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**Subject: State Aid SA. 52224– Austria  
Broadband project in Carinthia**

Excellency,

I am pleased to inform you that the European Commission has assessed the measure Broadband project in the Federal State of Carinthia (hereafter: "the measure") and decided not to raise objections as the State aid contained therein is compatible with Article 107(3) (c) Treaty on the Functioning of the European Union (TFEU).

**1. PROCEDURE**

- (1) Following pre-notification discussions, on 5 July 2019 the Republic of Austria notified the measure to the Commission under Article 108(3) of the Treaty on the Functioning of the European Union (TFEU).
- (2) By letter of 5 July 2018 the Austrian authorities of the Regional Government of Carinthia (hereafter: "Carinthia") provided a language waiver and exceptionally agreed to waive their rights deriving from Art. 342 TFEU in conjunction with Art. 3 of the EC Regulation 1/1958 and to have the planned Decision adopted and notified pursuant to Article 297 of the Treaty in English (EN).

Seiner Exzellenz Herrn Alexander Schallenberg  
Bundesministerium für Europa, Integration und Äußeres  
Minoritenplatz 8  
A - 1014 Wien

## 2. CONTEXT

- (3) The Digital Agenda for Europe (“DAE”) represents one of the seven flagship initiatives of the Europe 2020 Strategy.<sup>1</sup> The Digital Agenda proposes to better exploit the potential of Information and Communication Technologies (ICT) in order to foster innovation, economic growth and progress. The aim is to deliver sustainable economic and social benefits from a Digital Single Market based on fast and ultra fast internet and interoperable applications, with broadband access for all achieved by 2013 and access for all to higher internet speeds of 30 megabits per second (Mbps) or above and 50% or more of European households subscribing to internet connections of at least 100 Mbps targeted by 2020.
- (4) The DAE was further developed in 2016 by the Gigabit Communication<sup>2</sup> which, while restating the importance of Internet connectivity for the Digital Single Market, sets out a strategy for a European Gigabit society, where availability and take-up of very high capacity networks (VHCN) would enable the widespread use of products, services and applications in the Digital Single Market. The Gigabit Communication defines as strategic objectives for 2025: (i) 100% coverage of all households with download speeds of at least 100 Mbps, upgradeable to 1 Gbps, (ii) 1 Gbps symmetric for all main socio-economic drivers such as schools, transport hubs and main providers of public services as well as digitally intensive enterprises, and (iii) uninterrupted 5G coverage for all urban areas and all major terrestrial transport paths.
- (5) In 2015, Carinthia defined its broadband strategy in a policy measure called "Broadband Strategy of Carinthia 2020".<sup>3</sup> The goal of this strategy is to ensure that by 2020 all Carinthian households have access to ultrafast broadband with a symmetrical (upload and download) speed of 100 Mbps, based on upgraded backhaul networks.
- (6) The coverage of next generation access (NGA) networks in Carinthia is one of the lowest of all Federal States in Austria. In 2017, only 57% of the residences of Carinthia had broadband access.<sup>4</sup> As a result of various ongoing initiatives in Carinthia, the broadband roll-out may increase to 77% by the time this measure is implemented. However, even after the implementation of those initiatives, 23% (116,646 residences) will still not benefit from broadband services over NGA networks.
- (7) Overall, there are about 6-8 network operators active in Carinthia providing broadband services. However, only A1 Telekom Austria is active in the whole region and mostly with copper networks. The other network operators focus on areas with higher population density. The rural areas are therefore not adequately served by the market participants.

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<sup>1</sup> Communication from the Commission – EUROPE 2020: A strategy for smart, sustainable and inclusive growth, 3.3.2010, COM(2010) 2020 final.

<sup>2</sup> Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, COM (2016) 587 final Connectivity for a Competitive Digital Single Market - Towards a European Gigabit Society.

<sup>3</sup> The strategy is available at [www.ktn.gv.at/breitband](http://www.ktn.gv.at/breitband).

<sup>4</sup> A total of 216,300 residences (approx. 43 %) did not have a coverage of 30 Mbps.

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

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

- (8) The measure aims at deploying a next generation access network (NGA) complemented by a next generation backbone/backhaul-network (NGN) in Carinthia, with the objective to guarantee broadband internet access speeds of at least 100 Mbps symmetric, upgradeable to 1 Gbps.
- (9) The measure aims at securing the long-term socio-economic viability of Carinthia, ensuring open and non-discriminatory access to a very high capacity broadband network in underserved rural areas of Carinthia. The business model chosen supports competition at the active network and service providers' level.
- (10) The measure will only finance passive infrastructure elements (ducts<sup>5</sup>, cabinets/exchanges and dark fibre). It only targets white NGA/NGN areas in Carinthia. White NGA/NGN areas are areas where there is currently no infrastructure available which is able of sustaining download speeds of at least 30 Mbps, and where no such broadband network will be built in the near future. Backhaul (NGN) infrastructure will only be supported to the extent that the existing NGN network is not able to support an NGA network.
- (11) The view of the authorities of Carinthia is that a public sector intervention is justified. Commercial operators do not show an interest in upgrading their network in order to deliver NGA services in the target areas. The market consultation has shown that no private investment is foreseen in the next three years in the targeted areas. Once ongoing initiatives are completed, more than 116.000 (about 23%) households in Carinthia will still lack access to internet with download speeds of 30 Mbps or more.
- (12) The direct beneficiary is the fully state-owned BIK Breitbandinitiative Kärnten GmbH (hereafter "BIK"), a limited liability company newly established and 100% controlled by Carinthia.
- (13) The support measure consists of an individual aid in the form of a grant of EUR 60 million over a period of 6 years. The payment will be a grant/ direct aid coming exclusively from the budget of Carinthia. The yearly amounts may vary depending on the official decision of the regional parliament on the budget. Budgets not consumed within the year of allocation may be transferred to subsequent years.

#### **3.2. Legal basis**

- (14) The notified measure is based on the following legal bases, both at national and at regional level of Carinthia:
  - National level:
  - Federal Act enacting the Telecommunications Act

(Telekommunikationsgesetz 2003 – TKG 2003)<sup>6</sup>;

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<sup>5</sup> According to Carinthia, the ducts are large enough to cater for several fibre network and to allow for point to multipoint as well as point-to-point solutions.

