undertaking', (ii) the measure has to be granted through State resources and be imputable to the State, (iii) the measure has to confer an economic advantage, (iv) which is selective, (v) and has an effect on trade and competition.

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<sup>18</sup> Council Regulation (EU) 2015/1589 of 13 July 2015 laying down detailed rules for the application of Article 108 of the Treaty on the Functioning of the European Union (OJ L 248, 24.9.2015, p. 9).

### 3.1.1. Undertaking

- (95) Undertakings within the meaning of Article 107(1) TFEU are entities engaged in an economic activity, regardless of their legal status and the way in which they are financed.<sup>19</sup>
- (96) The beneficiaries of the notified measure are electronic communications network operators and municipalities in Austria (or co-operations in the form of consortia for the joint implementation of a project). In line with the functional character of the notion of "economic activity" in Article 107(1) TFEU, it is irrelevant whether the recipient of the funds is an entity with a separate legal status or an integrated part of the State administration.<sup>20</sup> All beneficiaries will deploy, operate, maintain and grant access to passive infrastructure (e.g. ducts, cabinets, exchanges, dark fibre, masts/towers) for fixed networks. The construction and operation of and the granting of access to passive infrastructure for fixed networks with a view to its commercial exploitation constitutes an economic activity. All beneficiaries under the notified measure are therefore considered to be undertakings within the meaning of Article 107(1) TFEU.

### 3.1.2. State resources and imputability

- (97) State resources include all resources of the public sector<sup>21</sup>, including resources of intra-State entities (decentralised, federated, regional or other)<sup>22</sup> and, under certain circumstances, resources of private bodies. In cases where a public authority grants financial support to a beneficiary, the measure is by definition imputable to the State, even if the authority in question enjoys legal autonomy from other public authorities.
- (98) The notified measure is co-financed by the Austrian federal government, Austrian authorities at regional level and Recovery and Resilience Facility funds assigned to Austria. Funds from the federal and regional budgets are resources of the public sector and also Recovery and Resilience Facility funds assigned to a Member State constitute State resources as they are subject to the Member State's control. The funds will be granted by the BMLRT. The notified measure is therefore considered to be granted through State resources and to be imputable to Austria.

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<sup>19</sup> Judgment of the Court of Justice of 10 January 2006, *Cassa di Risparmio di Firenze SpA and Others*, C-222/04, ECLI:EU:C:2006:8, paragraph 107.

<sup>20</sup> Case C 118/85, judgment of 16 June 1987, *Commission of the European Communities v Italian Republic*, European Court Reports 1987 -02599, paragraph 13 (ECLI identifier: ECLI:EU:C:1987:283); and Joined Cases T -443/08, T-455/08, judgment of 24 March 2011, *Mitteldeutsche Flughafen and Flughafen Leipzig/Halle v Commission*, paragraphs 88 and 89 (ECLI identifier: ECLI:EU:T:2011:117).

<sup>21</sup> Judgment of the General Court of 12 December 1996, *Air France v Commission*, T-358/94, ECLI:EU:T:1996:194, paragraph 56.

<sup>22</sup> Judgment of the General Court of 6 March 2002, *Territorio Histórico de Álava and Others v Commission*, Joined Cases T-92/00 and 103/00, ECLI:EU:T:2002:61, paragraph 57.

### 3.1.3. *Economic advantage*

- (99) An advantage, within the meaning of Article 107(1) TFEU, is any economic benefit, which an undertaking could not have obtained under normal market conditions, that is to say in the absence of State intervention.<sup>23</sup>
- (100) Austria has decided to provide financial support for the deployment of passive infrastructure for the new networks in the target areas. Once deployed by the beneficiaries, the passive infrastructure will not only be owned but also be operated by them. The beneficiaries will thus use the financial support under the notified measure for the economic activities of deployment and operation of and granting of access to passive infrastructure for fixed networks for their own commercial benefit. The notified measure will therefore enable beneficiaries to develop their networks and electronic communications services at a lower cost than what they would have to bear under normal market conditions if compared to companies investing under the same technical, commercial and legal conditions in the liberalised market without public financial support.
- (101) The financial support under the notified measure therefore constitutes a conferral of an economic advantage to the beneficiaries, which they could not have obtained in the absence of State intervention in the form of the notified measure. Hence, the Commission considers that the beneficiaries of the notified measure receive an economic advantage within the meaning of Article 107(1) TFEU.

### 3.1.4. *Selectivity*

- (102) To fall within the scope of Article 107(1) TFEU, a State measure must favour 'certain undertakings or the production of certain goods'. The notified measure is aimed at electronic communications network operators, Austrian municipalities and Austrian regions' in-house companies (as described at recital (22) above).
- (103) The notified measure thus targets electronic communications network operators, Austrian municipalities and Austrian regions' specialized in-house companies (*Landesgesellschaften*) that are active in one industrial sector (the electronic communications sector) but only in certain segments of the overall electronic communications sector (deployment and operation of fixed broadband networks), to the exclusion, in principle, of other undertakings active in other segments of the overall electronic communications market or in civil engineering works and infrastructure operation that cannot meet the requirements set out in the notified measure.<sup>24</sup>
- (104) Furthermore, the measure does not concern general infrastructure that would be open on a non-discriminatory basis to anyone but is limited to infrastructure that may be used only for the provision of broadband services.

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<sup>23</sup> Judgment of the Court of Justice of 29 April 1999, *Spain v Commission*, C-342/96, ECLI:EU:C:1999:210, paragraph 41.

<sup>24</sup> Judgment of 15 June 2006, *Air Liquide Industries Belgium*, Joined Cases C-393/04 and C-41/05, ECLI:EU:C:2006:403, paragraph 31.

