



## EUROPEAN COMMISSION

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### PUBLIC VERSION

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**Subject: State Aid SA.55578 – Germany  
Mobile infrastructure roll-out in Hesse**

Excellency,

I am pleased to inform you that the European Commission has assessed the measure concerning the roll-out of passive infrastructure for mobile communication networks in the target areas in the Federal State Hesse (hereafter: "the measure") and decided not to raise objections as the State aid contained therein is compatible with Article 107(3)(c) of the Treaty on the Functioning of the European Union (TFEU).

### **1. PROCEDURE**

- (1) Following pre-notification discussions, on 3 September 2020, the German authorities notified the European Commission of a new support scheme to promote the development of public mobile electronic communications networks in the German Federal State Hesse ("Land Hessen").

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

#### **2.1. Objective and design of the measure**

- (2) The objective of the measure is to close the gaps in mobile coverage in Land Hessen by supporting the availability of mobile voice and data services in typically sparsely populated and topographically difficult areas where such services are not available, currently or in the short term. In those areas, the authorities of Land Hessen aim to support the rolling out of terrestrial public mobile communications networks that will only be used to provide mobile voice and data services ("mobile networks").

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- (3) This support would help address digital division in society, increase the attractiveness of the rural areas, stimulate economic growth and maintain and create jobs in structurally weaker regions. In this respect, living conditions would be aligned with those in better-served regions. Finally, the problems posed by the lack of a mobile service in emergency situations would equally be reduced.
- (4) To this end, the scheme aims at deploying passive infrastructure<sup>1</sup> that will be used to support the deployment of mobile networks (“mobile passive infrastructure”). The aided mobile passive infrastructure should be capable to support the roll out of 4G mobile networks (based on LTE technology<sup>2</sup>) or above which can provide a wireless connection delivering at least a data rate of 50 Mbps with a latency of no more than 150 milliseconds per antenna sector.<sup>3</sup>
- (5) The intervention area will consist of areas in Land Hessen where mobile networks have not yet been deployed and where no private investors plan to invest in deploying mobile networks in the coming three years (“target areas”).
- (6) The scheme will also support the upgrading, replacement or rebuild of masts owned by Land Hessen and used only by authorities and organisations with security responsibilities (e.g. police radio networks) in order to enable mobile network operators (“MNOs”) to use these masts as part of their mobile networks (“BOS masts”) in the target area.
- (7) Limited new backhaul (ducts only) will be built only insofar as strictly necessary for the implementation of the scheme in the target areas namely where no ducts supporting the needed capacity are in place. Existing ducts supporting the needed capacity will not be overbuilt.
- (8) One and the same area may receive funding only once under this scheme. The funding is granted once for an operation of at least 7 years (earmarking period).
- (9) Funding may only be granted for projects that have not yet started or that were not already planned to be started.

## **2.2. Context**

- (10) By virtue of existing mobile coverage obligations, by the end of 2019, 97% of the households in each Federal State in Germany had to be covered with mobile networks providing at least 50Mbps per antenna sector. By the end of 2022, at least 98% of households per Land have to be covered with mobile networks providing at least 100 Mbps per antenna sector.

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<sup>1</sup> Passive infrastructure covered by this includes e.g. the towers, masts, and other supporting constructions (including foundations, and the electricity connection) ducts and access routes (*Zuwengung*). Active infrastructure, antenna systems, as well as the costs for land acquisition or land lease costs will not be supported.

<sup>2</sup> Long-Term Evolution (LTE) is a standard for high-speed wireless communication for mobile devices and data terminals.

<sup>3</sup> For a target of 50 Mbps per antenna sector, the Bundesnetzagentur assumes that a 10 Mbps access speed can be made available reliably to an end user in that sector even in peak-time periods.

- (11) However, these coverage obligations refer to households. Given the nature of the mobile services which have to be available “on the move”, a more relevant proxy is the areas that would remain uncovered following the implementation of the coverage obligations.
- (12) In Land Hessen, currently, the coverage amounts to 99.7% in terms of households and 96% in terms of territorial coverage.
- (13) The scheme will provide support exclusively in areas with mobile coverage gaps in Land Hessen. This represent approximately 0.34% of all Hessen households and 4% of its territory.

### **2.3. Legal Basis**

- (14) The notified measure is based on the following legal basis:
  - (a) The Financial Regulation of Land Hessen (Hessische Landeshaushaltsordnung (LHO)) of 15 March 1999, modified by Article 8 of the Regulation of 3 May 2018,<sup>4</sup>
  - (b) The Administrative Procedural Act (Hessisches Verwaltungsverfahrensgesetz) of 12 September 2018 and the corresponding Implementing provisions.<sup>5</sup>
- (15) The current Decision is also part of the legal basis.

### **2.4. Standstill obligation**

- (16) Land Hessen authorities have confirmed that the granting of the aid is conditional on the decision of the Commission on the notified measure. Pursuant to the standstill clause of Article 108(3) TFEU, and to Article 3 of Council Regulation (EU) 2015/1589<sup>6</sup>, new aid measures must not be put into effect before the Commission has taken a decision authorising it.

### **2.5. The Granting Authority**

- (17) The competent granting authority is the Economic and Infrastructure Bank of Hesse (Wirtschafts- und Infrastrukturbank Hessen), hereafter, “the Granting Authority” or “the WIBank”.
- (18) WIBank has a public policy mandate set by the State. It is responsible for the monetary execution of public promotion activities. Its tasks are governed by Section 2 of the Law on the Economic and Infrastructure Bank of Hesse. Pursuant to the law, among the identified activities, it is entrusted to provide support for infrastructure measures. For the implementation of the mobile telephony support programme, the State, Land Hessen, entrusted WIBank to carry out tasks of

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<sup>4</sup> <https://service.hessen.de/html/Landeshaushaltsordnung-3975.htm>

<sup>5</sup> See: [https://service.hessen.de/xbcr/VV\\_zu\\_23\\_LHO.pdf](https://service.hessen.de/xbcr/VV_zu_23_LHO.pdf) and [https://service.hessen.de/xbcr/VV\\_zu\\_44\\_LHO.pdf](https://service.hessen.de/xbcr/VV_zu_44_LHO.pdf)

<sup>6</sup> Council Regulation No 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 of 24.9.2015, p.9.

public authority in line with the given mandate. In particular, the WIBank will select the beneficiaries, carry out the authorisations, payments and settlements of the aid in both the leasing and shared use of existing BOS masts options. It will verify the use of funds. It will also examine the economy and efficiency of the design and construction and the reasonableness of the costs. In addition, it will check the fulfilment of the purpose of the aid.

- (19) The applicants can submit up to three calls for funds per project to WIBank in both funding options described in recitals (22) to (31). Once the mobile passive infrastructure has been successfully put into operation, a proof of use must be submitted to WIBank. After checking the proof of use, WIBank fixes the final amount of the grant.
- (20) In the shared use of existing BOS masts option, the Police Bureau for Technology (Hessisches Polizeipräsidium für Technik) which is responsible for the BOS sites, will conclude a contract with the selected company for sharing the masts.
- (21) In addition, the Hesse State Court of Auditors is responsible for auditing the overall budgetary and economic management of Land Hessen, its special funds and holdings, including the WIBank.

## **2.6. Investment and business model**

- (22) The scheme provides for two alternative support options:

### *2.6.1. Lease option*

- (23) Land Hessen will support public authorities (i.e. municipalities or inter-municipal co-operations if they are organised as legal entities under public law) and entities entrusted with public functions to build the mobile passive infrastructure to be used by MNOs.
- (24) Implementation will be carried out at the choice of the beneficiary through the building contract or concession model described below. In both models, all interested parties will rent the mobile passive infrastructure on an open and non-discriminatory basis.