<sup>6</sup> Austrian Federal Law Gazette I Nr. 70/2003.

- Regional level:
- Broadband strategy of Carinthia 2020, Decision of the College of the Government of Carinthia concerning BIK.<sup>7</sup>
- The current decision is part of the legal basis.

### **3.3. Stand still obligation**

- (15) The authorities of Carinthia 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>8</sup>, new aid measures must not be put into effect before the Commission has taken a decision authorising it.

### **3.4. Investment and business model**

- (16) The selected business model is a Three-Layer open model (3LOM). The roles of passive infrastructure provider, network provider and service provider are separated.
- (17) Whilst BIK, the company fully owned by Carinthia, will build, own and maintain the passive layer, the installation of the active layer on these new networks in different target areas will be awarded to network providers (NPs) by means of lease contracts following the applicable EU and national public procurement procedures
- (18) The selected NPs, i.e. the lessees of the passive infrastructure, will place active equipment e.g. in access nodes and build open, operator-neutral networks over which all interested service providers will be able to offer their services to end users.
- (19) By way of derogation from the rule of strict separation of the different roles in a 3LOM, it is foreseen that the selected NPs, 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.
- (20) BIK, as owner and lessor of the passive infrastructure, will provide for safeguards in the leasing contracts with NPs for preventing any anti-competitive behaviour towards other service providers when NPs are also active at retail level. Such contract clauses<sup>9</sup> will have to be reflected already in the tender documents, and the award criteria in particular, of the procurement procedures to find suitable NPs for the active layers of the networks. In case a conflict cannot be solved by BIK, the national regulatory authority (“the NRA”) will take the final decision.

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<sup>7</sup> Breitbandstrategie des Landes Kärnten 2020 Beschluss des Kollegiums der Kärntner Landesregierung zur BIK vom 5.12.2017.

<sup>8</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.

<sup>9</sup> Such obligations include: the obligation to treat wholesale customers fairly and non-discriminatory, the obligation to provide access to ducts, dark fibre and bitstream access or the obligation that when NP is also SP, the NP will be required to grant access at least 6 months before the launch of its retail services, in line with the Broadband Guidelines (paragraph 78 (g) and footnote 108.

### 3.5. Overlap with other schemes

- (21) The measure will run in parallel with the federal Austrian aid scheme "Broadband Austria 2020 (BBA 2020)" (SA.41175)<sup>10</sup>. The notified measure will only support passive infrastructure in white NGA/NGN areas in Carinthia. Overlaps with projects under BBA 2020 will be excluded by allowing funding under the measure at hand only in areas where no projects under BBA 2020 exist. Hence, BIK may apply for financing of individual projects eligible under BBA 2020 as long as they are separate and different from the projects financed under the scheme at hand. BIK will maintain adequate separate accounting clearly identifying the different sources of financing and the projects for which those funds are used.
- (22) If any projects will be awarded to BIK under the BBA 2020 scheme, that financing for that project will only be used to finance eligible costs for those individual projects, in line with the requirements of BBA 2020; therefore no such aid will be used in projects falling under the current measure.
- (23) In order to exclude any undue overcompensation of BIK, the administrative body in charge of managing the BBA2020 (the "Österreichische Forschungsförderungsgesellschaft (FFG))" will check when awarding tendered projects that there is no undue financing of those projects and that all European State aid rules are respected.

### 3.6. Mapping of the target areas

- (24) The measure targets white NGA areas, namely where NGA or NGN (providing sufficient backhaul capacity to support the NGA networks in place or to be deployed) are not present or planned by market investors over the coming three years.
- (25) The government of Carinthia has relied to identify the intervention areas on the mapping provided in the fifth call for financial aid for ducts published by the responsible Austrian Federal Ministry for Transport, Innovation and Technology (BMVIT) on 6 April 2018. This call covered the entire Austria, including Carinthia, at premises passed level.
- (26) Successful projects will be included in the Austrian central broadband database, Breitbandatlas, on a quarterly basis.<sup>11</sup>
- (27) As this mapping and the coverage analysis identifying the white NGA/NGN areas in Austria was sufficiently granular and recent, it was not deemed necessary nor economical to replicate this exercise.<sup>12</sup>
- (28) 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. This ensures that the investments supported by this

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<sup>10</sup> [http://ec.europa.eu/competition/state\\_aid/cases/259470/259470\\_1726891\\_122\\_2.pdf](http://ec.europa.eu/competition/state_aid/cases/259470/259470_1726891_122_2.pdf).

<sup>11</sup> The website <https://www.bmvit.gv.at/telekommunikation/breitband/foerderungen/projekte/index.html> shows the calls and the projects that have already been reflected in the Breitbandatlas.

<sup>12</sup> The detailed mapping is available at:

<https://www.bmvit.gv.at/telekommunikation/breitband/foerderungen/LeRohr/call05/gebiete/index.html>

<sup>15</sup> <https://www.ktn.gv.at/Service/Kaerntner-Landeszeitung>, Nr. 34 from 30 August 2018, pp. 9.

measure will only take place in NGA/NGN white areas throughout the duration of the whole project.

### **3.7. Public consultation**

- (29) Under the framework of the governmental aid scheme BBA2020, a public consultation is conducted on a yearly basis since the introduction of BBA2020. This ensures that the available data is less than one year old in any case. A public consultation in Carinthia took place between 30 August 2018 and 4 October 2018. The consultation contained a summary of the planned support measure and a description of the potentially targeted areas. This consultation was also published on the website of Carinthia.<sup>15</sup>
- (30) The only submission received from market participants in the consultation process supported the approach of the Carinthian government. The submission stressed that the intervention should not be limited to the support for deployment of access networks in NGA white areas but it should also ensure that backhaul networks are available and capable of transporting larger data volumes to and from the rural areas and supporting the use of existing or new NGA networks. No market player provided information about any intentions to invest in the NGA and NGN white areas identified in the foreseen measure within a three-year timeframe. In addition, the National Regulation Agency had no objections to the measure.