- (105) As concerns the identification of the particular legal framework against which selectivity can be assessed, it is noted that the construction and operation of and the granting of access to passive infrastructure for fixed networks is a liberalised economic activity usually conducted by commercial operators on the basis of private investments in the market. In this framework, economic activities normally do not receive subsidies. Indeed, the supported deployment and operation of passive infrastructure for fixed networks in the target areas is not justified by the nature of the liberalised market and the regulatory framework. In any event, the features of this legal framework cannot provide any justification for the granting of subsidies.
- (106) In the context of this particular legal regime, the notified measure has the effect of conferring an advantage on the beneficiaries over other undertakings active in other segments of the overall electronic communications market or in civil engineering works and infrastructure operation, which are, in the light of this legal regime, in a comparable factual and legal situation.
- (107) The notified measure is therefore selective.

#### 3.1.5. *Effect on trade and competition*

- (108) State measures fall within the scope of Article 107(1) TFEU insofar as they distort or threaten to distort competition and affect trade between Member States. According to the case law of Union courts, the concept of ‘*effect on trade between Member States*’ is linked to the notion of distortion of competition and both are often inextricably linked. In this regard, the Court has stated that ‘*In particular, where State financial aid strengthens the position of an undertaking as compared with other undertakings competing in intra-Community trade, the latter must be regarded as affected by that aid*’<sup>25</sup>.
- (109) The notified measure concerns the deployment of passive infrastructure for the new fixed networks in areas in Austria with no present or credibly planned network providing, under usual peak time conditions, download speeds of at least 30 Mbps and certain areas with one present or credibly planned network providing, under usual peak time conditions, download speeds of at least 30 Mbps but less than 100 Mbps. When looking at the electronic communications sector in Austria in general, it must be concluded that there is significant private financing of the deployment of passive infrastructure for fixed networks all over the country. The notified measure will determine the availability of networks that would not be provided under normal market conditions. State support may deter other operators from setting up or developing their own networks under commercial conditions and may also encourage local undertakings to take advantage of electronic communications services offered through the supported networks rather than other market solutions.

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<sup>25</sup> Judgment of 4 April 2001, *Regione Friuli Venezia Giulia v Commission*, T-288/97, ECLI:EU:T:2001:115, paragraph 41.

- (110) The markets for electronic communications networks are open to competition between operators, which generally engage in activities that are subject to trade between Member States. The construction and operation of and the granting of access to passive infrastructure for the new networks could as well be delivered by an undertaking from another Member State having cross border activities.
- (111) It must therefore be considered that the notified measure is capable of distorting competition and has an effect on trade between Member States.

### 3.1.6. Conclusion

- (112) The Commission concludes that the notified measure constitutes State aid within the meaning of Article 107(1) TFEU.

## 3.2. Compatibility

- (113) According to Article 107(3)(c) TFEU, “*aid to facilitate the development of certain economic activities or of certain economic areas, where such aid does not adversely affect trading conditions to an extent contrary to the common interest*” may be considered to be compatible with the internal market. The compatibility of State aid for the rollout of fixed broadband networks is normally assessed under the 2013 EU Guidelines for the application of State aid rules in relation to the rapid deployment of broadband networks (“2013 Broadband Guidelines”).<sup>26</sup>
- (114) However, in 2021, the 2013 Broadband Guidelines were subject to an evaluation assessing whether they were still fit for their main purpose of facilitating the development of economic activities consisting in broadband network deployment and related broadband network services, while not adversely affecting trading conditions to an extent contrary to the common interest. The evaluation showed that the 2013 Broadband Guidelines work well, are broadly fit for purpose and have made an important contribution to the deployment of broadband networks. At the same time, the evaluation showed that some targeted adjustments of the existing rules are necessary to reflect the latest market and technological developments and fast evolving connectivity needs. Such aspects are particularly relevant for the assessment of the conditions under which Member States may grant support *inter alia* with respect to the need for public intervention (existence of a market failure) and to the performance that the networks must achieve (step change)<sup>27</sup>.

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<sup>26</sup> Communication from the Commission – EU Guidelines for the application of State aid rules in relation to the rapid deployment of broadband networks, OJ C 25, 26.1.2013, p.1.

<sup>27</sup> See Commission Staff Working Document – Evaluation of the State Aid rules for broadband infrastructure deployment (SWD(2021) 195 final). On 19 November 2021, the Commission published for consultation a draft of revised broadband guidelines, which relies largely on the results, evidence and data collected in the context of the evaluation in combination with the Commission’s market experience stemming from its case practice (see [https://ec.europa.eu/competition-policy/public-consultations/2021-broadband\\_en](https://ec.europa.eu/competition-policy/public-consultations/2021-broadband_en)). The proposed revision aims to ensure that the market and technological developments are appropriately taken into account in the assessment of State aid in the broadband sector. The main proposed revisions concern: (i) alignment of the intervention threshold for aid for fixed broadband networks with current and expected technological and market developments;

- (115) Against this background, the Commission has assessed the notified measure on the basis of the 2013 Broadband Guidelines, taking into account, where justified, adjustments needed to reflect technological and market developments, based on the information provided by the Austrian authorities.
- (116) In order to be declared compatible, first, the aid must be intended to facilitate the development of certain economic activities or of certain economic areas and, second, the aid must not adversely affect trading conditions to an extent contrary to the common interest.<sup>28</sup>
- (117) Under the first condition, the Commission examines:
- (a) the economic activity being facilitated by the notified measure;
  - (b) the incentive effect of the notified measure, in that it changes the behaviour of the undertakings concerned in such a way that they carry out an additional activity which they would not carry out without the notified measure or would carry out in a restricted or different manner or location;
  - (c) the existence of a breach of any provision of Union law in relation to the notified measure.
- (118) Under the second condition, the Commission assesses the positive effects of the notified measure for the development of the activities that it intends to support and the negative effects that the notified measure may have on the internal market, in terms of distortions of competition and adverse effects on trade caused by the notified measure. In this regard, the Commission assesses:
- (a) the positive effects of the aid;
  - (b) whether the aid is needed and targeted to addressing a situation where it can bring about a material improvement that the market cannot deliver itself, for example by remedying a market failure or addressing important inequalities;
  - (c) whether the aid is an appropriate policy instrument to meet its objective;

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(ii) aid in the form of demand-side measures supporting the take-up of fixed and mobile networks; (iii) guidance regarding an operator's use of its own resources to connect to the publicly-funded infrastructure to provide services outside the area for which the aid was granted; (iv) adjustment of wholesale access obligations to reflect technological progress; (v) clarifications and further guidance on mapping, public consultation, selection procedure, wholesale access pricing, claw-back mechanism; (vi) aid for the deployment of mobile networks.