#### **2.6.1.1. Building contract model (Baufauftragsvariante)**

- (25) In this model, the local authorities build the mobile passive infrastructure themselves (or put the construction out to tender). They own the mobile passive infrastructure and provide full open, non-discriminatory access to all interested parties as lessors. There is no selection process at the level of the public authorities. However, selection procedures are carried out in order to identify the undertakings carrying out the construction and supplying the necessary components.
- (26) Under this model, the public authorities will limit their activity to the predefined target areas and shall not expand it to other commercially attractive regions. In addition, the public authorities will not compete on the retail level with commercial operators. Finally, they will have accounting separation between the funds used for the operation of the networks and the other funds at the disposal of the public authorities.

#### 2.6.1.2. Concession model (Baukonzessionsvariante)

- (27) In this model, the local authorities decide to put both the construction and operation of the mobile passive infrastructure out to tender (competitive selection procedure) as a concession. Only the tenderer submitting the most economically advantageous conditions will receive funding. The winning concession holder (which can be an MNO but also a special construction company e.g. tower company) subsequently builds, maintains, and leases the mobile passive infrastructure and provides full open, non-discriminatory access to all interested parties.
- (28) By way of derogation from the rule of strict separation between the network and service providers, it is foreseen that the selected concession holders, in addition to their activities at wholesale level, may also become active as service providers at retail level, and offer their services directly to end customers subject to certain conditions.
- (29) Indeed, Land Hessen authorities confirmed that they will provide for safeguards for preventing any anti-competitive behaviour towards other service providers when the network providers are also active at retail level. Such contract clauses will include the obligation to provide access to electricity connections, ducts, and masts and all passive equipment supported by aid as well as any existing infrastructure owned or controlled by the winning concession holder in the area covered by the concession in a fair and non-discriminatory manner. These obligations will have to be reflected already in the tender documents and the award criteria of the procurement procedures. In case a conflict cannot be solved by the Granting Authority, the national regulatory authority (“the NRA”) will take the final decision.

#### 2.6.2. *Shared use of existing BOS masts option*

- (30) Land Hessen may grant support to MNOs for projects carried out by themselves or by third parties to upgrade (replace or rebuild) the BOS masts of Land Hessen in order to enable network operators to share their use. The MNOs are selected in a fair, transparent and non-discriminatory selection procedure. The aid is granted to the MNOs. They will grant an open, non-discriminatory access to the BOS masts.
- (31) In both options, the lease option and the shared use of existing BOS masts, MNOs using the supported infrastructure to provide retail services will bear the costs of installing, maintaining and powering any active equipment, as well as connecting the supported mobile passive infrastructure to their own infrastructure.

### 2.7. **Budget and duration**

- (32) The support measure consists of direct grants and loans.
- (33) In the lease option (both building contract and concession models), Land Hessen Authorities will provide support for external advisory and support services to the municipal authorities and municipal undertakings. This is intended to cover expenditure relating to the preparation and implementation of the lease option. The external consultant shall be appointed by means of a transparent and non-discriminatory selection procedure.

### *2.7.1. Direct grants*

- (34) The overall budget for direct grants amounts to EUR 50 million. The support scheme is foreseen to end on 31 December 2026 at the latest.<sup>7</sup>
- (35) The maximum intensity of the aid provided by Land Hessen under the scheme is, as a general rule<sup>8</sup>, limited to 90% of the eligible costs. Eligible costs are all expenses necessary for the construction or upgrading of the mobile passive infrastructure. Costs relating to active equipment and connections between the supported mobile passive infrastructure and the infrastructure owned by the MNOs are excluded.<sup>9</sup>
- (36) The maximum amount of support for each local authority is, as a rule, EUR 500 000. All necessary costs incurred by the beneficiary for the construction of the mobile passive infrastructure (for e.g. the mast, the foundation, the electricity connection, ducts and access routes), including the use of advisory and support services<sup>10</sup>, are eligible.
- (37) Only in cases of hardship may the maximum amount of support be exceeded with the agreement of the competent specialist department, a department of Land Hessen government responsible for broadband and telecommunications. This is located in the Land Hessen State Chancellery under the Minister for Digital Strategy and Development. There is case of hardship if the maximum amount of support is not sufficient to achieve the objective of the support, in particular because of unfavourable topographical conditions or the structure of the settlement that require particularly complex deployment scenarios. This is particularly valid in sparsely populated areas where it is possible that long supply lines for electricity and ducts in particular to the supported masts may result in very high costs. In such areas it cannot be ruled out that an unfavourable distribution of settlements, e.g. in lane-drawn valleys, could lead to the construction and connection of more masts than is currently expected.
- (38) In the case of support for inter-municipal co-operations this maximum amount increases by EUR 50 000 for each participating municipality. Projects with eligible costs of less than EUR 20 000 will not be supported.
- (39) In the case of shared use of existing BOS masts option, the maximum amount of support rate per project is EUR 250 000. This support will cover the costs of

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<sup>7</sup> Given possible delays in the preparation and implementation caused by the Covid 19 pandemic, the aid scheme is foreseen to end on 31 December 2026.

<sup>8</sup> In the case of local authorities, the aid (grant and loan) can amount to 100%, see recital (42) below.

<sup>9</sup> Any VAT paid by network providers for the upgrading of existing passive infrastructure forms part of the eligible costs only insofar as such VAT paid cannot be deducted from input tax. The revenue surplus of local authorities from letting the passive infrastructure to MNOs over a period of seven years has to be deducted from the eligible costs.

<sup>10</sup> Consultancy (external advice and assistance both from a technical and legal point of view) may be granted to the public authority. In such a case, the consultants will be selected through a competitive selection procedure.

upgrading the mobile passive infrastructure of a site (excluding broadcasting technology) within the target areas.

#### 2.7.2. *Loans*

- (40) A so-called complementary funding may be granted. It consists of an interest-free loan that the Granting Authority will grant to the local authorities in the lease option to finance their own contribution. The application for the loan is strictly linked to the application for a grant for rolling out mobile passive infrastructure. It is therefore not possible to draw on the loan without using the grant.
- (41) The loan has a maturity of seven years and will be repaid by the local authority in instalments. The interest on the loan is paid by Land Hessen.
- (42) The aid intensity in the case where a public authority is the beneficiary can thus reach 100% (up to 90% consisting of a grant and up to 10% of a loan). The maximum (nominal) amount of the granted loan would be EUR 55 000 per local authority.
- (43) Funding under the scheme can be combined with funding under other schemes at federal level or at EU level. In these cases, Land Hessen authorities commit to ensure that safeguards against overcompensation are in place.<sup>11</sup> In these cases, funding by Land Hessen under the current scheme will be reduced to the extent necessary for keeping the cumulative aid intensity at maximum 90%<sup>12</sup> of the eligible costs. Co-financing by third parties, in particular by private companies, is admissible and welcomed. However, with the exception of the local authorities that can benefit of a 10% loan, the beneficiary's own contribution must in all cases reach at least 10% of the eligible costs.
- (44) The funding comes from the overall budget of Land Hessen.

### 2.8. **Beneficiaries**

- (45) In the building contract model, the local and regional authorities or any other entity entrusted with public responsibility are direct beneficiaries. In the concession model, the local and regional authorities and the concessionaires (the MNOs, and the special construction companies such as the tower companies) are direct beneficiaries.
- (46) In the shared use of existing BOS masts option, MNOs and the special construction companies receiving a grant to update the BOS masts are the direct beneficiaries.
- (47) In the concession model and in the shared use of existing BOS masts option, the concessionaires, the MNOs and the special construction companies will be

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<sup>11</sup> The budgetary law of Land Hessen and the Federal Government prohibits over-compensation or so-called double funding. In order to effectively avoid double funding, the applicant is requested to provide information on third-party funding for the supported action when submitting the application. If the authorising authorities are misled about this information, this can be a criminal case of subsidy fraud under Section 264 of the Criminal Code.