### **3.8. Target areas**

- (31) After having identified the existing and planned NGA/NGN infrastructures on the basis of a mapping of the relevant areas and a public consultation, the exact target areas will be defined. Areas with available networks providing NGA/NGN capabilities will be excluded from the measure. Only areas where such networks neither exist nor are planned to be deployed by private investors within the next three years will be covered by the measure. Thus, target areas are only NGA/NGN white areas.
- (32) The notified measure provides for wholesale access to the subsidised infrastructure in the target area. This access can be used also by private operators to reach and serve other white NGA/NGN areas outside the intervention area. The measure does not cover connections of that infrastructure into grey or black NGA/NGN areas.

### **3.9. Beneficiaries**

- (33) The direct beneficiaries of the aid will be the wholesale operator of the network, BIK, and the selected network providers (NPs). Indirect beneficiaries will be wholesale access seekers purchasing access to the new network from the NPs, namely the service providers (SPs).

### **3.10. Competitive selection procedure**

- (34) The intervention model chosen by Carinthia relies on direct investment, where the public authorities deploy and manage the NGA/NGN network through the fully owned infrastructure provider, BIK.
- (35) Carinthia confirmed that: (i) BIK shall limit its activity to the predefined target areas and shall not expand to other regions; (ii) BIK shall limit its activity to

maintaining the passive infrastructure and granting access to it, but shall not engage in competition on the retail levels with commercial operators; and (iii) BIK will maintain an accounting separation between the funds used for the operation of the network and the other funds at the disposal of BIK.

- (36) The construction of the physical infrastructure will also be subject to a competitive selection process. The operation/management of the infrastructure will be transferred to one or several NPs, who will be selected via competitive selection processes.
- (37) Carinthia committed to ensure that all competitive selection processes under the measure will be in line with both the national and the European public procurement regulations. The call for tenders will be published at the regional level and at EU level according to public procurement and rules.<sup>13</sup>
- (38) Carinthia committed to ensure that the following requirements will be fulfilled for all selection procedures:
- All selection procedures must be in line with the spirit and principles of the EU public procurement directives<sup>14</sup>.
  - All selection procedures must ensure transparency for all interested bidders.
  - All selection procedures must ensure equal and non-discriminatory treatment of all bidders and objective evaluation criteria.
  - All selection procedures must be published on a dedicated website.

### **3.11. Economically most advantageous offer**

- (39) Carinthia confirmed that all selection procedures for the selection of NPs will be based on selecting the economically most advantageous offer.
- (40) Offers received in the course of the competitive selection procedures will be assessed using qualitative award criteria established in advance by the aid granting authority.
- (41) Only lease offers will be taken into account where NPs can demonstrate a high economic, technical and financial performance. It will be necessary to demonstrate in each case that the prospective lessee has successfully managed at least three reference projects where the subject matter involved the operation of an active network and, if applicable, the provision of services to end-customers, and that the prospective lessee meets the technical requirements and has the respective knowhow. The contract will be concluded with the prospective lessee that scores highest regarding the number of points in the weighted average selection process of offers.

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<sup>13</sup> At national level, the call for tender will be published in Wiener Zeitung Amtsblatt, Ausschreibungen at: [https://www.wienerzeitung.at/amtsblatt/aktuelle\\_ausgabe/](https://www.wienerzeitung.at/amtsblatt/aktuelle_ausgabe/). On regional level, the call for tender will be published on: <https://www.ktn.gv.at/Service/Amtliche-Informationen?kid=35-> link to <https://ktn.vergabeportal.at/List>.

<sup>14</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.

- (42) Award criteria are, for instance, the offered rent, the quality of the offered services, the planned final-user prices and possible synergies with existing infrastructure, as well as the impact of the proposed solution on competition. The qualitative criteria have to be weighed against the requested aid amount. In order to minimise the amount of aid, at similar if not identical quality conditions, at the overall assessment of a bid, the bidder who offers the highest rent (i.e. requires the lowest State aid amount) will receive most priority points. Bidders proposing a wholesale-only model, a passive only model or both will receive additional points.

### **3.12. Technological neutrality**

- (43) Carinthia confirmed that while this is a direct investment model, BIK will ensure the deployment of the NGA/NGN network using or combining any technology suitable to deliver 100 Mbps symmetric (upgradeable to 1 Gbps).
- (44) The support measure will allow for the deployment by the NPs of any active network technology as long as the network allows for reliable provision of a symmetrical bandwidth of at least 100Mbps. SPs will therefore have the choice between using different types of wholesale access products offered on open and non-discriminatory terms, allowing SPs to offer their own retail services to end users using the technological solution of their choice in line with the principle of technological neutrality.

### **3.13. National Regulatory Authority**

- (45) The Austrian national regulatory authority is the Telecom-Control-Commission (TKK). The TKK is supported by the Austrian Regulatory Authority for Broadcasting and Telecommunications (RTR), which processes and edits the decisions of TKK and provides operational support to TKK.
- (46) The Austrian NRA (TKK as supported by the RTR) fulfils functions such as: (a) the provision of information about access prices; (b) to advise and assist public authorities in determining the wholesale access prices; (c) dispute resolution (for example to settle disputes in connection with access conditions, and (d) maintaining the central infrastructure Database (ZIS).<sup>15</sup> The RTR will resolve disputes between operators and/or municipalities and operators with respect to wholesale access technically and/or commercially.

### **3.14. Use of existing infrastructure**

- (47) In the planning process for the construction of the passive infrastructure, BIK will take into account all existing infrastructure in the relevant target areas that can be accessed and used to realize synergies. For mapping the existing infrastructure, the infrastructure Database (ZIS) of the Austrian regulatory authority will be used.<sup>16</sup>

### **3.15. Wholesale access**

- (48) The selected NPs that will lease the passive infrastructure from BIK and operate active networks on that infrastructure will have to provide and ensure fair and non-discriminatory access for all interested SPs. The effective wholesale access to

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<sup>15</sup> <https://www.rtr.at/de/tk/ZIS>.

<sup>16</sup> <https://www.rtr.at/de/tk/ZIS>.



the subsidised infrastructure is for at least 7 years and the right of access to the new passive infrastructure elements such as dark fibre and ducts is not limited in time.