<sup>28</sup> Judgment of 22 September 2020, Case C-594/18 P, *Austria v Commission (Hinkley Point C)*, ECLI:EU:C:2020:742, para. 19.

- (d) whether the aid is proportionate and limited to the minimum necessary to attain its objective and stimulate additional investment or activity in the area concerned;
  - (e) whether the aid is transparent; to measure and minimise the impact on the internal market, Member States, stakeholders, the general public and the Commission must have easy access to information on the aid awarded;
  - (f) the negative effects of the aid on competition and trade between Member States.
- (119) As a final step, the Commission balances the identified negative effects of the notified measure on the internal market with the positive effects of the planned aid on the supported economic activities.

*First condition*

*3.2.1. Facilitation of the development of an economic activity*

- (120) The notified measure supports the development of the economic activities of deployment and operation of passive infrastructure for fixed networks in line with the objectives of the Austrian Broadband Strategy 2030<sup>29</sup>. The notified measure also intends to ensure the availability for end users of fixed broadband services at speeds of at least 100 Mbps download and 100 Mbps upload under usual peak time conditions in target areas in Austria (see at recitals (9) and (10) above). The notified measure will also ensure at least the doubling of both download and upload speeds under usual peak time conditions if compared to the existing networks (see at recital (68) above). In addition, the passive infrastructure supported and deployed under the notified measure could also be used to provide end users speeds of at least 1 Gbps download and 1 Gbps upload under usual peak time conditions, which may require in some cases however additional investments in active and/or passive elements not supported by the notified measure (see at recital (9) above). The public interventions will take place only in areas where end users currently have fixed broadband access only at download speeds of less than 100 Mbps under usual peak time conditions and where fixed networks capable of supporting a fixed broadband access service of 100 Mbps are neither expected nor planned to be deployed (see at recitals (43) and (44) above). The notified measure aims at overcoming market failures, which jeopardize the ability of citizens, businesses and public administrations in the target areas to have access to electronic communications services capable of addressing their needs, thereby increasing the economic competitiveness of the target areas.
- (121) The Commission acknowledges that by supporting the deployment and operation of passive infrastructure for the new networks in these target areas and by imposing the obligation on beneficiaries to ensure (i) effective and comprehensive wholesale access to the supported networks at all layers of the broadband value

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<sup>29</sup> Breitbandstrategie 2030 – Österreichs Weg in die Gigabit-Gesellschaft, 2019, available for download under: <https://info.bmlrt.gv.at/service/publikationen/telekommunikation/breitbandstrategie-2030.html>.

chain as well as (ii) the provision of fixed broadband services to end users at speeds of at least 100 Mbps download and 100 Mbps upload under usual peak time conditions, the Austrian authorities contribute to the development of these economic activities.

### 3.2.2. *Incentive effect*

- (122) To ensure an incentive effect for the development and facilitation of the indicated economic activities, electronic communications network operators, other interested stakeholders and the wider public in general have been consulted on the design of the notified measure, the potential target areas and their deployment plans for at least the next three to five years already twice in 2021 (see section 2.8 above). The Austrian authorities will moreover launch additional public consultations on the notified measure's target areas and request the submission of information about any network deployment plans in these areas at least once per year throughout the duration of the notified measure. As a result, the notified measure will only cover areas as described at recitals (43) and (44) above, at any time during its duration.
- (123) The Commission concludes on this basis that the notified measure has an incentive effect for the development of the economic activities described under section 3.2.1 above in the areas described at recitals (43) and (44) above. The notified measure will change the behaviour of potential beneficiaries in such a way that they carry out activities, which they would not carry out without the notified measure or would carry out in a restricted or different manner or not in the areas described at recitals (43) and (44) above.

### 3.2.3. *Compliance with other provisions of Union law*

- (124) If a State aid measure, the conditions attached to it (including its financing method when that method forms an integral part of the aid measure) or the activity it finances entail a violation of a provision or general principles of Union law, the aid cannot be declared compatible with the internal market.
- (125) The Commission is not aware of any possible breach of Union law that would prevent the notified measure from being declared compatible with the internal market.

### *Second condition:*

### 3.2.4. *Positive effects of the aid*

- (126) The granting authority will award aid only for the deployment of passive infrastructure for the new networks in areas where end users do not yet have fixed broadband access at download speeds of at least 100 Mbps under usual peak time conditions and where the roll-out of such networks is neither expected nor planned within the next three to five years since the last market consultation, and subject to further public consultations (see at recitals (43) and (44) above). Moreover, the granting authority will give priority under the notified measure to areas where end users do not yet have fixed broadband access at download speeds of at least 30 Mbps under usual peak time conditions. In these areas, the notified

measure will ensure that supported networks will give end users fixed broadband access at the speed of at least 100 Mbps download and 100 Mbps upload under usual peak time conditions as from the start of the operation of the new networks.