<sup>12</sup> With the exception of the public authorities which can benefit of up to 100% aid intensity. Rules preventing overcompensation will also be applicable in this case.

selected following an open, transparent and non-discriminatory selection process in the framework of a public tender that would take place at the EU level.<sup>13</sup>

## **2.9. Target areas**

- (48) The scheme will provide support exclusively in areas where mobile services are not available and will not be made available within the next three years.
- (49) Supported infrastructure will not be taken into account to meet the coverage obligations arising for MNOs out of spectrum licence conditions and will therefore not be reported as such to the Federal Network Agency (Bundesnetzagentur). MNOs using the supported infrastructure must commit in this regard and confirm it in writing to the Federal Network Agency, the Broadband Office of Hesse and the WIBank (as Granting Authority). This written confirmation will be sent to the Federal Network Agency together with a documentation of (i) the current situation, and (ii) the planned situation following construction of the mobile passive infrastructure and activation of stations. This mechanism ensures that the aid scheme will in fact complement the existing mobile coverage which results from the coverage obligation imposed on the MNOs.

## **2.10. Mapping**

- (50) Any funding under the scheme will be based on a map of mobile coverage in Land Hessen.
- (51) A market survey was completed on 8 July 2019 in the framework of which the MNOs presented the current supply situation in the country and the planned roll-out over the next three years. On the basis of these data, a service availability map of Land Hessen has been drawn up. The basic mobile availability data are based on calculations for GSM, GPRS, UMTS and LTE technologies. Common parameters, e.g. minimum signal strength, have also been defined as criteria for the availability of a technology in an area.
- (52) The Broadband Office Hesse will publish a map<sup>14</sup> identifying all mobile coverage gaps in Land Hessen, i.e. areas in which no MNO offers mobile services. These areas, identified in the map as mobile coverage gaps, constitute potential target areas of the scheme. The determination of the final target areas for mobile network development will be done by the Broadband Office of Hesse only after conclusion of corresponding project specific public consultations.
- (53) Before the start of any single investment measure, the status of the area will be checked on the basis of the current mapping and the results of the public consultations (described below). Any area will be removed if its status changes during the planning period.

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<sup>13</sup> The procurement procedures are published on the mobile communication portal of the Land Hessen ([www.mobilfunk-hessen.de](http://www.mobilfunk-hessen.de)), the call for tenders platform of the Land Hessen and the call for tenders platform of the European Union ([www.ted.europa.eu](http://www.ted.europa.eu)).

<sup>14</sup> [www.mobilfunk-hessen.de/weisse-flecken-karte](http://www.mobilfunk-hessen.de/weisse-flecken-karte)



## **2.11. Public consultation**

- (54) A general public consultation whereby the market was asked for comments with regard to the proposed measure took place on 20 December 2019. The consultation contained a summary of the planned support measure, a description of the potentially targeted areas, and an indication of the development of backhaul.
- (55) This consultation was published on the website of the Broadband Office of Hesse<sup>15</sup> and the website of the Hesse State Chancellery. The call for consultation was displayed on the home pages of both websites until 31 January 2020. No comments or submissions were made.<sup>16</sup>
- (56) Following the general public consultation, the local authorities with mobile coverage gaps in their territories, as identified by the map of mobile coverage in Land Hessen, can declare their interest in receiving support.
- (57) On the basis of the submitted declarations of interest by local authorities in receiving support under the scheme, the Broadband Office of Hesse will initiate project-specific public consultations for the territory of each local authority that has expressed their interest in receiving support under the scheme. All project-specific public consultations will be initiated via the central online website.<sup>17</sup> In the framework of these project-specific public consultations, all interested parties will be invited to comment and be requested to inform the Hesse Broadband Office of their development plans in the mobile coverage gaps of these territories in the three coming years starting from the date of the initiation of the relevant public consultation. MNOs, in particular, are expected to outline their potential plans concerning the development of a mobile network.
- (58) These local public consultations are carried out in advance of the individual funding projects. They have a duration of 12 weeks and are a prerequisite for the granting of the aid. These local, project-specific public consultations will ensure that up-to-date development projects are taken into account and thus ensure effective protection of investment and competition.

## **2.12. Competitive selection procedure**

### *2.12.1. Lease option*

- (59) Local authorities will conduct transparent and non-discriminatory public procurement procedures in accordance with the applicable public procurement rules either for the construction of the mobile passive infrastructure or for concessions that comprise planning, construction and operation of the mobile passive infrastructure. In both cases, the newly constructed mobile passive infrastructure will be owned by the local authorities for at least seven years. The

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<sup>15</sup> <https://www.breitband-in-hessen.de/start>

<sup>16</sup> Nevertheless, in preparation of the scheme, in the second part of 2019, a series of meetings and discussions took place between the stakeholders and Hessian authorities. In this context, various players expressed their views on the initial draft of the scheme.

<sup>17</sup> [www.mobilfunk-hessen.de](http://www.mobilfunk-hessen.de)

supported mobile passive infrastructure will be designed in such way that it can be used by all interested mobile communications network providers.

#### *2.12.2. Shared use of BOS masts option*

- (60) The Hesse Broadband Office will publish a notice asking MNOs to express their interest in sharing the use of existing BOS masts owned by the Land Hessen.
- (61) This expression of interest on the shared use of the BOS masts is necessary to ensure that the subsidised masts will be actually used by the MNOs once they have been upgraded.
- (62) Thereafter, in order to select a company that will benefit from the aid, the BOS masts will be advertised in a public, transparent and non-discriminatory manner.<sup>18</sup>
- (63) In their bids, MNOs will specify the requirements and technical specifications for upgrading the masts in question. The MNOs in charge of the upgrade will be chosen by the Hesse Broadband Office in a transparent and non-discriminatory public procurement procedure in accordance with the applicable public procurement rules. At the end of the procurement procedure, the selected company will submit an application for funding to the Granting Authority which will assess if all criteria for granting of the aid are fulfilled.
- (64) The upgraded masts will remain in the ownership of the Land Hessen. All MNOs have to be able to use the upgraded masts.
- (65) Land Hessen authorities ensure that all competitive selection processes under the measure will be in line with both the national and the European public procurement regulations. The specifications established by the Granting Authority will be examined by the Land before publication.
- (66) The call for tenders will be published at the regional, and EU level according to public procurement rules.<sup>19</sup>
- (67) Land Hessen authorities committed to ensure that the following requirements will be fulfilled for all selection procedures:
  - (a) All selection procedures must be in line with the spirit and principles of the EU public procurement directives.<sup>20</sup>
  - (b) All selection procedures must ensure transparency for all interested bidders.

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<sup>18</sup> On the tender database website of Land Hessen: [www.had.de](http://www.had.de)

<sup>19</sup> The procurement procedures are published on the mobile communication portal of the Land Hessen ([www.mobilfunk-hessen.de](http://www.mobilfunk-hessen.de)), the call for tenders platform of the Land Hessen and the call for tenders platform of the European Union ([www.ted.europa.eu](http://www.ted.europa.eu)).

<sup>20</sup> 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 2014/23/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.

