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**Subject: State Aid SA.58074 (2020/N) – Germany
Mobilfunk Bayern Modification**

Excellency,

1. PROCEDURE

- (1) On 17 July 2020, Germany notified to the Commission, in accordance with Article 4(2)(a) of Commission Regulation (EC) No 794/2004¹, an increase in the budget of an authorised aid scheme exceeding 20%. The aid scheme in question has been approved by the Commission by decision of 16 November 2018 in case SA.48324 (the “2018 decision”). The Commission requested additional information from the German authorities by letter of 20 August 2020. The official German response to this letter was received by the Commission on 7 September 2020.

2. DETAILED DESCRIPTION OF THE MEASURE

- (2) By decision of 16 November 2018, the Commission approved the Bavarian Mobile Communications Directive (*Richtlinie zur Förderung des Ausbaus der Mobilfunkversorgung im Freistaat Bayern – Mobilfunkrichtlinie – MFR*²), a financial support scheme, aiming at closing gaps in coverage by public mobile communications networks ("mobile networks") located typically in sparsely populated and topographically difficult parts of Bavaria. In these areas exclusively, the Bavarian government supports the provision of state-of-the-art

¹ Commission Regulation (EC) No 794/2004 of 21 April 2004 implementing Council Regulation (EU) 2015/1589 laying down detailed rules for the application of Article 108 of the Treaty on the Functioning of the European Union.

² https://www.gesetze-bayern.de/Content/Document/BayVV_7074_W_198/true.

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public mobile communications services ("mobile services"), based at least on LTE technology,³ by subsidizing the required passive infrastructure⁴.

- (3) The support is granted by the Bavarian government from the regional Bavarian budget in the form of direct grants. The direct beneficiaries of the measure are, depending on the support option used⁵, (i) Bavarian municipalities or inter-municipal co-operations if they are organised as legal entities under public law, (ii) concession holders and (iii) mobile network operators (MNOs). The maximum intensity of the aid provided by the state of Bavaria under the scheme is, as a general rule, limited at 80% of the eligible costs⁶. The maximum amount of support for each local authority (*i.e.* municipalities or inter-municipal co-operations) is, as a rule, €500 000. Projects with eligible costs of less than €25 000 are not supported.
- (4) Funding under the scheme can be combined with funding under other schemes at federal level or at EU level. In these cases funding by the state of Bavaria under the current scheme is reduced to the extent necessary for keeping the cumulative aid intensity at maximum 80% (or 90%, if applicable⁷) of the eligible costs.
- (5) Co-financing by third parties, in particular by private companies, is admissible and welcomed. However, the beneficiary's own contribution must in all cases reach at least 10% of the eligible costs.
- (6) A "mobile communication centre" was set up at the district government of Upper Palatinate, which has been appointed granting authority under the scheme and which manages and administers the scheme and supports the municipalities concerned in close contact with the MNOs.
- (7) The support scheme ends on 31 December 2022. For further details on the design and functioning of the aid scheme it is referred to the Commission's Decision of 16 November 2018 in case SA.48324 at recitals (2) – (41).
- (8) The present notification foresees an overall budget increase by €50 million (*i.e.* from originally €85 million to €135 million). Aside from the budget increase, the

³ Long-Term Evolution (LTE) is a standard for high-speed wireless communication for mobile devices and data terminals, developed by the 3GPP (3rd Generation Partnership Project).

⁴ Passive infrastructure covered by this scheme includes e.g. the mast, the foundation, the electricity connection, ducts and access routes. In contrast, active infrastructure, antenna systems, dark fibre as well as the costs for the acquisition of land or land lease costs cannot be supported.

⁵ Please see for more details on the scheme's support options Decision of 16 November 2018 in case SA.48324, section 2.2., at recitals (10) – (14).

⁶ Eligible costs are all expenses necessary for the construction or upgrading of the passive infrastructure covered by this scheme. Connections between the supported passive infrastructure and the infrastructure owned by the MNOs are excluded. 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.

⁷ If a local authority is located in a region with particular need for action the maximum intensity of the aid provided by the state of Bavaria may be increased to 90% of the eligible costs. See for further information Decision of 16 November 2018 in case SA.48324, section 2.4., at recital (17).

originally approved aid scheme remains unaltered. The budget increase is deemed necessary because the interest in funding among eligible Bavarian municipalities is much higher than expected and, although almost half of the scheme's current overall budget has already been blocked by funding decisions issued to date, many mobile coverage gaps still remain and the current budget will not suffice to close them all.

3. ASSESSMENT OF THE MEASURE:

3.1. Existence of aid

- (9) The scheme constitutes State aid within the meaning of Article 107(1) of the Treaty on the Functioning of the European Union (TFEU), as stated at recitals (42) - (65) of the 2018 decision. The increase of the budget of the scheme does not affect this assessment.