- (127) At the same time, the notified measure will ensure that the passive infrastructure supported and deployed under it is capable of contributing to the provision of speeds of at least 1 Gbps download and 1 Gbps upload under usual peak time conditions without further investments in this passive infrastructure, even though complementary investments in other active and/or passive elements of the network may be required. That will make the infrastructure supported and deployed under the notified measure future-proof should end user demands develop towards gigabit speeds in the future. This will be the case even if other parts of the supported networks might still have to upgrade their passive and/or active infrastructure with private funds in order to actually provide end users access to speeds of at least 1 Gbps download and 1 Gbps upload under usual peak time conditions.
- (128) Furthermore, the effective and comprehensive obligations and conditions on wholesale access that will be applicable under the notified measure (see under section 2.14 above) will further ensure that end users receive fixed broadband access at the target speeds regardless of the network business model used by a beneficiary in the individual case. The Commission considers that the effective and comprehensive rules and conditions for wholesale access under the notified measure (as explained in detail under section 2.14 above) will have positive effects on competition at the retail level, not only between service providers using the same broadband technologies but potentially also between service providers using different broadband technologies.
- (129) This also means that the award of funds under the notified measure will lead in all cases to the availability of fixed broadband services for end users at speeds of at least 100 Mbps download and 100 Mbps upload under usual peak time conditions in areas that currently have fixed broadband access only at download speeds of less than 100 Mbps under usual peak time conditions. It is also clear that without the notified measure these end users, given their location in the target areas, would not get fixed broadband access at such speeds for at least the next three to five years following each public consultation.
- (130) At the same time, considering the likely location of the vast majority of the target areas in rural and remote parts of the country, the notified measure has the potential and, in fact, the objective to reduce regional inequalities and the digital divide between rural and urban areas in Austria. The notified measure contributes to addressing Austria's backlog in the deployment of fixed access networks offering speeds of at least 100 Mbps download and 100Mbps upload and contributes to the Commission's 2020 European semester country-specific recommendations for Austria on additional investment in infrastructure, including broadband and ensuring high-speed connectivity in rural areas.<sup>30</sup>

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<sup>30</sup> See Recommendation for a Council Recommendation on the 2020 National Reform Platform Programme of Austria and delivering a Council opinion on the 2020 Stability Programme of Austria,

(131) The notified measure brings about a material improvement in the availability of high-quality connections in the target areas to the benefit of citizens, businesses and the public sector. It contributes to correcting social or regional inequalities by promoting the availability of performant broadband networks in the target areas in Austria. A wide availability of performant networks is an essential means of communication and participation in society and improves social and territorial cohesion. The notified measure will also contribute towards the achievement of objectives of Union digital policy, and more specifically, to reducing the digital divide across Austria. This can be seen against a wider ambition of the Union to achieve throughout its territory ambitious connectivity objectives.<sup>31</sup> The European Electronic Communications Code also identifies the general objective of promoting connectivity as well as access to, and take-up of, very high capacity networks by all citizens and businesses of the Union<sup>32</sup>.

(132) Hence, the Measure has positive effects in the target areas.

### 3.2.5. *Necessity of the aid: absence of market delivery due to market failure*

(133) State aid may be deemed necessary where it can bring about a material improvement that the market alone does not deliver. Indeed, State aid measures can, under certain conditions, correct market failures, thereby improving the efficient functioning of markets and enhancing competitiveness.

(134) A market failure exists if markets, left to their own devices, without public intervention fail to deliver an efficient outcome for society. This may arise, for instance, when certain investments are not being undertaken even though the economic benefit for society exceeds their cost.

(135) The notified measure's target areas are areas where end users do currently not have fixed broadband access at download speeds of at least 100 Mbps under usual peak time conditions and in many cases not even at download speeds of at least 30 Mbps under usual peak time conditions. In addition, the notified measure's

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COM/2020/520 final, at recital 21 (available under: <https://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1591720698631&uri=CELEX%3A52020DC0520>); Recommendation for a Council Recommendation on the 2019 National Reform Programme of Austria and delivering a Council opinion on the 2019 Stability Programme of Austria, COM/2019/520 final, at recital 15 (available under: <https://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1560256438669&uri=CELEX%3A52019DC0520>).

<sup>31</sup> See, in particular, the Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee the Committee of Regions of 9 March 2021, '2030 Digital Compass: the European way for the Digital Decade' (COM/2021/118 final). In this regard, see also the Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee the Committee of Regions of 19 February 2020, 'Shaping Europe's digital future' (COM/2020/67 final), according to which, as the decade progresses, households will increasingly need 1 Gbps speed. Finally, see the Proposal for a Decision of the European Parliament and of the Council establishing the 2030 Policy Programme 'Path to the Digital Decade', COM(2021) 574 final, 2021/0293 (COD), which underlines that "By 2030, networks with gigabit speeds should become available at accessible conditions for all those who need or wish such capacity".

<sup>32</sup> See Article 3 (2) (a) and (d) of Directive (EU) 2018/1972 of the European Parliament and of the Council of 11 December 2018 establishing the European Electronic Communications Code.

target areas are areas where the rollout of such networks, *i.e.* fixed broadband networks at download speeds of at least 100 Mbps, is neither expected nor planned to be made within at least the next three to five years following each public consultation (see at recitals (43) and (44) above and under section 2.8 above).

- (136) As explained at recital (49) above, these public consultations will be launched at least once per year throughout the notified measure's duration period, requesting the submission of information about any network deployment plans in these target areas within the next at least three years. The map of target areas will be updated accordingly on a regular basis.
- (137) In this respect, the Austrian authorities have demonstrated that the passive infrastructure covered by the notified measure would not be deployed in the target areas without support under the notified measure. The cost of deploying passive infrastructure for the new networks in the notified measure's target areas is, on a per premises calculation basis, significantly higher than the cost of connecting urban and densely populated areas, because the target areas are often located in topographically difficult and mountainous parts of Austria with often significant distances between individual premises. Moreover, the achievable revenue is more limited in the notified measure's target areas than elsewhere in Austria due to low population density in the notified measure's target areas.
- (138) Furthermore, as explained at recitals (114) and (115) above, in its assessment of the necessity of State aid, the Commission also takes into account the technological and market developments since the adoption of the 2013 Broadband Guidelines. The necessity for State intervention in the notified measure's target areas is supported by the following considerations.
- (139) The notified measure's intervention threshold of fixed broadband access at download speeds of less than 100 Mbps under usual peak time conditions and its target speeds of at least 100 Mbps download and 100 Mbps upload under usual peak time conditions, combined with the requirement that the supported and deployed passive infrastructure must at least double the existing download and upload speeds provided under usual peak time conditions to end users in the target areas and must also be capable of providing speeds of at least 1 Gbps download and 1 Gbps upload under usual peak time conditions without further investments in this passive infrastructure, are justified with a view to Austria's comparably weak performance in the area of fixed broadband deployment and current and future challenges posed by the digitalisation, especially in rural and remote areas targeted by the measure. These thresholds and targets adequately take account of the required longevity of networks and investments and Austria's central goal of ensuring equal opportunities for all Austrian citizens in terms of their ability to participate fully in the possibilities of digitization.
- (140) In light of the current situation in Austria, these thresholds and target speeds will contribute to achieving the Austrian goal of nationwide deployment of fixed gigabit-capable broadband networks by 2030. The Commission acknowledges that this is necessary in order to be prepared for the continued strong increase in global data usage in private and professional contexts as well as the ever-

increasing connectivity of devices (Internet of Things), machine-to-machine communication and smart home applications.