- (49) BIK will not offer any retail services. BIK will act as wholesale-only operator and will sell passive wholesale access to wholesale access seekers. Such passive wholesale access will include but not be limited to: access to ducts, dark fibre, street cabinets, including full and effective unbundled access.
- (50) NPs will provide both active and passive wholesale access, including but not limited to: bitstream, access to ducts, poles, dark fibre, and street cabinets, including full and effective unbundled access. The granting authority will clearly define the conditions for NPs 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 and in the future lease agreements.
- (51) Access to ducts and dark fibre will be governed by a standard offer that may be audited by the RTR.
- (52) The access obligations shall be enforced irrespective of any change in ownership, management or operation of the subsidised infrastructure.

### **3.16. Wholesale access pricing**

- (53) Wholesale access prices (including backhaul prices) are to be based on the price set or approved by RTR or benchmarked against average wholesale prices of comparable access and backhaul services in other, more competitive, parts of the country and will take into account the aid received by BIK and the NPs. In case of disputes between the NPs and SPs or where the price is not regulated, RTR will resolve them with the objective to keep prices at a reasonable and non-discriminatory level.

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

- (54) A claw-back mechanism is not necessary in case of publicly-owned, wholesale only infrastructures managed by a public authority / in-house company with the sole purpose to grant fair and non-discriminatory access to all operators. Therefore, Carinthia does not intend to apply a claw-back mechanism to BIK.
- (55) However, Carinthia will implement a claw-back mechanism with regard to the selected NPs who will lease the passive infrastructure from BIK and operate active networks on it.
- (56) The claw-back mechanism will be linked to unanticipated gains by the NPs. NPs have to present to BIK as part of their bid in the competitive selection process, sufficient information regarding expected gains from sales of wholesale access. If the NPs act also as SPs, they will also have to present BIK with information regarding expected gains from take-up of services by consumers. If, after 3 years, the actual gains exceed the expected gains by more than 30%, the gains above those expected have to be paid to the government of Carinthia.
- (57) The government of Carinthia will carry out an ongoing monitoring of the measure. Both BIK and the selected NPs are subject to extensive reporting obligations. SPs will also have to report, to e.g. collect take-up-rates on an end customer basis, pricing of products, chosen products by end customers, etc. The

NPs will be responsible for collecting that information from SPs and for reporting it to BIK on a contractual basis. BIK will report to the government of Carinthia.

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

- (58) Carinthia 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 NGA/NGN network expansion will be published on the region<sup>17</sup> and federal<sup>18</sup> websites which will allow easy access to all relevant acts and information regarding the project.
- (59) 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 information must remain published for at least ten years and be available for the general public without restrictions.
- (60) BIK as well as the selected NPs are obliged to provide entitled third parties with comprehensive and non-discriminatory access to information on the infrastructure (including ducts, street cabinets, fibre, etc.) built within the scope of the measure, which will facilitate other operators' access to the infrastructure.
- (61) BIK and the NPs will also published detailed information concerning wholesale access conditions and prices applied by BIK and by the selected NPs.
- (62) Carinthia will report to the Commission about the application and the progress of the measure every two years. 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 network is expected to become operational; the wholesale products and access conditions and pricing; the number of parties seeking access and service providers in the network; the number of houses passed and the take-up rate; information regarding any disputes regarding the project, if any, and in particular concerning wholesale access, as well as how such disputes were resolved.
- (63) Carinthia also committed to submit to the Commission annual reports, as required under Article 26 of Council Regulation (EU) 2015/1589.

## **4. ASSESSMENT OF THE MEASURE**

### **4.1. Existence of aid**

- (64) 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."
- (65) 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

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<sup>17</sup> <https://www.ktn.gv.at/Verwaltung/Amt-der-Kaerntner-Landesregierung/Abteilung-11/Breitband>

<sup>18</sup> <https://www.bmdw.gv.at>.

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.

#### **4.1.1. Undertaking**

- (66) 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>
- (67) BIK will construct and maintain the passive infrastructure for broadband networks with a view of its future commercial exploitation by third-party operators. This constitutes an economic activity.<sup>20</sup> BIK is therefore considered an undertaking within the meaning of Article 107(1) TFEU.
- (68) The NPs will deploy active equipment in all access nodes and will offer access on open non-discriminatory terms to SPs. The SPs will purchase access to the newly built network and also, in their turn, will sell on their services. Both the activities of the NPs and SPs amount to an economic activity. Therefore, the selected NPs and SPs are also considered undertakings within the meaning of Article 107(1) TFEU.

#### **4.1.2. State resources and imputability**

- (69) 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>21</sup> Resources of local and regional authorities are for the application of Article 107(1) of the TFEU State resources.<sup>22</sup> As described in Section 3.1 above, the measure at stake is financed from the budget of Carinthia, which is allocated to the beneficiaries under the control of the authorities with an element of discretion. Hence, State resources are involved and the measure is imputable to the State.

#### **4.1.3. Economic advantage**

- (70) 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>
- (71) BIK will be granted a direct investment in the amount of EUR 60 million paid in instalments over six years. The public consultation has shown that no commercial investment in white NGA/NGN areas in Carinthia is envisaged in the near future. Given the topographic situation and the challenging environment for broadband infrastructure rollout in white NGA/NGN areas in Carinthia, which are characterized by a mountainous landscape, low population density and scattered settlements, such an investment is unlikely to be profitable from an ex-ante point of view. The public consultation has shown that no private investor was interested in

<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> Judgment by the General Court, *Freistaat Sachsen and Land Sachsen-Anhalt v Commission*, T455/08, ECLI:EU:T:2011:117, paragraph 90 and following

<sup>21</sup> Case C-482/99 *France v Commission* (hereafter: "Stardust Marine") [2002] ECR I-4397.

<sup>22</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>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.

investing into an ultrafast broadband network with symmetrical access speeds of at least 100 Mbps in the selected white NGA/NGN areas in Carinthia.

- (72) It is hence considered that BIK has been granted an advantage by Carinthia that would not have occurred in normal market conditions.
- (73) Furthermore, NPs and SPs receiving wholesale access to the subsidised infrastructure will be able to operate NGA/NGN networks in white NGA/NGN areas on conditions not otherwise available on the market which means that they will also have an economic advantage.