- (c) All selection procedures must ensure equal and non-discriminatory treatment of all bidders and objective evaluation criteria.
- (d) All selection procedures must be published on a dedicated website. Tenders will be published in the European Union (EU) database and in the database of Land Hessen.<sup>21</sup>
- (e) In cases where a competitive selection process does not generate a sufficient number of bidders, the implementing authority will use the services of an external auditor for the assessment of the bid, in particular regarding cost calculations.

### **2.13. Economically most advantageous offer**

- (68) Land Hessen authorities confirmed that all selection procedures for the selection of beneficiaries will be based on selecting the economically most advantageous offer.
- (69) Offers received in the course of the competitive selection procedures will be assessed using qualitative award criteria established in advance by the local authorities.
- (70) To this end, the Granting Authority will define minimum standards for the infrastructure to be built. This includes, inter alia, minimum bandwidths, but also the sizing of ducts, which ensures that all wholesale users can use the mobile passive infrastructure. In addition, the Granting Authority ensures that the tenders are carried out under market economy conditions with at least three competitors. If this is not the case, it will have the selected offer tested for market conformity by an external auditor.
- (71) The main condition for all beneficiaries is that they have to declare that all requirements from the grant notices regarding the performance and dimensioning of the network set up for the prerequisite for participation in the award procedure have been met.
- (72) With regard to the concession model, the participants to the tender need to provide a detailed cost-benefit analysis to be able to participate in the call for tenders. To this end, the development measures necessary for the implementation of the project and their costs must be set out, together with the expected demand and revenues.
- (73) Award criteria are: technical specifications, timeframe for deployment, rental prices they expect for each site, possible synergies with existing infrastructure, impact of the proposed solution on competition, costs for the construction and operation, including the maintenance of the rolled-out infrastructure. The qualitative criteria have to be weighed against the requested aid amount. In order to minimise the amount of aid to be granted, the public authorities will award most priority points to the applicant who, at similar if not identical quality conditions (including technical specifications, timeframe for deployment, etc.), requests the lowest amount of aid.

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<sup>21</sup> The calls for tenders are published on Land Hessen mobile communication portal ([www.mobilfunk-hessen.de](http://www.mobilfunk-hessen.de)) and the Hessen call for tenders platform.

## **2.14. Technological neutrality**

- (74) Land Hessen authorities confirmed that the beneficiaries will be selected on the basis of objective criteria. Any public authority and electronic communications provider capable of rolling out mobile passive infrastructure capable of allowing the roll out of mobile networks supporting speeds of at least 50 Mbps and latency of max. 150 milliseconds per antenna sector are eligible as beneficiaries. Also, wholesale access will be offered on open and non-discriminatory terms in line with the principle of technological neutrality.

## **2.15. Use of existing infrastructure**

- (75) All existing mobile masts in Germany can be viewed on the Federal Network Agency's (*Bundesnetzagentur*) website data-base.<sup>22</sup> Mobile network providers will indicate any mobile passive infrastructure planned within the coming three years in the framework of the public consultations carried out by the Hessen Broadband Office.
- (76) In the planning process for the construction of the mobile passive infrastructure, the Granting Authority will take into account all existing infrastructure in the relevant target areas that can be accessed and used to realize synergies. This would help reduce investment costs for the development of the network and minimise the amount of public funding needed for the project. The support for double structures is excluded in both lease and sharing of existing BOS masts options. In areas where BOS masts are already in place, the shared use of existing BOS masts option will be favoured over the lease option.

### *2.15.1. Specifically in the concession model*

- (77) The local authorities will include to the best extent possible all available information on existing infrastructure in their procurement documents (in particular in "invitations to tender").
- (78) Bidders should explicitly include existing infrastructure in their network planning. This applies in particular to the use of existing infrastructures for the fibre-based connection of the base stations. The information from the central information office of the Federal Government (in particular, the information from the Federal Infrastructure Atlas) must be taken into account as part of the network planning. It provides planning information (overview of facilities that can be used for electronic communication purposes), shared use information (for the shared use of passive public utility infrastructure) and information on civil works (for the coordination of civil works on public utility networks).
- (79) Any operator that owns or controls infrastructure (irrespective of whether it is actually used) in the target area and which wishes to participate in the competitive selection process, will (i) inform the local authorities about that infrastructure during the public consultation, and (ii) provide all relevant information to other bidders at a point in time which would allow the latter to include such infrastructure in their bid. Where a bidder does not provide this information, it will be excluded from the procurement process. The procurement process will be

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<sup>22</sup> <http://emf3.bundesnetzagentur.de/karte/>

conducted in accordance with a timetable that allows sufficient time for bidders to compile bids on the basis of information provided by other suppliers, and allows for any non-compliance issues to be resolved efficiently. All operators participating in the public consultation will be required to provide data on the available existing infrastructure that may be used for building the network, including conditions and prices for access.

#### *2.15.2. Specifically in the shared use of BOS masts option*

- (80) In areas where existing BOS masts are to be co-used, they will be included as existing infrastructure. The existing masts will not be doubled but only upgraded or expanded.
- (81) Also, when locating the site, account shall be taken of the existing infrastructure located in the area. If there is an usable BOS mast, implementation should be carried out by means of a BOS model.

### **2.16. Wholesale access pricing**

- (82) Land Hessen authorities will ensure that the beneficiaries will provide wholesale access on an open, non-discriminatory basis.
- (83) In case of a sale of the mobile passive infrastructure after expiry of the earmarking period of seven years, the sales contract will include an obligation on the buyer to allow for continued open, non-discriminatory access to the mobile passive infrastructure also in the future.
- (84) With regard to the backhaul, the Granting Authority specified that ducts financed under the measure shall be large enough to cater for at least all licensed mobile operators.
- (85) The beneficiaries will provide for passive wholesale access, including but not limited to: access to electricity connections, ducts, masts, and all passive equipment supported by aid. Access to all (new and existing) passive network infrastructure will be granted for an unlimited amount of time.
- (86) The Granting Authority will clearly define the conditions for the aid beneficiaries to ensure wholesale access to third-party operators and will ensure that the requirements for wholesale access will be outlined in a transparent manner in the tender documents. The same access conditions will apply on the entirety of the supported network including the part of it where existing infrastructure will be used.
- (87) The Commission further notes that Germany has transposed Directive 2014/61/EU<sup>23</sup> into German law<sup>24</sup>, and in particular its Articles 3(2) and 3(4) which ensure that any network operator, within the meaning of that Directive, will

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<sup>23</sup> Directive 2014/61/EU of the European Parliament and of the Council of 15 May 2014 on measures to reduce the cost of deploying high-speed electronic communications networks, OJ L 155, 23.5.2014, p. 1.

<sup>24</sup> Gesetz zur Erleichterung des Ausbaus digitaler Hochgeschwindigkeitsnetze (DigiNetzG) vom 4. November 2016, Bgbl. 2016 Teil I Nr. 52, S. 2473.

meet all reasonable requests for access to its physical infrastructure under fair and reasonable terms and conditions, including price, with a view to deploying elements of high-speed electronic communications networks and that disputes regarding access to such physical infrastructure can be referred to the competent national dispute settlement body.<sup>25</sup>

- (88) The exact rental fee to be paid by the access seekers for each project will be subject to negotiations between the access seekers and the direct beneficiary and may therefore be different for each project/location. However, all MNOs/access seekers, including the beneficiaries if active on this level, will always pay the same rental fee at the same location. That is to say, whilst rental fees may differ from location to location, at the same location they are always the same for all interested parties.
- (89) All information will be permanently available on the website of the Hesse government.<sup>26</sup>
- (90) Disputes among operators regarding wholesale access products conditions and pricing will be submitted to the Federal Network Agency.
- (91) The access obligation shall not expire after the expiry of the earmarking period. In the event of a sale, the open access obligation shall be transferred by contract to the buyer.