- (141) It can therefore be concluded that the notified measure addresses a market failure in its target areas, where end users do not yet have fixed broadband access at download speeds of at least 100 Mbps and where the rollout of such networks is neither expected nor planned in at least the next three years following the last market consultation. The Commission therefore considers the notified measure necessary to support the development of the economic activities at issue.

### 3.2.6. *Appropriateness of State aid as a policy instrument*

- (142) The State aid measure proposed must be an appropriate policy instrument to address the problem of absence of market delivery due to market failure.
- (143) The Austrian authorities explained that alternative and less distortive instruments have been tried and implemented in the past but did not resolve the problem. *Ex ante* VULA regulation is already in place and the use of shared infrastructure has been facilitated by streamlining procedures. The Austrian NRA has imposed altogether various regulatory measures, such as obligations on access, increased transparency, further obligations on non-discrimination and price control. However, these alternative, regulatory instruments have proven insufficient with a view to resolving the problems related to the lack of suitable fixed broadband infrastructure and services in the target areas.
- (144) As regards demand-side measures, these are not an appropriate means to solve the problem as the required passive infrastructure for the new networks does not yet exist in the target areas and its deployment without support by the notified measure would not be profitable (see section 3.2.4.2.1. above).
- (145) In order to be an appropriate State aid measure, the new networks supported under the notified measure through the deployment of passive infrastructure must also provide significantly enhanced characteristics in comparison to the existing networks in the target areas. Thus, the new networks supported under the notified measure should represent a step change. A step change can be demonstrated if:
- (a) The new network is the result of a significant new investment in the network under the notified measure, and
  - (b) The supported new network brings significant new capabilities to the market in terms of broadband service availability, capacity, speeds and competition.
- (146) The notified measure will support the new networks only through financial support for the deployment of passive infrastructure. The deployment of passive infrastructure constitutes an investment in the network. The deployment of such passive infrastructure will only be supported in the notified measure's target areas, *i.e.* in areas in Austria where the passive infrastructure that is needed for the deployment of fixed networks offering at least 100 Mbps download and 100 Mbps upload broadband access is not yet in place and neither expected nor planned in the coming three years following the last market consultation. End

users in these areas do currently have fixed broadband access only at download speeds of less than 100 Mbps under usual peak time conditions. That means that the new networks in the target areas will be the result of the supported deployment of passive infrastructure, which constitutes a significant new investment in the network as a result of the notified measure. Besides, in light of the fact that the passive infrastructure supported and deployed under the notified measure must also be capable of supporting the provision to end users of fixed broadband services at speeds of at least 1 Gbps download and 1 Gbps upload under the conditions described at recital (9) above, the vast deployment of such passive infrastructure constitutes a significant investment in the new networks and provides for a step change in itself as it will bring new capabilities to the market.

- (147) The supported new networks will provide, as from their start of operation following the deployment of the passive infrastructure, in each individual case and target area, at least a doubling of both download and upload speeds under usual peak time conditions if compared to the existing networks and, in any event, even in the case of very low existing speeds, at least speeds of 100 Mbps download and 100 Mbps upload under usual peak time conditions. Moreover, the supported and deployed passive infrastructure will also be capable of providing speeds of at least 1 Gbps download and 1 Gbps upload within the meaning of recital (9) above. This represents significant new capabilities for the markets in the target areas, as not only broadband service availability and capacity but also speeds will significantly improve. Moreover, given the notified measure's rules and conditions on wholesale access (see section 2.14 above), the supported new networks will also bring significant new capabilities in terms of competition to the markets in the target areas. Overall, the notified measure will contribute to a significant, sustainable, pro-competitive and non-temporary technological advancement without creating disproportionate disincentives to private investments (considering the lack of interest of private parties to invest in the deployment of similar networks in the target areas).
- (148) The Commission therefore considers the notified measure to provide a step change. Thus, the notified measure is an appropriate policy instrument for addressing the market failure concerning the deployment of passive infrastructure for the new networks in the notified measure's target areas.

### 3.2.7. *Proportionality: Aid limited to the minimum necessary*

- (149) Aid is considered proportionate if its amount is limited to the minimum necessary and the potential distortions of competition are minimised. A number of conditions are necessary to minimise the State aid involved and the potential distortions of competition.

#### 3.2.7.1. Detailed mapping and public consultation

- (150) Member States should clearly identify which geographic areas will be covered by the notified measure and give adequate publicity to the main characteristics of the notified measure and to the target areas by publishing the relevant information and inviting electronic communications operators and other interested stakeholders to comment.

- (151) The notified measure will support the deployment of passive infrastructure in the target areas only (see under section 2.7 above), as they have been identified in the mapping exercise (see at recitals (46) - (48) above). The main characteristics of the notified measure and the identification of the target areas have been made public and were verified in various public consultations, two of which have been carried out already in 2021 and more of which will be carried out at least once per year throughout the duration of the notified measure (see at recitals (49) - (52) above).
- (152) That means that all target areas have been communicated to the public in an open and transparent manner following their identification in the mapping exercise. The Austrian authorities were and are thus in a position to update the target areas on the basis of the deployment plans communicated by stakeholders in response to these public consultations. In the first public consultation (see at recital (49) above), the Austrian authorities also consulted the wider public on the notified measure's legal bases (see at recitals (24) - (26) above) and took stakeholders' comments on the design of the initially proposed measure into account in the following revision of the notified measure's legal bases.
- (153) This is sufficient to ensure proper publicity of the notified measure and its design, to identify clearly the geographic areas that will be covered by the notified measure, thereby ensuring that the measure covers only areas where the intervention is necessary.