#### **4.1.4. Selectivity**

- (74) The measure supporting the deployment of an NGA/NGN broadband network is selective in nature in that it targets undertakings that are active only in one industry sector (telecommunications) and only in certain segments of the overall electronic communications market (deployment and operation of an NGA/NGN broadband network), to the exclusion of other electronic communications services and other economic activities.<sup>24</sup> It does not concern general infrastructure (e.g. general civil engineering works regarding for example roads) which would be open on a non-discriminatory basis to all potential users, but it is limited to electronic communication operators.<sup>25</sup> The measure is therefore sector-specific.
- (75) The measure is moreover territorially selective. The scheme is set up with the aim of improving NGA/NGN broadband coverage in certain underserved (white) areas in Carinthia.
- (76) As concerns the identification of the particular legal framework against which selectivity can be assessed, it is noted that the construction and operation of passive infrastructure for broadband networks 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.
- (77) In the context of this particular legal regime, the measure has the effect of conferring an advantage to BIK, the NPs, and indirectly to SPs over other companies in the electronic telecommunications market, which are, in the light of this legal regime, in a comparable factual and legal situation. Such advantage consists of reducing the costs that they would normally have to bear under normal market conditions, as compared to companies investing into broadband networks and services only on the basis of private funds under the same technical, commercial and legal conditions – i.e. in the liberalized market, under the regulatory framework.
- (78) This advantage cannot be justified on the basis of the framework system (i.e. economic activity relying on private investments) since the outcome of market consultation and public consultation identifies the target areas of the support measure as areas where no company wants to make an investment.
- (79) The measure is therefore selective.

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<sup>24</sup> See also Judgment of the Court of 15 June 2006 Joined Cases C-393/04 and C-41/05 *Air Liquide Industries Belgium* [2006] ECR I-5293, paragraph 31. 40

<sup>25</sup> See also N 383/09 – Germany – Amendment of N 150/08 Broadband in the rural areas of Saxony.

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

- (80) The markets for electronic communications services (including the wholesale markets and the retail broadband markets) are open to competition between NPs and SPs, which generally engage in activities that are subject to trade between Member States.
- (81) By favouring certain NPs and SPs, the notified measure alters the existing market conditions and is liable to distort competition and affect trade between Member States. It will create the availability of passive infrastructure which would not be provided under normal market conditions. At network operator level, State support may deter other operators from setting up or developing their own networks under commercial conditions. The State support may also encourage local undertakings to take advantage of services offered in the subsidised network rather than more expensive market solutions. The offer of lease of passive infrastructure to several operators simultaneously creates a new competitive wholesale market. The measure will alter the conditions of competition between wholesale access seekers who are likely to use the services of the planned network.
- (82) The improved broadband infrastructure and additional wholesale capacity provided by the scheme therefore is liable to distort competition. Insofar as the intervention (at least potentially) liable to affect providers of electronic communications services from Austria and from other Member States, the measure has an effect on trade.

#### **4.1.6. Conclusion**

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

### **5. COMPATIBILITY**

- (84) The Commission has to assess whether the aid can be found compatible with the internal market. 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 can only be 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. In its assessment, the Commission has taken into account the Broadband Guidelines<sup>26</sup>, which contain a detailed interpretation of Article 107(3)(c) TFEU with regard to the broadband sector.
- (85) 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.

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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 (hereafter the "Broadband Guidelines").

- (86) 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.
- The aid must contribute to the achievement of objectives of common European interest;
  - Absence of market delivery due to market failures or important inequalities;
  - The aid must be appropriate as a policy instrument;
  - The aid must have an incentive effect;
  - The aid is limited to the minimum necessary;
  - Negative effects must be limited;
  - The aid measure must be transparent.
- (87) 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.

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

- (88) In its Europe 2020 Strategy, the Commission stated that the Digital Agenda for Europe flagship initiative has the "aim to deliver sustainable economic and social benefits from a Digital Single Market based on fast and ultra-fast internet and interoperable applications [...]". In pursuing this aim, "at national level, Member States will need [...] to draw up operational high speed internet strategies and target public funding, including structural funds, on areas not fully served by private investments."
- (89) The strategic objectives of the Digital Agenda for Europe were further developed by the Commission's Communication "Connectivity for a Competitive Digital Single Market – Towards a European Gigabit Society" which sets a vision of Europe where availability and take-up of very high capacity broadband networks enable the widespread use of products, services and applications in the Digital Single Market. To this end, the Commission proposes that by 2025 all European households, rural or urban, should have access to broadband networks offering a download speed of at least 100 Mbps, which can be upgraded to 1 Gbps.
- (90) The government of Carinthia is faced with large white NGA/NGN areas in several districts of the Federal State. This demonstrates a "digital divide" which may lead to rural depopulation and does mean decreased sustainability for commercial activities of enterprises. The underserved districts contain sparsely populated areas where private operators have no commercial interest to invest in the near future. Furthermore, the population structure and the topography of Carinthia imply that there are many small villages in mountainous and forested regions.
- (91) With the aid measure at hand, Carinthia will provide the passive infrastructure required for the provision of NGA/NGN broadband services in selected white

NGA/NGN areas in Carinthia. It will also require NPs to provide a wider range of wholesale access products allowing SPs (and eventually NPs) to provide at retail level symmetrical access speeds of at least 100 Mbps at any eligible location served by the supported networks. The aid measure will therefore bridge the digital divide between areas already covered by NGA/NGN networks and some areas that are not yet connected at such speeds.

- (92) Therefore, the measure intends to address the digital divide in Carinthia and allow more citizens and households to have access to very high-speed broadband services. The measure therefore pursues genuine cohesion and economic development objectives and will make a significant contribution to the achievement of the objectives of the Digital Agenda for Europe and of the Communication "Connectivity for a Competitive Digital Single Market – Towards a European Gigabit Society". The aid measure thus contributes to the achievement of objectives of common interest.