## **2.17. National Regulatory Authority**

- (92) The Federal Network Agency (*Bundesnetzagentur* or *BNetzA*) has been informed of the planned support scheme and was given the possibility to comment. It did not raise any concerns.
- (93) In addition, the Federal Network Agency assumes a dispute settlement role in the implementation of open access. In particular, in case of disputes concerning the determination of the level of rent of the mobile passive infrastructure, BNetzA's dispute resolution chambers will decide.
- (94) Also, the aid scheme requires MNOs not to notify to BNetzA any subsidised infrastructure as part of their coverage obligations resulting from frequency auction requirements. To this end, all MNOs using infrastructure supported under the aid scheme must undertake not to notify this infrastructure as part of their coverage obligations and confirm in writing their commitment to the State Government of Hesse. This written confirmation, together with a documentation of the current and planned situation after the construction of the mobile passive infrastructure will be sent to the Federal Network Agency. This mechanism ensures that the support programme is indeed complementary to the existing mobile telephony coverage and is not used to comply with the licensing requirements.

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<sup>25</sup> Cf. Sections 77d(1) and (2) and 77n(1) of the Telekommunikationsgesetz (TKG) vom 22. Juni 2004.

<sup>26</sup> [www.mobilfunk-hessen.de](http://www.mobilfunk-hessen.de)

## **2.18. Claw-back and monitoring mechanism**

- (95) The correct use of the funds will be monitored by the Granting Authority. In case of improper use of the funds those funds will be recovered by the Granting Authority.
- (96) The Granting Authority will monitor in particular the tendering processes and the construction of the mobile passive infrastructure as well as the improvement of the mobile coverage in the target areas.
- (97) Under the lease option, the surplus revenue (rental income minus current costs) within the 7 years period reduces the eligible expenditure. In this option, all necessary costs incurred by the beneficiary for the construction of the mobile passive infrastructure including the use of advisory and support services are eligible. Revenue generated with the aided infrastructure shall be offset over a period of 7 years against the expenditure incurred for the operation and maintenance of the infrastructure. Any surplus of revenue is deducted from eligible expenditure.
- (98) Finally, the Land Hessen will implement a claw-back mechanism with regard to the concession-holders who build and operate mobile passive infrastructure under concession model. This will apply to projects with eligible costs above EUR 1 million.
- (99) The claw-back mechanism will be linked to unanticipated gains by the concession-holders. The concession-holders are obliged to present to the local authorities as part of their bid in the competitive selection process sufficient information regarding expected gains from their activities. If, after seven years, their actual gains exceed the expected gains by more than 30%, the excessive gains have to be paid to the respective local authority. If a reimbursement is made, the local authority shall reimburse the Granting Authority the corresponding part of the authorised grant.
- (100) The local authority must document its assessment no later than six months after the expiry of the earmarking period and forward the documentation including its assessment to the Granting Authority.

## **2.19. Transparency and reporting of the measure**

- (101) Land Hessen will ensure, for the entire duration of the project, that all transparency requirements are met at each phase of the project. The relevant information about the mobile network expansion will be published on the regional website<sup>27</sup> which will allow easy access to all relevant acts and information regarding the project.
- (102) The following information will be published: the full text of the approved aid scheme and its implementing provisions, the date of granting, the name of the aid beneficiaries, aid amounts and aid intensities, the technology used. This

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<sup>27</sup> See at <http://www.mobilfunk-hessen.de>. The aid granted to the beneficiaries selected in the competitive selection procedure above EUR 500 000 will be also recorded in the Transparency Award Module (TAM).

information must remain published for at least ten years and be available for the general public without restrictions.

- (103) The Granting Authority as well as the beneficiaries are obliged to provide entitled third parties with comprehensive and non-discriminatory access to information on the mobile passive infrastructure (including ducts, electricity connection and masts) deployed under the measure, which will facilitate other operators' access to the infrastructure.
- (104) The Granting Authority and the beneficiaries will also publish detailed information concerning wholesale access conditions and prices.
- (105) The Land Hessen will report to the Commission about the application and the progress of the measure every year. The report will contain the following key data concerning the aid project: the information already published in accordance with the transparency requirements (as above); the date on which the networks are expected to become operational; the wholesale products and access conditions and pricing; the number of parties seeking access and service providers in the network; information regarding any disputes regarding the project, if any, and in particular concerning wholesale access, as well as how such disputes were resolved.

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

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

- (106) According to Article 107(1) of the Treaty on the Functioning of the European Union (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."
- (107) 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.

##### *3.1.1. Undertaking*

- (108) 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>28</sup>
- (109) Depending on the support option used, the direct beneficiaries of the scheme are the public authorities in the building contract option, and the MNOs and the special construction companies in the concession model and shared use of existing BOS masts option.

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<sup>28</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.



- (110) Under the lease option, local authorities will receive public funds in order to deploy mobile passive infrastructure, which they will own and let to all MNOs or make available to a selected concession-holder under a concession contract. The concession-holder will let it to the MNOs. The construction of mobile passive infrastructure with a view of its future commercial exploitation constitutes an economic activity. The operation of an electronic communication network, even if limited to the provision of passive network elements, is an economic activity within the meaning of Article 107(1) TFEU.<sup>29</sup> In that role, the local authorities and the concession holders are thus considered undertakings within the meaning of Article 107(1) TFEU.
- (111) Under the shared use of existing BOS masts option, a selected company (MNO or special construction company) will receive public funds for upgrading existing masts owned by Land Hessen in order to allow those masts to be used for the provision of mobile services to end users on a commercial basis, which equally constitutes an economic activity. Those selected companies are thus likewise considered undertakings within the meaning of Article 107(1) TFEU.

### *3.1.2. State resources and imputability*

- (112) The concept of State aid applies to any advantage granted through State resources by the State itself or by any intermediary body acting by virtue of powers conferred on it.<sup>30</sup> Resources of local and regional authorities are for the application of Article 107(1) of the TFEU State resources.<sup>31</sup> As described in recital (44) the measure is financed from the budget of the Land Hessen. The financing is allocated to the beneficiaries under the control of the Granting Authority, which as shown in recital(18), has a public mandate to provide support for (mobile) infrastructure measures.
- (113) Hence, State resources are involved and the measure is imputable to the State.

### *3.1.3. Economic advantage*

- (114) 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>32</sup>
- (115) Local authorities, concession-holders and MNOs will be granted direct grants and loans amounting to up to EUR 50 million for the rolling out of mobile passive infrastructure or for upgrading existing BOS masts owned by Land Hessen . This enables MNOs as well as local authorities and concession-holders as operators of

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<sup>29</sup> Judgment by the General Court of 24 March 2011, *Mitteldeutsche Flughafen and Flughafen Leipzig/Halle v Commission*, T-455/08, ECLI:EU:T:2011:117, paragraph 90 and following.

<sup>30</sup> Case C-482/99 *France v Commission* (hereafter: "*Stardust Marine*") ECLI:EU:C:2002:294.

<sup>31</sup> Judgment of 12 May 2011 in Joined Cases T-267/08 and T-279/08 *Nord-Pas-de-Calais*, ECLI:EU:T:2011:209, paragraph 108.

<sup>32</sup> Judgment of the Court of Justice of 29 April 1999, *Spain v Commission*, C-342/96, ECLI:EU:C:1999:210, paragraph 41.

the mobile passive infrastructure to provide services in the target areas on conditions that would otherwise not be available.