#### 3.2.7.2. Competitive selection procedure and most economically advantageous offer

- (154) As a rule, in order to limit State aid to the minimum necessary, a competitive selection procedure in line with the principles of public procurement should ensure that there is transparency for all funding applicants wishing to apply for funding. The granting authority has to establish qualitative award criteria on which the submitted applications are assessed and the funding should be awarded to the most economically advantageous offer.
- (155) All beneficiaries of the notified measure will be selected on the basis of open, transparent and competitive procedures in line with the EU Public Procurement Directives. All relevant information including the assessment criteria and the evaluation manual containing information on the evaluation will be published in the calls for funding applications on the website of the granting authority as well as on the website of the *Abwicklungsstelle* (see at recitals (53) - (54) above).
- (156) The selection of all beneficiaries under the notified measure will be based on the economically most advantageous offer (*i.e.* the funding application). An evaluation panel consisting of independent experts will carry out the evaluation of funding applications according to the quality criteria (see at recital (59) above) described in the evaluation manual (see at recitals (57) - (58) above). The results of the qualitative evaluation of the funding applications will be weighed against the requested amount of funding for each offer and, at similar or identical quality conditions, the offer requiring the lowest amount of funding will be selected (see at recital (60) above). In view of the integration of financial contributions by regional authorities into the notified measure and the likely participation of

regional in-house companies as funding applicants under the notified measure, the granting authority will ensure also in this respect the absence of conflicts of interest by any member of the evaluation panels.

- (157) The notified measure's requirement for beneficiaries' own contributions in the amount of at least 25% ("Access" programme) and 10% ("OpenNet programme) of the eligible project costs constitutes a safeguard for ensuring the avoidance of any overcompensation of beneficiaries. In light of the possibility of having various funding sources, the granting authority furthermore has to verify in every single case that, before the signing of any funding agreements, no "top-up" grants from other public entities will lead to overcompensation of beneficiaries and that the maximum overall aid intensities of the notified measure (75% for the Access programme and 90% for the OpenNet programme) are respected.
- (158) On the basis of the information provided by the Austrian authorities (see at recitals (53) - (61) above), the Commission is satisfied that the requirements with regard to the competitive selection procedure and the most economically advantageous offer are fulfilled.

#### 3.2.7.3. Technological neutrality

- (159) The notified measure must not favour or exclude any particular technology, both in the selection of beneficiaries and in the provision of wholesale access. As different technological solutions exist, the calls for funding applications must not favour or exclude any particular technology or network platform. Funding applicants should be able to propose whatever technology they deem most suitable. This is without prejudice to the possibility for Austria to determine the desired performance of the supported new networks.
- (160) Based on the information provided by the Austrian authorities (see at recital (62) above), the notified measure does not require or exclude any specific technology, provided that the supported new networks will provide the target speeds, represent a step change and that the supported and deployed passive infrastructure is capable of providing speeds of 1 Gbps download and 1 Gbps upload within the meaning of recital (9) above. Funding applicants are able to propose the use or combination of any technology they deem most suitable for providing the target speeds. Also, effective and comprehensive wholesale access will be offered in line with the principle of technological neutrality at all layers of the broadband value chain, regardless of the network business model chosen by the beneficiary. The notified measure is therefore technologically neutral.

#### 3.2.7.4. Use of existing infrastructure

- (161) Member States should incentivise recourse to any existing infrastructure so as to avoid unnecessary and wasteful duplication of resources and to reduce the amount of public funding.
- (162) As explained (see at recitals (47) and (48) above), Austria has set up a national database on broadband coverage (the broadband atlas). All data on existing fixed and mobile broadband networks are publicly accessible (in the form of maps) and available for download there. The broadband atlas is regularly updated based on

the comments received on the notified measure's public consultations and the relevant infrastructure data submitted by telecoms operators to Austria's NRA. Austria encourages the inclusion of existing broadband infrastructure where possible to be used for the deployment of the new networks and requires all funding applicants to provide data on the available networks including wholesale access conditions and prices already in the funding applications (see at recitals (64) - (67) above).

- (163) This information on existing infrastructure and networks will be made available in the relevant calls for applications to all funding applicants and in all cases at a point in time that would allow them to include such information on existing infrastructure in their bids (see for more details at recital (67) above).
- (164) The Commission considers that there are sufficient incentives for the use of the existing infrastructure by the beneficiaries and that the approach taken by the Austrian authorities allows for finding the best and most cost-efficient solution and for avoiding unnecessary duplication of infrastructure.

#### 3.2.7.5. Wholesale access and pricing

- (165) The subsidised networks must offer effective wholesale access under open, transparent, fair and non-discriminatory conditions to all operators who request it, since wholesale access enables third party operators to compete with the selected beneficiary and, thus, to develop competition in the notified measure's target areas in the longer term. The type of wholesale access obligations imposed on a supported network should be aligned with the portfolio of access obligations laid down under the sectoral regulation. However, State aid beneficiaries should provide a wider range of wholesale access products than those imposed by NRAs on the operators who have significant market power since a State aid beneficiary is using not just their own resources but also taxpayers' money.
- (166) As explained under section 2.14 above, the notified measure will provide for effective and comprehensive wholesale access at open, fair and non-discriminatory conditions to the entirety of the supported new networks and at all layers of the broadband value chain. This applies also in cases where the beneficiary uses an open network business model (and is, as a consequence, not active at retail level) (see at recital (69) above).
- (167) Effective and comprehensive wholesale access includes, but is not limited to, access to ducts, dark fibre, masts/towers, street cabinets and exchanges, including full and effective unbundling, bitstream access and VULA (see at recital (71) above).
- (168) Passive wholesale access (irrespective of whether the infrastructure was deployed under the notified measure or existed already) will be granted unlimited in time, while access to the active infrastructure elements will have to be granted for at least ten years (see at recital (70) above). The notified measure does furthermore ensure that the supported and deployed passive infrastructure will be large enough and provide enough capacity for at least three access seekers (see at recital (70) above). The wholesale access obligations will be clearly set out in the calls for

funding applications and all wholesale access conditions and prices will have to be specified already in the funding applications (see at recital (70) above).