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

- (93) According to paragraph 37 of the Broadband Guidelines, "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."
- (94) The intervention of Carinthia targets so-called white NGA/NGN areas within the meaning of paragraph 75 of the Broadband Guidelines, i.e. areas where NGA/NGN networks do not at present exist and where they are not likely to be built within the next three years. The market therefore fails to deliver NGA/NGN broadband network coverage in Carinthia and generates, in light of the targets of the Digital Agenda for Europe and the Commission's Communication "Connectivity for a Competitive Digital Single Market – Towards a European Gigabit Society", only insufficient private investment in NGA/NGN broadband networks in Carinthia.
- (95) This has been ensured in the public consultation exercise as described above in section 3.7 and will continue to be ensured by the government of Carinthia throughout the remaining stages of the mapping exercise as described above in section 3.6. The market in Carinthia also fails to deliver an efficient outcome for society with a view to the increasing social inequalities within Carinthia generated by the lack of access to high-speed internet networks in rural areas in Carinthia. The intervention of Carinthia will help correct this development.
- (96) It can therefore be concluded that the notified measure addresses a market failure in rural areas in Carinthia where private operators will not invest in establishing passive infrastructure for NGA/NGN broadband networks.

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

- (97) When broadband coverage is considered insufficient, public intervention may be necessary. However, it should be assessed whether State aid is an appropriate policy instrument to address the problem or whether there are alternative, better placed instruments.

- (98) In the situation currently under assessment, the efforts from alternative instruments, including ex ante regulation, do not solve the problems related to the lack of supply of high speed networks (non-existence of adequate infrastructure) in the targeted areas and would fail to deliver the wider economic benefits of a widespread NGA/NGN network.
- (99) The implementation of the State aid scheme will therefore guarantee network roll-out according to the needs of Carinthia. The State aid scheme makes it possible to achieve the objective of ensuring NGA/NGN network coverage cost-effectively, efficiently and within the planned time scale.
- (100) Consequently, the Commission can agree that without further public intervention, it would seem impossible to prevent the deepening of the "digital divide" between urban and more rural areas, which could lead to the economic and social exclusion of the local citizens and businesses.

#### **5.4. Existence of incentive effect**

- (101) As set out in paragraph 45 of the Broadband Guidelines, regarding the existence of an incentive effect, it needs to be examined whether the broadband network investment concerned would not be undertaken within the same timeframe without any state aid.
- (102) The measure ensures that aid can only be provided if it is established that in the targeted areas no comparable investment would take place without public funding within the next three years. This has been confirmed by the public consultation carried out by the government of Carinthia (see above in section 3.7). It follows from this that the supported investment in passive infrastructure for NGA/NGN broadband networks in white NGA/NGN areas in Carinthia would not be made within the same timeframe without the aid.
- (103) The Commission therefore considers the aid scheme to have an incentive effect.

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

- (104) 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.

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

- (105) It should be clearly identified which geographic areas will be covered by the support measure.
- (106) As described in section 3.8. above, the measure will provide support exclusively in white NGA/NGN areas in Carinthia. All potential target areas have been identified in the mapping as provided in the fifth call for financial aid for access networks in the framework of the national aid scheme BBA 2020 published by the BMVIT on 6 April 2018. The final target areas will be chosen by the government of Carinthia taking into account economic conditions in all potential target areas.
- (107) It should be noted in this context that the amount of EUR 60 million of State aid provided by the measure will not suffice to serve all white NGA/NGN areas in Carinthia with passive infrastructure for NGA/NGN broadband networks.



- (108) In fact, the government of Carinthia estimates that an amount of EUR 700 million would be needed in order to serve all white NGA/NGN areas in Carinthia. The government of Carinthia will therefore focus on those areas and municipalities with the most pressing need. Thus, financial support will flow on a minimum level (EUR 60 million represent 8.5% of the required monetary funds) to the area with the largest needs and therefore the measure represents a minimum intervention to improve the situation.<sup>27</sup>
- (109) The Commission considers this to be sufficient to clearly identify which geographic areas will be covered by the support measure.

#### **5.5.2. Public consultation**

- (110) The main characteristics of the aid measure have been made public in a public consultation conducted between 30 August 2018 and 4 October 2018, as described above in section 3.7. A public consultation is conducted yearly within the framework of BBA 2020 and also covers Carinthia.
- (111) The Commission considers this approach to be sufficient to ensure proper publicity.

#### **5.5.3. Competitive selection process and most economically advantageous offer**

- (112) A competitive selection process should ensure that there is transparency for all investors wishing to bid for the implementation and/or management of the subsidised project and the aid granting authority shall establish qualitative award criteria on which the submitted bids are assessed.
- (113) The government of Carinthia chose to implement the measure via a direct investment model in which the government of Carinthia builds and maintains the passive infrastructure for NGA/NGN broadband networks through a fully-owned private entity, the in-house company, BIK. In order to ensure that the recourse to a direct investment model does not disproportionately distort competition but, to the contrary, ensures a pro-competitive use of the subsidised infrastructure, the government of Carinthia put in place, in line with the Broadband Guidelines<sup>28</sup>, a number of competitive safeguards:
- BIK as the owner of the subsidised passive infrastructure for NGA/NGN broadband networks will limit its activities on the predefined target areas and will not expand to other commercially attractive regions;
  - BIK will limit its activities to maintaining and repairing the passive infrastructure and to granting access to it, but will not engage in competition on the retail levels with commercial operators.
  - BIK will have an accounting separation between the funds used for the operation of the passive infrastructure and the other funds at its disposal.

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<sup>27</sup> Carinthia will use certain criteria to identify the areas for intervention such as: (a) the synergies with civil works of other utilities, (b) connected white NGA areas, (c) cost per household, (d) demand (e.g. touristic areas, business development), (c) roll-out plans of utility providers and network operators, (d) strategic cooperation with utility providers and network operators, or (e) initiatives of communities.

<sup>28</sup> See paragraph 78(c) and footnote 96 of the Broadband Guidelines.

- (114) The Commission concludes that these safeguards are sufficient to avoid undue distortions of competition as far as the selection of BIK without public procurement procedure is concerned.
- (115) The subsidised passive infrastructure will be leased to NPs, who will be chosen in each case in a fair, transparent and non-discriminatory selection procedure in line with the applicable rules on public procurement at EU and national levels and who will operate the active networks and grant fair and non-discriminatory access to SPs. For more details regarding the selection procedure it is referred to section 3.8. above. This approach will ensure transparency for all NPs wishing to bid for the operation of the active layer of the subsidised infrastructure and equal and non-discriminatory treatment of all bidders.
- (116) On the basis of the detailed explanation in section 3.9. above, the Commission is satisfied that all bids received within the scope of the competitive selection procedures regarding the selection of NPs but also the construction of the passive infrastructure will be assessed according to pre-established qualitative award criteria that will be weighed against the price offered in the bid, in line with paragraph 78(d) of the Broadband Guidelines. As is foreseen by the score system explained in section 3.9. above, in order to minimise the amount of aid indirectly received by NPs, the bidder offering the highest rent under comparable or even identical quality conditions will receive the most priority points within the overall assessment of its bid.
- (117) The Commission considers the requirements with regard to the competitive selection process and the most economically advantageous offer fulfilled.