- (116) Such advantage consists of reducing the costs that they would normally have to bear under normal market conditions, as compared to companies investing only on the basis of private funds under the same technical, commercial and legal conditions – i.e. in the liberalized market.
- (117) It is hence considered that local authorities, concession-holders and MNOs supported under the scheme are granted an advantage by Land Hessen which would not have occurred in normal market conditions.

#### *3.1.4. Selectivity*

- (118) To fall within the scope of Article 107(1) TFEU, a State measure must favour “certain undertakings or the production of certain goods”. In the case at hand, the measure is aimed at local authorities in Land Hessen with mobile coverage gaps in their territories, at concession holders as well as MNOs and special construction companies in Germany.
- (119) The measure thus targets:
  - (a) only undertakings that are active in the electronic communications sector in particular MNOs, to the exclusion, in principle, of other electronic communications network and service providers, such as, e.g. satellite and fixed communications operators, when these cannot provide the mobile communications services;
  - (b) undertakings that are specialised in the construction and/or wholesale provision of mobile passive infrastructure for public mobile communications, to the exclusion of other construction companies active rather in the general industrial or other sectors of the construction industry.
- (120) Furthermore, the measure does not concern general infrastructure which would be open on a non-discriminatory basis to anyone but is limited to infrastructure used for the provision of mobile services.
- (121) As concerns the identification of the particular legal framework against which selectivity can be assessed, it is noted that the construction and operation of mobile passive infrastructure is a liberalised economic activity usually conducted by commercial operators on the basis of private investments in the market. In such a framework, economic activities normally do not receive subsidies. Indeed, the deployment and operation of mobile passive networks in gap 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.
- (122) The measure is moreover territorially selective. The scheme is set up with the aim of rolling out mobile passive infrastructure in certain areas in Hessen where no mobile services are available or planned.
- (123) The measure is therefore selective.

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

- (124) As regards the construction of infrastructure, the Commission considers that an effect on trade between Member States or a distortion of competition is normally excluded in cases where at the same time (i) an infrastructure typically faces no direct competition, (ii) private financing is insignificant in the sector and Member State concerned and (iii) the infrastructure is not designed to selectively favour a specific undertaking or sector but provides benefits for society at large.
- (125) The present case concerns the development of mobile passive infrastructure to be used only for the provision of mobile services in areas in Land Hessen without any mobile coverage. When looking at the mobile communications sector in Germany in general, it must be concluded that there is significant private financing of the development of mobile passive infrastructure for the provision of mobile services all over the country.
- (126) Also, the markets for electronic communications networks and services are open to competition between operators, which generally engage in activities that are subject to trade between Member States. Two of the three MNOs in Germany belong to groups of companies with headquarters in another Member State. Furthermore, if a local authority decides to tender a public works contract or grant a concession, the construction and operation of the mobile passive infrastructure may be delivered by a company from another Member State having cross-border activities.
- (127) It must therefore be considered that the support scheme in question is capable of distorting competition and has an effect on trade between Member States.

### *3.1.6. Conclusion*

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

## **3.2. Compatibility**

- (129) The Commission has to assess whether the aid can be found compatible with the internal market.
- (130) Given the specificity of mobile networks (as opposed to the fixed networks which do not allow for the provision of voice and data services “on the move”<sup>33</sup>), the

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<sup>33</sup> Performance gaps persist between fixed and mobile technologies in terms of capabilities (speed, latency, sensitivity to external electromagnetic and meteorological interferences). Therefore, mobile broadband was found to be complementary (not substitutable) to fixed broadband. See Study prepared for the European Commission DG Communications Networks, Content & Technology by WIK Consult, “Future electronic communications product and service markets subject to ex-ante regulation Recommendation on relevant markets, Final report” page 29-33, (“WIK Study”) available at: <https://ec.europa.eu/digital-single-market/en/news/study-future-electronic-communications-product-and-service-markets-subject-ex-ante-regulation>. The Commission reach a similar conclusion underlining also differences in price, stability on the network connection and secured access, in merger case M.8864 Vodafone / Certain Liberty Global Assets, paragraph 53, available at: [https://ec.europa.eu/competition/elojade/isef/case\\_details.cfm?proc\\_code=2\\_M\\_8864](https://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=2_M_8864)

measure is not directly assessed under the Broadband Guidelines.<sup>34</sup> Therefore, the Commission assesses the compatibility of the scheme pursuant to Article 107(3)(c) TFEU and in analogue application of the Broadband Guidelines, where appropriate.<sup>35</sup>

- (131) Article 107(3) TFEU provides for certain exemptions to the general rule set out in Article 107(1) TFEU that State aid is not compatible with the internal market. The aid in question is assessed on the basis of Article 107(3)(c) TFEU, which stipulates that: "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.
- (132) In the assessment under Article 107(3)(c) TFEU the Commission ensures that the positive impact of the aid measure in reaching an objective of common interest outweighs its potential negative side effects, such as distortions of trade and competition. This exercise is conducted in two steps.
- (133) First, every aid measure has to comply with the below necessary conditions. Failure to comply with one of the following conditions will result in declaring the aid incompatible with the internal market.
- (a) The aid must contribute to the achievement of objectives of common European interest;
  - (b) Absence of market delivery due to market failures or important inequalities;
  - (c) The aid must be appropriate as a policy instrument;
  - (d) The aid must have an incentive effect;
  - (e) The aid is limited to the minimum necessary;
  - (f) Negative effects must be limited;
  - (g) The aid measure must be transparent.
- (134) Second, if all these conditions are fulfilled, the Commission balances the positive effects of the aid measure in reaching the objective of common interest against its potential negative effects.

### *3.2.1. Contribution to the achievement of objectives of common interest*

- (135) The supply of mobile voice and data services forms part of the fundamental needs of a modern society. That is why the objectives of common interest pursued by the Commission include access to mobile services throughout the territory, in all

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<sup>34</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 (hereafter the "Broadband Guidelines").

<sup>35</sup> See also State Aid SA.48324 (2018/N) – Germany Mobilfunk Bayern available at: [https://ec.europa.eu/competition/state\\_aid/cases/275029/275029\\_2029861\\_118\\_2.pdf](https://ec.europa.eu/competition/state_aid/cases/275029/275029_2029861_118_2.pdf).

places where people live, work, travel and gather.<sup>36</sup> The European Electronic Communication Code also identifies the general objective of promoting connectivity and access to, and take-up of, very high capacity networks, including mobile networks, by all citizens and businesses of the Union.<sup>37</sup>

- (136) Many Europeans own a smartphone but cannot always use its full potential given the gaps in mobile coverage or poor service quality.
- (137) This holds true also for the aid scheme's potential target areas as identified during the mapping exercise in Land Hessen.<sup>38</sup> People living, working or travelling in these areas currently do not have access to ubiquitous mobile services, which causes complications in nearly all areas of society and the economy. For instance, mobile coverage gaps pose obstacles to the work of emergency doctors who regularly have to use their mobile phones when in the car. The abrupt termination of telephone conversations when driving into an area without mobile coverage can have serious consequences for patients. Other examples include cardiac pacemakers, which can nowadays be digitally monitored, provided they are reliably connected to the internet. Without access to mobile services, the functionality of emergency services in case of road accidents or accidents in remote areas may be affected.
- (138) The Commission acknowledges that by providing financial support for the construction of mobile passive infrastructure in areas where such networks are currently not available, Land Hessen pursues genuine objectives of common interest, such as those stipulated in the Gigabit Communication and the European Electronic Communication Code.
- (139) At the same time, the notified aid scheme has the potential to reduce regional inequalities and the digital divide. Uniformity of living conditions is a major objective of German and Hessen public policy. Likewise it is an objective of the Union's regional policy to have a European Union where people in all regions can realise their full potential and can work on a lasting improvement in the economy and quality of life for everybody, wherever they live and travel.