- (169) Effective and comprehensive wholesale access will be available for all broadband technologies and be subject only to limited restrictions for the provision of services in the target areas (see at recitals (72) and (73) above).
- (170) This approach reinforces the technological neutrality of the obligation to grant wholesale access to the supported networks and contributes to increased competition, not only within the same broadband technology but also between different broadband technologies, by providing customers at the retail level with more and better products and prices (see at recital (128) above). The approach thus amplifies the positive effects of the notified measure as described in section 3.2.4 above for end users at the retail level.
- (171) The approach also contributes to limiting the aid to the minimum necessary under the notified measure. An increased choice of wholesale access products for different technologies is set to increase the beneficiaries' revenues from operating the passive infrastructure supported and deployed under the notified measure (in particular in an open network business model), thus likely increasing the profitability and thereby decreasing the amount of aid needed to close the funding gap.
- (172) In light of the enhanced capabilities of the new networks (see under section 3.2.4 above), the Commission considers at the same time that such a wide and technologically neutral wholesale access obligation does not pose a noteworthy risk of distortion of competition in fixed or mobile markets, considering that wholesale access will be ensured on an open, transparent, fair and non-discriminatory basis to all interested access seekers and that mobile network coverage in the target areas via access to the supported new networks must not be reported under obligations attached to mobile network operators' spectrum rights of use.
- (173) The wholesale access obligations under the notified measure will be enforceable irrespective of any change in ownership, management or operation of the supported passive infrastructure (see at recital (78) above).
- (174) The wholesale access pricing/the pricing methodology will be incorporated in the calls for funding applications. As described at recital (79) above, the price for wholesale access will be based on the prices set or approved by the NRA for similar regulated services or in the absence of such regulated wholesale prices, benchmarked against published average wholesale prices of comparable access services in other, more competitive, parts of the country, or in the absence of such published or regulated prices available for certain wholesale access products to benchmark against, the pricing will follow the principles of cost-orientation or the methodology mandated in accordance with the sectorial regulatory framework. In case of disputes between the network operator and access seekers, including where the price is not regulated pursuant to the regulatory framework in the sector, the TTK will solve any related disputes.

#### 3.2.7.6. Claw-back mechanism

- (175) To limit the risks of overcompensation and distortions of competition, it is important that Member States closely monitor the implementation of a measure during its entire duration and foresee a claw-back mechanism in order to allow Member States to reclaim financial support from beneficiaries in the amounts that exceed a reasonable profit. Factors which may have an impact on the profitability of the project and which may be difficult, or even impossible, to establish *ex-ante* with adequate accuracy are, for example: (i) the actual deployment costs of the network; (ii) the actual revenues from the core services; and (iii) the actual take-up.
- (176) The Austrian authorities have committed to closely monitor the implementation of the notified measure during the scheme's entire duration (see at recital (92) above).
- (177) The claw-back mechanism will be applicable if the eligible project costs in a given project exceed EUR 10 million at the time of final account (see at recitals (80) and (82) above).
- (178) In addition, to ensure that aid remains proportional and does not lead to overcompensation or cross-subsidisation of non-aided activities, the beneficiaries must ensure to have in place accounting separation between the funds used for the deployment and operation of the passive infrastructure supported and deployed under the notified measure and other funds at their disposal (see at recital (83) above).
- (179) The Commission concludes that, based on the information provided by the Austrian authorities (see under section 2.15 above), the notified measure contains an adequate claw-back mechanism.

#### 3.2.7.7. Conclusion on proportionality

- (180) In light of the considerations at recitals (150) - (179) above, the Commission considers that the State aid involved and the potential distortions of competition are limited to the minimum necessary under the measure.

#### 3.2.8. *Transparency, monitoring, reporting*

- (181) State aid under the notified measure will be awarded in a transparent manner. Member States, economic operators, the interested public and the Commission will have easy access to all relevant information about the aid awarded under the notified measure. The information will remain published for at least ten years and will be available for the general public without restrictions. The aid granting authority and the beneficiaries will also publish detailed information concerning wholesale access conditions and prices (see under section 2.17 above).
- (182) The Austrian authorities will closely monitor the implementation of the notified measure, including the calls for funding applications and tender procedures, the deployment and operation of the passive infrastructure and the fulfilment of all requirements under the notified measure during its entire period of duration.

- (183) The Austrian authorities will report to the Commission about the application and the progress of the notified measure every two years and will also submit to the Commission the annual reports required under Article 26 of Council Regulation (EU) 2015/1589. The Austrian authorities will also maintain detailed records of the notified measure for ten years from the dates of award of individual support under the notified measure and will provide them to the Commission upon request (see at recital (90) above).

#### 3.2.9. *Ex-post evaluation*

- (184) The notified measure will be covered under the same ex-post evaluation plan as already approved and further adapted by the Commission in 2015 and 2020 (see at recital (86) above). The Commission considers that the already approved and further adapted evaluation plan, as extended to cover also the notified measure, contains all the necessary elements for carrying out the required ex post evaluation. The evaluation will be conducted by an independent evaluation body and sufficient publicity and transparency will be ensured. The Austrian authorities will submit to the Commission a final evaluation report together with the additional ex-post evaluation report for *Broadband Austria 2020* by 31 December 2025 and an additional ex post evaluation report, which will take account of the effects of the notified measure and covering all aid granted under the notified measure, by 31 December 2032. The Austrian authorities also committed to communicate to the Commission any difficulties that could significantly affect the agreed evaluation plan in order to work out possible solutions. The Commission notes that the notified measure must be suspended if the final evaluation report were not submitted in good time and sufficient quality.