#### **5.5.4. Technological neutrality**

- (118) As different technological solutions exist to provide broadband services, no particular technology or network platform should be favoured among those that can meet the targets of the measure.
- (119) The aid measure aims to serve selected white NGA/NGN areas in Carinthia with passive infrastructure for NGA/NGN broadband networks that must allow for the reliable provision of symmetrical bandwidth of at least 100 Mbps and are upgradeable to download speeds of 1 Gbps.
- (120) As is described in section 3.12 above, the aid measure will allow for the use of any active network technology as long as the network technology used meets the requirements described above.
- (121) The Commission therefore considers that the aid measure fulfils the requirements of the Broadband Guidelines regarding technological neutrality.

#### **5.5.5. Use of existing infrastructure**

- (122) It should be encouraged to have recourse to any existing infrastructure so as to avoid unnecessary and wasteful duplication of resources and to reduce the amount of public funding.
- (123) The Commission considers that the approach taken by the government of Carinthia (see above in section 3.14) allows for finding the best and most cost-efficient solution and for avoiding unnecessary duplication of infrastructure.

### **5.5.6. Wholesale access**

- (124) All interested third parties should have effective wholesale access under fair and non-discriminatory conditions to a subsidised NGA/NGN network for at least a period of seven years and get the possibility of effective and full unbundling. Access to new passive infrastructure such as ducts or poles should be granted and be unlimited in time. The same access conditions shall apply on the entirety of the subsidised network, including on the parts of such network where existing infrastructures have been used. Newly constructed ducts should be large enough to cater for several fibre networks and to host point-to-multipoint as well as point-to-point solutions. Where the NPs also provide retail services, access should be granted at least six months before the launch of such retail services.
- (125) In line with the requirements of paragraph 78(g) and 80 of the Broadband Guidelines, the government of Carinthia confirmed that the new networks will offer wholesale access on an open, non-discriminatory basis, respecting the principle of technological neutrality. In the case at hand, the obligation to grant wholesale access is on the selected NPs.<sup>29</sup> Selected NPs will provide full open access to the subsidised network including but not limited to full and effective unbundled access, bitstream access, access to ducts, dark fiber and street cabinets. SPs will be able to use such wholesale access in order to connect end users via any access technology of their choice. Effective wholesale access to the subsidised network will be granted for at least seven years and the right of access to the new passive infrastructure (such as ducts or poles) 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.
- (126) Furthermore, the selected NPs renting passive infrastructure from BIK will sell wholesale access to that passive infrastructure, as well as active wholesale access, only for the provision of NGA/NGN speeds in the "white" areas targeted by the measure. In case a selected NP is also a SP (vertically integrated), that network provider will be required to grant access to the network to other service providers at least 6 months before the launch of its retail services, in line with the recommendation of the Broadband Guidelines (paragraph 78(g) and footnote 108).
- (127) The above limitation concerning the provision of only NGA/NGN speeds aims at reducing the risk of distortion of competition. The Commission therefore concludes that it supports the assessment of the measure as compatible with the State aid requirements regarding wholesale access.

### **5.5.7. Wholesale access pricing**

- (128) Wholesale access prices should be made under market conditions. They should be based on the pricing principles set by TTK and RTR GmbH and on benchmarks. 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

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<sup>29</sup> BIK's activities are limited to the construction, maintenance and repair of the subsidised passive infrastructure.

orientation pursuant to the methodology established in accordance with the sectorial regulatory framework.

- (129) As described in section 3.16 and in accordance with paragraph 78(h) of the Broadband Guidelines, the government of Carinthia committed itself to ensure that wholesale access prices will be based on the price set or approved by RTR GmbH or benchmarked against average wholesale prices of comparable access services in other, more competitive parts of the country.
- (130) The Commission considers this to be in line with the Broadband Guidelines.

#### **5.5.8. Fair and non-discriminatory treatment**

- (131) The subsidised infrastructure must enable the provision of competitive and affordable services to end-users by competing operators. Where the NP is vertically integrated, adequate safeguards must be put in place to prevent any conflict of interest, undue discrimination towards access seekers or content providers and any other hidden indirect advantages.
- (132) Since selected NPs will be allowed to become active also as SPs at retail level, offering services directly to end customers,<sup>30</sup> the government of Carinthia will ensure that BIK, as owner and lessor of the passive infrastructure, will provide for safeguards in the leasing contracts with NPs for preventing any anti-competitive behaviour of NPs towards other SPs when also active at retail level. Such contract clauses will have to be reflected already in the tender documents, and the award criteria in particular, of the procurement procedures for the lease of the subsidised passive infrastructure.

#### **5.6. Monitoring and claw-back mechanism**

- (133) Granting authorities shall closely monitor the implementation of the broadband project during the entire duration of the project.
- (134) The government of Carinthia will carry out an ongoing monitoring of the measure as described above in section 3.17.
- (135) A claw-back mechanism is not necessary in case of publicly-owned, wholesale only infrastructures managed by an in-house company with the sole purpose of granting fair and non-discriminatory access to all operators, in line with the Broadband Guidelines.<sup>31</sup> Therefore, Carinthia does not need to implement a claw-back mechanism in relation to BIK whose activities as a state-owned in-house company are limited to building, maintaining and repairing the passive infrastructure and leasing it to selected NPs chosen in competitive selection procedures in accordance with the applicable rules on public procurement.
- (136) However, the government of Carinthia will implement a claw-back mechanism with regard to the selected NPs who operate the subsidised networks at wholesale level and may also become active at retail level. For the details of this claw-back mechanism it is referred to section 3.17. above.
- (137) It will therefore be guaranteed that NPs cannot generate unreasonably excessive profit by making use of the publicly funded infrastructure.