### *3.2.2. Absence of market delivery due to market failures or important inequalities*

- (140) A market failure exists if markets, left to their own, without 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 the cost.

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<sup>36</sup> Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions – Connectivity for a Competitive Digital Single Market: Towards a European Gigabit Society, COM(2016) 587 final, (“Gigabit Communication”) page 8.

<sup>37</sup> See Directive (EU) 2018/1972 of the European Parliament and of the Council of 11 December 2018 establishing the European Electronic Communications Code, Articles 3 (2) (a) and (d).

<sup>38</sup> [www.mobilfunk-hessen.de/weisse-flecken-karte](http://www.mobilfunk-hessen.de/weisse-flecken-karte).

- (141) Existing and future applications of the Gigabit society rely on a powerful mobile network that is available on a balanced geographical basis. New forms of economic activity and ways of working require mobile data and voice services. In the potential target areas, such needs currently cannot be satisfied.
- (142) As shown by the current mapping and verified in the public consultation, private companies do not find it profitable to invest in remote or less densely populated areas of Land Hessen where potential demand for mobile services is low. Also, potential fixed broadband services in those areas cannot meet the needs covered by mobile services, namely to provide access to voice and data “on the move”. Fixed broadband was found to be complementary (not substitutable) to mobile broadband.<sup>39</sup> Indeed, broadband mobile networks can offer the possibility for users to have an uninterrupted access to telecommunications services “on the go” without the limitations of fixed broadband networks. In that sense, they provide a supplementary service that cannot be substituted by a combination of connections to fixed broadband networks.
- (143) Therefore, public intervention for rolling out mobile passive infrastructure would be very beneficial as it would help providing 0.34% of Hessian households and up to 4% of Hessian territory with mobile services (recital (13)). The areas concerned would also become interesting for enterprises and economic activity. Finally, the problems posed by the lack of a mobile service in emergency situations would equally be reduced.
- (144) It can therefore be concluded that the notified measure addresses a market failure in sparsely populated and topographically difficult parts of Land Hessen where private operators are not present, did not commit to invest under their coverage obligations and are not willing to invest on a commercial basis in the near future.

*3.2.3. Appropriateness of State aid as a policy instrument and the design of the measure*

- (145) It should be assessed whether State aid is an appropriate policy instrument to address the problem or whether there are alternative, better-placed instruments. Alternative instruments include mobile coverage obligations attached to spectrum licenses and demand-side measures.
- (146) Mobile coverage obligations aiming at promoting further mobile coverage of the German territory have been attached to spectrum licenses granted through a number of spectrum auctions. By virtue of these obligations by the end of 2019, 97% of the households in each Federal State in Germany must have mobile coverage with at least 50Mbps per antenna sector. By the end of 2022, at least 98% of households per Land have to be covered with at least 100 Mbps per antenna sector. Compliance with these obligations will however not provide full geographical coverage.
- (147) As regards demand-side measures, these are not appropriate means to solve the problem as the required mobile passive infrastructure in the potential target areas

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<sup>39</sup> See WIK Study, page 29-33 and Merger case M.8864 Vodafone/Certain Liberty Global Assets, paragraph 53.

does not yet exist and its construction would not be profitable for network providers due to the low population density in these areas.

- (148) The Commission therefore considers the aid scheme to be an appropriate policy instrument for closing mobile coverage gaps in Land Hessen.

#### *3.2.4. Existence of incentive effect*

- (149) It needs to be examined whether the network investment concerned would not have been undertaken within the same time frame without any State aid.
- (150) The three MNOs active on the German market will be asked if they intend to invest in mobile passive infrastructure in the scheme's potential target areas during the next three years. Only in case such investment is not foreseen, can the aid be granted. Also, the design of the scheme ensures that MNOs may not report the supported infrastructure under their obligations arising from their spectrum licences.
- (151) The aid will therefore only be granted in areas where no mobile coverage exist and where MNOs are not obliged or are not planning to deploy a mobile network. Intervention will allow for all MNOs in Germany to provide mobile services on the aided sites.
- (152) The Commission therefore considers the aid scheme to have an incentive effect.

#### *3.2.5. Aid limited to the minimum necessary*

- (153) In assessing the proportional character of the notified measure, the Commission has highlighted a number of necessary conditions to minimise the State aid involved and the potential distortions of competition.

##### *3.2.5.1. Detailed mapping and analysis of coverage*

- (154) The scheme will provide support exclusively in the gap areas.
- (155) Land Hessen identified all potential target areas in a map displaying the mobile coverage in Hessen (see recital (50)). The final target areas will be identified following public consultations in territories of local authorities who will express their interest in receiving funding under the scheme in the framework of which MNOs will inform the Hesse government about possible locations for mobile passive infrastructure (see recitals (54) to (58)).
- (156) The Commission considers this to be sufficient to clearly identify which geographic areas will be covered by the support measure.

##### *3.2.5.2. Public consultation*

- (157) The main characteristics of the aid measure have been made public in the public consultation of 20 December 2019 as described in recitals (54) to (58)). Project specific public consultation will be organised for the precise identification of the target areas.
- (158) The Commission considers this approach to be sufficient to ensure proper publicity.

#### 3.2.5.3. Coverage obligations

- (159) As per recital (49) the MNOs will not report subsidised infrastructure to the Federal Network Agency (Bundesnetzagentur) under their coverage obligations arising out of their spectrum licence conditions. This mechanism ensures that the aid scheme will complement the existing mobile coverage which results from the coverage spectrum licence obligations imposed on the MNOs.

#### 3.2.5.4. Competitive selection process and most economically advantageous offer

- (160) Competitive selection processes as described in recitals (59) to (67)) ensure that there is transparency for all investors wishing to bid for the rolling out and/or operation of the subsidised projects.
- (161) In the lease option, the direct beneficiaries can be local authorities which are not chosen by way of a competitive selection process. However, the Commission considers that the necessary safeguards are in place to ensure that no distortion of competition occurs (as described in recital (26)).
- (162) In the concession model and shared use of existing BOS masts option, the beneficiaries will be chosen in a fair, transparent and non-discriminatory selection procedure in line with the applicable rules on public procurement.
- (163) On the basis of the detailed explanation in recitals (59) to (67) above, the Commission is satisfied that all tenders organised within the scope of the competitive selection procedures regarding the selection of the MNOs and special construction companies will be assessed according to pre-established qualitative award criteria that will be weighed against the price offered in the bid.
- (164) The Commission considers the requirements with regard to the competitive selection process and the most economically advantageous offer fulfilled.