#### 3.2.10. *Negative effects on competition and trade between Member States*

- (185) Article 107(3)(c) TFEU requires the assessment of any negative effects on competition and on trade in the relevant product markets, that is, in this case, the deployment and operation of and access to passive infrastructure for fixed networks and the provision of fixed broadband services at the retail level to end users.
- (186) It cannot be excluded that some private market actors may see the profitability of their prior investments decreased because of the notified measure. Private market actors may also decide to reduce their own future investments, withdraw from the markets concerned altogether or decide not to enter into a new market or a geographic area because of the notified measure. The notified measure may also encourage local service providers to have recourse to the supported new networks rather than to seek other market solutions. Additionally, even though the notified measure is not specifically targeted at beneficiaries likely to be already dominant on the market, it is not excluded that the financial support under the notified measure may strengthen the position of such electronic communications operators.

*3.2.11. Weighing the positive effects of the aid against any negative effects in terms of distortions of competition and adverse effects on trade*

- (187) A carefully designed State aid scheme should ensure that the overall balance of the effects of the measure is positive in terms of avoiding adversely affecting trading conditions to an extent contrary to the common interest.
- (188) The notified measure contributes to the development of the economic activities of deployment and operation of passive infrastructure for fixed networks and ensures the availability for end users of fixed broadband services at speeds of at least 100 Mbps download and 100 Mbps upload under usual peak time conditions (see under section 3.2.1 above).
- (189) The notified measure has various positive effects for end users but also for competition in the target areas at all layers of the broadband value chain (see under section 3.2.4 above). The measure will provide better choice for consumers, higher quality and innovation and help to reduce inequalities and the digital divide in Austria. In addition, any passive infrastructure supported and deployed under the notified measure will furthermore be capable of providing speeds of at least 1 Gbps download and 1 Gbps upload under usual peak time conditions without further investments in this passive infrastructure. Moreover, the notified measure is in line with the connectivity objectives set at the EU level.
- (190) The notified measure addresses a market failure (see under section 3.2.5 above) in that the deployment of such passive infrastructure would not be made in the target areas without the notified measure. It also represents a step change (see under section 3.2.6 above).
- (191) The notified measure is also proportional (see under section 3.2.7 above). Its design ensures that the aid is limited to the minimum necessary and that its negative effects on competition and on trade in the markets for the construction and operation of as well as for the granting of access to passive infrastructure for fixed networks and for the provision of fixed broadband services at the retail level to end users are limited. The notified measure is designed to limit crowding out of private investments and its effects are confined to the target areas in Austria where private investors do not intend to invest without the notified measure.
- (192) The Commission considers that any potential negative effects would not unduly affect trading conditions to an extent contrary to the common interest for the reasons explained at recitals (133) - (180) above and in particular:
- (a) Potentially affected private operators have been publicly consulted twice before the start of the implementation of the notified measure on the design of the notified measure, its legal bases, its target areas and their broadband network deployment plans in these target areas for at least the next three years and their comments have been taken into account in the final design of the notified measure. Further public consultations on the notified measure's target areas and private operators' deployment plans will be carried out at least once per year during the duration of the notified measure;

- (b) The design of the notified measure ensures that investments undertaken under Broadband Austria 2020, as well as certain other private investments in passive infrastructure for fixed broadband networks will be protected by excluding these areas from the target areas under the notified measure (see at recital (44) above);
  - (c) The overall aid intensity of the financial support under the notified measure is limited under both support options to 75% and 90%, respectively.
  - (d) Any financial support under the notified measure will be awarded through competitive selection procedures in line with the EU Public Procurement Directives, the notified measure is technologically neutral and funding applicants are required to offer effective and comprehensive wholesale access not only to infrastructure supported and deployed under the notified measure but also to existing infrastructure in the target areas.
  - (e) The notified measure provides for the widest possible, technologically neutral, effective and comprehensive wholesale access to all parts of the supported new networks, irrespective of the support programme used and the network business model chosen by a beneficiary, which will foster further development of competition in the target areas;
  - (f) The notified measure features an adequate claw-back mechanism.
  - (g) The notified measure ensures transparency and monitoring and reporting obligations will be complied with.
  - (h) The notified measure will also be covered by an adequate ex-post evaluation plan. The ex-post evaluation will allow the Commission to verify (i) whether the assumptions and conditions that led to this decision have been realised; (ii) the effectiveness of the notified measure in light of its predefined objectives; (iii) the impact of the notified measure on markets and competition; and (iv) that no undue distortive effects have arisen throughout the duration of the notified measure that are contrary to the interests of the Union.
- (193) In light of the above, the positive impact of the notified measure in developing the economic activities at issue outweighs any potential negative effects on competition and trade. On balance, the measure is in line with the objectives of Article 107(3)(c) TFEU as it facilitates the deployment and operation of passive infrastructure for the new networks and will provide end users concerned with fixed broadband services at speeds of at least 100 Mbps download and 100 Mbps upload under usual peak time conditions. Moreover, such aid does not adversely affect competition to an extent contrary to the common interest.

#### 4. CONCLUSION

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) TFEU.

If this letter contains confidential information that should not be disclosed to third parties, please inform the Commission within fifteen working days of the date of receipt. If the Commission does not receive a reasoned request by that deadline, you will be deemed to agree to the disclosure to third parties and to the publication of the full text of the letter in the authentic language on the Internet site: <http://ec.europa.eu/competition/elojade/isef/index.cfm>.

Your request should be sent electronically to the following address:

European Commission,  
Directorate-General Competition  
State Aid Greffe  
B-1049 Brussels  
[Stateaidgreffe@ec.europa.eu](mailto:Stateaidgreffe@ec.europa.eu)

Yours faithfully,

For the Commission

Margrethe VESTAGER  
Executive Vice-President