3.2. Compatibility

- (10) In the 2018 decision, the Commission assessed the compatibility of the scheme pursuant to Article 107(3)(c) TFEU and in analogue application of the Broadband Guidelines, where appropriate. In the assessment under Article 107(3)(c) TFEU the Commission ensured that the positive impact of the scheme in reaching an objective of common interest outweighed its potential negative side effects, such as distortions of trade and competition. This approach is still valid.
- (11) The objectives of common interest pursued by the Commission in its Digital Single Market Strategy⁸, mentioned in the 2018 Decision, complemented more recently by the “Shaping Europe’s Digital Future”⁹ Communication, include the promotion of the deployment and take-up of fixed and wireless connectivity that enables data to flow, people to collaborate wherever they are, and to connect more objects to the internet. It is the Commission's ambition that there should be access to mobile services throughout the territory, in all places where people live, work, travel and gather.¹⁰
- (12) The supply of mobile voice and data services forms still part of the fundamental needs of a modern society and the Commission continues to acknowledge that, by implementing the scheme, the Bavarian government pursues genuine objectives of common interest as stipulated in the Digital Single Market Strategy, the Digital Agenda for Europe and the communication Connectivity for a Competitive Digital Single Market: Towards a European Gigabit Society.

⁸ Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions – A Digital Single Market Strategy for Europe, COM(2015) 192 final.

⁹ Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions – Shaping Europe's digital future, COM(2020) 67 final.

¹⁰ Cf. 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.

- (13) The scheme has been well received so far by Bavarian municipalities that do have areas on their territories that are currently not yet supplied with mobile voice and data services (2G) by any of the three MNOs active on the German market. 906 Bavarian municipalities have been identified as having mobile coverage gaps on their territories and are thus potential target areas. To date, 440 of these municipalities have expressed their interest in funding under the scheme. Over 400 market consultations have been already carried out in potential target areas. In 281 potential target areas, MNOs informed of private investment plans during the market consultations and the respective areas have been taken out of the pool of target areas. However, in many cases, smaller white spots remain even after taking account of planned private investments and the respective municipalities therefore continued to be target areas for these remaining white areas. As a result of the market consultations carried out up to date, 223 final target areas have already been identified. Subsequently, 84 municipalities applied for funding under the scheme and 73 municipalities have already received funding decisions.
- (14) This underlines the Commission's conclusion that, by subsidising the construction of the relevant passive infrastructure, the scheme lowers barriers of entry in the target areas and actually fosters competition. At the same time, many mobile coverage gaps still remain, even though more than 40% of the scheme's current overall budget has already been blocked by the 73 funding decisions issued to date.
- (15) The Commission also affirms its conclusion in the 2018 decision that the scheme addresses a market failure in sparsely populated and topographically difficult parts of Bavaria where MNOs do not invest in establishing passive infrastructure for the provision of mobile networks and services that are required for closing the existing mobile coverage gaps (see recitals (75) – (82) of the 2018 decision).
- (16) The Commission considers that the scheme is still an appropriate policy instrument for closing mobile coverage gaps in the state of Bavaria as the coverage requirements for MNOs resulting from spectrum auctions do still not provide full geographical coverage. The problem of mobile coverage gaps in the scheme's target areas remains even after the fulfilment of these coverage requirements on MNOs. Furthermore, the aid scheme stipulates that MNOs must not report subsidized infrastructure to the Federal Network Agency (*Bundesnetzagentur*) under their coverage obligations arising out of their spectrum licence conditions. The scheme's implementation up-to-date shows indeed that it only complements the existing mobile coverage including planned investment resulting from the spectrum licence obligations imposed on MNOs. Moreover, demand-side measures are still not an appropriate means to address the lack of passive infrastructure for the provision of mobile networks and services in underserved areas in Bavaria because the target areas are characterised by low population density and the deployment of passive infrastructure is not profitable for MNOs.
- (17) The aid scheme has shown to have an incentive effect. The requirements with regard to detailed mapping and analysis of existing coverage have, according to the information provided by the German authorities in this regard, been fulfilled so far. The scheme provides support exclusively in public mobile communications network "dead zones" and all potential target areas have been identified in a map displaying the mobile coverage in Bavaria (see at

www.mobilfunk.bayern). The final target areas are identified by way of market consultations in territories of local authorities who have expressed their interest in receiving funding under the scheme. In these market consultations, the MNOs inform the Bavarian government about possible locations for passive infrastructure.