#### 3.2.5.5. Technological neutrality

- (165) As described in recital (74) , any technology capable of supporting the provision of mobile broadband services at speeds of at least 50 Mbps and latency of max. 150 milliseconds per antenna sector is eligible. Also, wholesale access will be offered on open and non-discriminatory terms in line with the principle of technological neutrality.
- (166) At the current stage, LTE technology and above are capable to offer the required speed and latency per antenna sector. LTE based mobile networks and the next generations offer a superior performance for the combination of the essential qualitative criteria of voice and data transmission as well as unrestricted mobility. Namely, the LTE and the following technologies fulfil the following requirements: (i) it enables operators to provide services of advanced voice communication and high-speed data transmission, (ii) it allows the use of a single device widely available for receiving both types of services, (iii) it allows a wider



range of roaming possibilities and (iv) it can operate on the basis of increasingly more available (also re-farmed) spectrum allocations.<sup>40</sup>

- (167) As regards other possible wireless technologies, these seem generally not to be able to offer an access equivalent in terms of its characteristics and quality to the access provided by mobile networks in view of the requirements of Land Hessen.
- (168) WIFI technologies are, as a general rule, not equivalent as they do not provide full mobility. LTE technology networks (and above) offer much more coverage and wider reach than WIFI solutions, which force users to depend upon hotspots in each area and to switch after a short distance to another hotspot and possibly provider. With (at least) LTE technology on the other hand, users will be assured of seamless wide-area connectivity. In other words, whilst users would have to log in to a new WIFI network once they are leaving their current network, connectivity with LTE technology is not interrupted when moving into another antenna sector.
- (169) WIFI networks are also inferior in terms of online security, which is particularly important for business users. Whilst LTE (and above) networks offer enhanced privacy, security, and safety, WIFI solutions cannot offer this, especially not on mobile devices. Finally, WIFI solutions have a much higher latency and varying quality of the services offered.
- (170) As regards satellite technology solutions, whilst being a full mobile solution from the technological point of view<sup>41</sup>, satellite technology has become in practice rather a substitute for fixed-line telecommunications services since the devices are of larger size and weight than mobile devices which makes them unsuitable for the use as mass market mobile device in the gigabit society. Moreover, in addition to their much higher latency, mobile satellite services and devices are generally also much more expensive than LTE services and devices which raises issues of affordability.
- (171) In light of the above, the Commission considers that the State aid scheme fulfils the condition regarding the principle of technology neutrality.

#### 3.2.5.6. Use of existing infrastructure

- (172) As stated in recitals (75) and (76), Land Hessen encourages recourse to any existing infrastructure so as to avoid unnecessary and wasteful duplication of resources and to reduce the amount of public funding.

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<sup>40</sup> The envisaged deployment of LTE corresponds to the requirement laid down in Article 6(3) of the Commission's Radio Spectrum Policy Programme (Decision No 243/2012/EU of the European Parliament and of the Council of 14 March 2012, establishing a multiannual radio spectrum policy programme, OJ L 81, 21.3.2012, p.7) to foster network upgrades to the latest most efficient technology.

<sup>41</sup> Mostly used in areas not covered by mobile communications services, for example on oceans, in deserts and other regions without human settlement.

- (173) Land Hessen clarified that, in addition to the mapping and public consultation exercises, there will also be public access to the database encompassing all existing mobile masts in Germany.<sup>42</sup>
- (174) In the planning process for the construction of the mobile passive infrastructure, the Granting Authority will take into account all existing infrastructure in the relevant target areas that can be accessed and used to realize synergies. Also, the option of upgrading existing masts will be duly considered in each single project before a final decision is made.
- (175) The Commission considers that this approach allows for finding the best and most cost-efficient solution and for avoiding unnecessary duplication of infrastructure.

#### 3.2.5.7. Wholesale access and pricing

- (176) As explained above in recitals (82) to (91), all mobile network providers currently active in Germany will have fair, transparent and non-discriminatory access to the subsidised mobile passive infrastructure. The rent for using the mobile passive infrastructure is in all cases subject to negotiation with the respective lessor (local authority/concession-holder/MNO).
- (177) Effective wholesale access to the mobile passive infrastructure will not be limited in time. The same access conditions will apply on the entirety of the network including on the part of it where existing infrastructure will be used. The access obligations shall be enforced irrespective of any change in ownership, management or operation of the subsidised infrastructure.
- (178) The Commission therefore concludes that it supports the assessment of the measure as compatible with the State aid requirements regarding wholesale access.

#### 3.2.5.8. Monitoring and clawback mechanism

- (179) As shown in recitals (95) and (96), the Granting Authority shall closely monitor the implementation of aid schemes during the entire duration of the projects.
- (180) Concerning the claw-back, it is not necessary in case of local authorities whose sole purpose is the granting of fair and non-discriminatory access to all MNOs. Any surplus revenues made by the local authorities is deducted from eligible expenditure.
- (181) As shown in recitals (97) to (99), Land Hessen will implement a claw-back mechanism with regard to concession-holders and the MNOs. This will be applicable to projects with eligible costs of EUR 1 million or more. This will guarantee that MNOs and concession-holders engaging in project with significant budgets cannot generate unreasonably excessive profit by making use of the publicly funded mobile passive infrastructure.

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<sup>42</sup> <http://emf3.bundesnetzagentur.de/karte/>

### 3.2.5.9. Transparency and reporting

- (182) The competent Hessen authorities shall publish on a central website the necessary information as indicated in recitals (101) to (104). Aid beneficiaries are obliged to provide entitled third parties with comprehensive and non-discriminatory access to information on their infrastructure deployed under the aid scheme.
- (183) Furthermore, as indicated in recital (105), for the duration of the aid scheme, Land Hessen will consolidate key information on the individual aid projects and report every year to the European Commission.<sup>43</sup>

### 3.2.6. *Limited negative effects*

- (184) It follows from the above assessment regarding market failure that the aid scheme does not crowd out private investment. In particular, the aid is confined to areas in Land Hessen that are characterized by mobile coverage gaps, i.e. areas where no mobile voice and mobile data services are available and no plans to get this coverage for the following three years.
- (185) The subsidised mobile passive infrastructure will enable the provision of competitive and affordable mobile services to end-users by competing mobile operators and bring about significant mobile network capabilities in terms of availability and capacity. Also, as indicated in recital (29) when the network providers are exceptionally also present at the retail level, they will provide for safeguards for preventing any anti-competitive behaviour towards other service providers (in particular the obligation to provide access to electricity connections, ducts, and masts and all passive equipment supported by aid in a fair and non-discriminatory manner).
- (186) By enabling all mobile operators active on the German market to offer their services in a competitive fashion, similarly to the profitable areas in other parts of Land Hessen, the notified measure avoids the creation of local monopolies which would result from use of the mobile passive infrastructure by only one mobile services provider. The aid scheme therefore has pro-competitive effects.
- (187) In the light of these arguments, it can be concluded that negative effects of the aid scheme, if any, are limited.

### 3.2.7. *The overall balancing exercise*

- (188) A carefully designed State aid scheme should ensure that the overall balance of the effects of the measure is positive.
- (189) As a result of the aid scheme, local authorities in Hessen will build or upgrade mobile passive infrastructure with a view to addressing persistent gaps in the deployment of mobile networks. Such infrastructure would not be built or upgraded without the aid. The aid scheme will reduce the number of mobile communications coverage "gap areas" in Land Hessen. This will provide for

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<sup>43</sup> Such information should at least include besides the information already made public on the central website, the date when the supported infrastructure is put into use, the number of mobile network providers using it, the number of houses covered by the mobile communications networks, take-up rates.

better mobile coverage and reduce important inequalities in Land Hessen. Moreover, the aid scheme contributes to the achievement of the Commission's ambition to provide access to mobile services, including mobile voice and broadband access throughout the EU territory, namely in all places where people live, work, travel and gather.<sup>44</sup>

- (190) As regards the data transmission services that will be enabled in the aid scheme's target areas, these will deliver broadband access “on the move”, better choice for consumers, higher quality and innovation. Hence, consumers' access to online resources in these areas will be strongly improved.
- (191) Furthermore, by granting access to the supported mobile passive infrastructure to all MNOs that express an interest, the aid scheme aims at creating additional competition in the target areas. The overall impact on competition is deemed to be positive. The negative effects on competition, if any are very limited.
- (192) The overall balance of the effects of the aid scheme is positive.

#### **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) of the TFEU.

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

Your request should be sent electronically to the following address:

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

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<sup>44</sup> See page 8 of the Gigabit Communication.