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<sup>30</sup> See above in section 3.4.

<sup>31</sup> See paragraph 78(i) and footnote 113 of the Broadband Guidelines.

## **5.7. Transparency and reporting**

- (138) The government of Carinthia must ensure, for the entire duration of the measure, that all transparency requirements are met at each phase of the measure. In particular, the government of Carinthia shall publish on a central website<sup>32</sup> at least the following information: The full text of the award decision and its implementing provisions, the names of the aid beneficiaries, aid amounts, aid intensities and the technology used. Such information shall be published after the granting decision has been taken, must be kept for at least ten years and shall be available for the general public without restrictions. BIK as well as the selected NPs are obliged to provide entitled third parties with comprehensive and non-discriminatory access to information on the infrastructure (including ducts, poles, street cabinets, fibre, etc.) built within the scope of the measure, which will facilitate other operators' access to the infrastructure.
- (139) Furthermore, for the duration of the measure, the government of Carinthia shall consolidate key information on the individual projects and report to the Commission about the application and the progress of the measure every two years.<sup>33</sup>
- (140) The reporting obligations of BIK, of the selected NPs as well as of SPs explained in section 3.15. above should provide the government of Carinthia with detailed insight into the development, the operations and the use of the broadband network and thus provide information concerning the fulfilment of all obligations by BIK and the NPs. This ensures that e.g. wholesale access is guaranteed and the profits that are subject to the claw-back mechanism can be determined.

## **5.8. Limited negative effects and step change**

- (141) It follows from the above assessment regarding market failure that the aid measure does not crowd out any private investment. In particular, the aid is confined to white NGA/NGN areas in Carinthia, i.e. areas where no operator is willing to invest in NGA/NGN infrastructure without State aid in the next three years.
- (142) Therefore, the Commission concludes that negative effects of the aid measure, if any, are limited.
- (143) As regards the required 'step change', the aid measure does not provide aid for purely marginal investments related merely to the upgrade of the active components of the network but for significant new investments in the broadband network by rolling out new passive infrastructure. As described above, this subsidised infrastructure will enable symmetrical access speeds of at least 100 Mbps, upgradeable to download speeds of 1 Gbps, in white NGA/NGN areas. It will thus deliver an upgrade from basic to NGA/NGN broadband networks. At the same time, recourse to the ZIS database run by RTR GmbH<sup>34</sup> will likely reduce the overall cost of development of the new passive infrastructure by allowing an

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<sup>32</sup> E.g. on the Federal State website at <http://www.verwaltung.steiermark.at/breitband>.

<sup>33</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 wholesale access products, the number of access seekers and service providers on the network, the number of houses passed, take-up rates.

<sup>34</sup> See above in section 3.12.

efficient re-use of the infrastructure already deployed for the existing basic broadband networks.

- (144) Furthermore, the design of the aid measure ensures open access to the subsidised network on equal and non-discriminatory terms in favour of all access seekers, thus favouring competition among SPs at retail level. The provision of passive infrastructure for NGA/NGN networks has a pro-competitive impact, as it allows NPs and SPs to use the subsidised infrastructure and compete on services to the end users. The measure is thus expected to create a level playing field for competition benefitting end-users. The increase in network capacity is expected to stimulate market entry by SPs and the provision of a larger variety of services.
- (145) The Commission therefore concludes that the subsidised network is pro-competitive and that the subsidised infrastructure brings significant new capabilities to the market in terms of broadband service availability and capacity, speeds and competition. An adequate 'step change' is ensured.

### **5.9. The overall balancing exercise**

- (146) A carefully designed State aid measure should ensure that the overall balance of the effects of the measure is positive. A subsidised network should also be able to ensure a 'step change' that can be demonstrated if as the result of the public intervention the beneficiary makes significant new investments in the broadband network and the subsidised infrastructure brings significant new capabilities to the market in terms of broadband service availability and capacity, speeds and competition.
- (147) As mentioned above in section 3.1., one of the objectives of the measure is to bridge the "digital divide" and provide access to NGA/NGN services where they are currently unavailable by making possible a significant new investment in areas where private operators are not planning equivalent investments in the near future.
- (148) As a result of the aid measure, BIK will build passive infrastructure supporting ultrafast broadband networks providing symmetrical access speeds of at least 100 Mbps that can be upgraded to provide download speeds of 1 Gbps in selected white NGA/NGN areas in Carinthia. As has been confirmed by the outcome of the public consultation, such investment would not be made without the aid. The deployment of the passive infrastructure therefore constitutes the necessary first step to enable the achievement of the EU's goals as expressed in the Digital Agenda for Europe and the Commission's Communication "Connectivity for a Competitive Digital Single Market – Towards a European Gigabit Society" in the target areas in Carinthia.<sup>35</sup> The rollout of the infrastructure will enable the delivery of broadband connectivity bringing additional capacity and speed on the market in the measure's target areas and might eventually lead to lower prices and better choice for consumers, with services offering higher quality and innovation. Consumers in the measure's target areas will have better access to online resources, which, in combination with higher quality of the services, is likely to stimulate demand in the target areas. This constitutes an important step on the way to bridging the "digital divide" in Carinthia and to completion of the Digital Single Market in the EU as a whole.

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<sup>35</sup> See above in section 4.2.1.

- (149) The Commission notes that Carinthia paid particular attention to ensure the presence of an adequate step change by foreseeing the deployment of NGA/NGN networks able to support access speeds of 100Mbps symmetrical, upgradeable to 1 Gbps symmetrical. This helps to ensure that the new subsidized network will be future proof and will be able to support also the objectives of the European Gigabit society, in addition to those of the DAE.
- (150) Finally, the government of Carinthia has designed the measure under examination in such a way as to minimise the State aid involved and the potential distortions of competition arising from the measure.<sup>36</sup>
- (151) In view of the characteristics of the project and of the safeguards applied, the Commission considers, based on the information available, that the aid measure's overall impact on competition will be positive.

## 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>.

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State Aid Greffe  
B-1049 Brussels  
[Stateaidgreffe@ec.europa.eu](mailto:Stateaidgreffe@ec.europa.eu)

Yours faithfully,

For the Commission

Margrethe VESTAGER  
Member of the Commission



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<sup>36</sup> Please see above in section 4.2.5.