- (18) The German authorities had also given adequate publicity to the main characteristics of the measure by having had them made available to all three MNOs active in Germany, i.e. Telefónica Germany, Deutsche Telekom and Vodafone Germany, the local authorities' associations in Bavaria (*Gemeindetag*, *Landkreistag*, *Städtetag*), undertakings that are specialised in the construction and/or wholesale provision of passive infrastructure for public mobile communications and the Bavarian trade associations (see for more details at recitals (97) – (101) of the 2018 decision). The German authorities further committed to verify before the implementation of the scheme that there are no other overlapping technologies which could be affected in the targeted areas.
- (19) The requirements with regard to the competitive selection process and the most economically advantageous offer are still fulfilled (see for more details at recitals (102) – (106) of the 2018 decision).
- (20) As stated in recitals (107) – (114) of the 2018 decision, the aid scheme is also technologically neutral. The Commission still considers mobile communications technology using LTE technology for data transmission services to be the only suitable technological solution pending the deployment of more advanced mobile network solutions. Local authorities and MNOs supported this view but, in any event, the German authorities committed to check and ensure before executing any support plan that there is no operator of alternative technologies which could be affected by the scheme.
- (21) The German authorities do also ensure that the aid scheme's support option of upgrading existing masts is duly considered in each single project before a final decision is made. This approach allows for finding the best and most cost-efficient solution and for avoiding unnecessary duplication of infrastructure. Up to date, however, the option of upgrading existing masts has not been used by aid applicants. All 73 funding decisions issued by today concern the lease option.¹¹
- (22) As explained in recitals (118) – (121) of the 2018 decision, all mobile network providers currently active in Germany do have fair and non-discriminatory access to the subsidized passive infrastructure. The rent for using the passive infrastructure is in all cases subject to negotiation with the respective lessor (local authority/concession-holder/state of Bavaria). The Commission still considers this mechanism to be in line with the requirements in paragraph 78 (g) and (h) of the Broadband Guidelines.
- (23) The German authorities are closely monitoring the implementation of the aid scheme during the entire duration of the projects and have submitted first

¹¹ Whilst not yet all beneficiaries have definitively decided on whether they build the passive infrastructure themselves (or put the construction out to tender) or whether they rather put the construction and operation of the passive infrastructure out to tender as a public works concession, it seems that both variants are used by beneficiaries.

information in this regard to the Commission on 7 September 2020. The first official interim implementation report to the Commission is due on 31 December 2020. A claw-back mechanism is in place for concession-holders to guarantee that in larger projects concession-holders cannot generate unreasonably excessive profit by making use of the publicly funded passive infrastructure (see for more details at recitals (123) – (125) of the 2018 decision).

- (24) The competent Bavarian authorities are reminded that they shall publish on a central website at least the following information on the state aid scheme: the full text of the approved aid scheme and its implementing provisions, names of the aid beneficiaries, aid amounts, aid intensities and used technologies. Such information shall be published after the granting decision has been taken and shall be kept for at least ten years and shall be available for the general public without restrictions. 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.
- (25) Furthermore, for the duration of the aid scheme, the Bavarian government should consolidate key information on the individual aid projects and report every two years to the European Commission (*i.e.* by 31 December 2020 and by 31 December 2022).
- (26) Due to the design of the scheme, the 73 funding decisions already issued effectively block €36.5 million of the scheme's budget. Although funds will be paid out only once the passive infrastructure has been built and put into operation (no funded passive infrastructure is yet in operation), the maximum amount of funding for each municipality, as a general rule €500 000, needs to be blocked in the budget for as long as the final costs of the projects in question are not settled.
- (27) Given the great interest of eligible municipalities in funding under the scheme, which would allow covering more areas and gaps than originally estimated, a budget increase by €50 million is reasonable. The intensity of the aid would remain the same, proportionated to cover the funding needs. The already to be subsidized passive infrastructure will bring about significant new mobile network capabilities in terms of availability and capacity and is promising to have pro-competitive effects with several MNOs expected to provide their services in parallel. Moreover, the results of the more than 400 market consultations already carried out in potential target areas show that the scheme does not crowd-out private investments but may have even prompted further private investment.
- (28) The Commission therefore concludes that the negative effects of the aid scheme, if any, are limited and will remain limited after the increase of the overall budget by €50 million.
- (29) Furthermore, the aid scheme will reduce the number of mobile communications "dead zones" in Bavaria and provide additional households and businesses in Bavaria with mobile coverage. This will reduce important inequalities in Bavaria. Moreover, the aid scheme contributes to the achievement of the Commission's ambition to provide access to mobile services, including mobile voice and mobile broadband access throughout the EU territory, namely in all places where people live, work, travel and gather. This, in turn, contributes to the completion of the Digital Single Market.

- (30) As regards the data transmission services that will be enabled in the aid scheme's target areas, these promise the delivery of additional broadband access capacity that permits mobility of users in these areas. Hence, consumers' access to online resources in these areas will be strongly improved.
- (31) Finally, by granting access to the supported 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 Commission cannot identify any negative effects on competition.
- (32) The overall balance of the effect of the aid scheme is therefore still positive, even after the increase of the overall budget by €50 million.

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:

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Yours faithfully
For the Commission

Margrethe VESTAGER
Executive Vice-President