



## EUROPEAN COMMISSION

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C(2018) 4840 final

### PUBLIC VERSION

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**Subject: State aid SA.48325 (2018/N) – Austria  
Breitbandausbau in Oberösterreich**

Madam,

#### **1. SUMMARY**

- (1) I am pleased to inform you that the European Commission has assessed the measure NGA-Broadband project in Upper Austria "OÖ-LAN"<sup>1</sup> (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).

#### **2. PROCEDURE**

- (2) Following pre-notification discussions, the authorities of the Federal State of Upper Austria - Land Oberösterreich notified the measure NGA-Broadband project in Upper Austria "OÖ-LAN" to the Commission on 18 June 2018 under Article 108(3) TFEU.
- (3) By letter of 15 June 2018 the authorities of the Federal State of Upper Austria have 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).

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<sup>1</sup> Breitbandausbau in Oberösterreich "OÖ-LAN".

Ihrer Exzellenz Frau Dr. Karin KNEISSL  
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### **3. DETAILED DESCRIPTION OF THE MEASURE**

#### **3.1. State of play of the Broadband Provision in the Federal State of Upper Austria**

- (4) There is widespread consensus on the crucial impact on, and benefits to, economies and societies of ubiquitous broadband connectivity: it supports business efficiencies and growth, ensures that economies can remain competitive, and enables citizens to enhance their skills and learning and to benefit from online services and offerings, including key public services.
- (5) Broadband connectivity is of strategic importance for European growth and innovation in all sectors of the economy and to social and territorial cohesion. The Europe 2020 Strategy (EU2020)<sup>2</sup> underlines the importance of broadband deployment as part of the EU's growth strategy for the coming decade and sets ambitious targets for broadband development. One of its flagship initiatives, the Digital Agenda for Europe (DAE)<sup>3</sup> acknowledges the socio-economic benefits of broadband, highlighting its importance for competitiveness, social inclusion and employment. The achievement of the EU2020 objective of smart, sustainable and inclusive growth depends also on the provision of widespread and affordable access to high speed internet infrastructure and services. Meeting the challenge of financing an affordable broadband infrastructure of good quality is a crucial factor for Europe to increase its competitiveness and innovation capacity, provide job opportunities for young people, prevent de-location of economic activity and attract inward investments. Therefore the DAE restates the objective of the EU 2020 Strategy with the following targets for broadband development in Europe: (i) to bring basic broadband to all Europeans by 2013, (ii) and by 2020, for all Europeans to have access to much higher internet speeds of above 30 Mbps and (iii) for 50% or more of European households to subscribe to internet connections above 100 Mbps.
- (6) The DAE was complemented in 2016 by the Gigabit Communication<sup>4</sup> which, while restating the importance of Internet connectivity for the Digital Single Market sets out a vision 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, (iii) uninterrupted 5G coverage for all urban areas and all major terrestrial transport paths until 2025; as intermediate objective for 2020: 5G connectivity available as a fully-fledged commercial service in at least one major city in each Member State, building on commercial introduction in 2018.
- (7) As a result of the various broadband initiatives of the Federal State of Upper Austria, numerous measures for broadband roll-out have been promoted in the

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<sup>2</sup> EUROPE 2020 – A strategy for smart, sustainable and inclusive growth, COM(2010) 2020.

<sup>3</sup> Communication from the Commission to the European Parliament, the Council, the Social Committee and the Committee of the Regions, COM (2010) 245 final *A Digital Agenda for Europe*.

<sup>4</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*

past years. A basic broadband provision was ensured even in the rural areas, but a comprehensive coverage with modern high-speed broadband technology outside of the town centres and the metropolitan areas was not possible. Especially in sparsely-populated rural areas and in the peripheries of metropolitan areas there are no present or planned high-speed broadband networks which can support download speeds above 30 Mbps.

- (8) To date only smaller and region-specific projects have been deployed in the Federal State of Upper Austria, under either commercial investment or public investment under previously approved State aid measures<sup>5</sup>. The reason for this is essentially the high network connection costs for what is known as the ‘last mile’<sup>6</sup>, which pose a significant barrier to investment, particularly in rural and sparsely populated areas. According to the authorities of the Federal State of Upper Austria, there is a risk that the existing commercial funding landscape may lead to a deepening of the digital divide between urban and rural regions, resulting in disadvantages with regard to the introduction of new services for citizens, educational institutions and the business community.

### **3.2. Objectives of the measure**

- (9) In line with the EU2020 strategy for more growth, the DAE, as well as the Gigabit Communication, the measure aims at deploying a comprehensive next generation access network (NGA) complemented by a next generation backbone/backhaul-network (NGN) throughout the territory of the Federal State of Upper Austria, with the objective to guarantee broadband internet access speeds of at least 30 Mbps download and at least 30 Mbps upload in the first stages and progressively up to at least 100 Mbit/s symmetric, upgradeable without further significant investment to 1 Gbit/s symmetric by 2033. The measure aims to minimise the "digital divide" in the Federal State of Upper Austria which exists predominantly in rural and remote areas and accelerate the roll-out of NGA/NGN broadband. The measure will only finance passive infrastructure elements. It only targets white NGA/NGN areas on the entire territory of the Federal State of Upper Austria. White NGA/NGN areas are areas where there is currently no NGA/NGN network able of sustaining download speeds above 30 Mbps (including no ultrafast-network able of sustaining download speeds above 100 Mbps) and where also no such broadband network will be built in the near future.
- (10) The view of the authorities of the Federal State of Upper Austria is that the public sector intervention is justified. NGA/NGN broadband is not being delivered by commercial operators in the areas concerned. The cost of deploying NGA/NGN broadband to those areas is significantly higher than the cost of reaching urban densely populated areas (on a per premises basis). Moreover, the achievable revenue base is more limited due to low population density in those areas. This impediment cannot be addressed by other less distortive measures, such as ex-ante regulation. Despite the crucial role that regulation plays in ensuring competition and supply in the market for electronic communications,

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<sup>5</sup> SA.35884 Austrian federal broadband scheme, Commission Decision of 18.01.2013 (publication on 26.02.2013: Official Journal: JOCE C/56/2013); SA.41175 Broadband Austria 2020, Commission Decision of 17.12.2015 (publication on 19.02.2016: Official Journal: JOCE C/66/2016)

<sup>6</sup> This concerns the connection from the end-user, e.g. dwellings, hospitals, companies or schools, to the access nodes.

the regulatory measures imposed by the Austrian national regulatory authority (such as obligations on access, transparency, non-discrimination and price-control) did not solve the problems related to the lack of suitable broadband infrastructure and services in the targeted areas. The authorities of the Federal State of Upper Austria consider that without further public intervention, reducing the "digital divide" does not seem possible. In line with paragraphs 37-39 of the Broadband Guidelines, the authorities of the Federal State of Upper Austria see no alternative but to grant public aid to extend the coverage of NGA/NGN networks in the targeted areas. An effective, reliable and secure broadband infrastructure network is deemed essential to the future growth and sustainable development of rural and remote communities.

- (11) With the notified measure, the authorities of the Federal State of Upper Austria intend to accelerate the roll-out of NGA/NGN networks, in line with the EU's and Austria's priorities, and help drive further economic growth, producing further economic and social benefits. The authorities of the Federal State of Upper Austria expect that the notified measure would also indirectly serve to further accelerate the deployment of NGA broadband by commercial operators, via the possibility offered to connect to the new subsidised network by purchasing wholesale access.
- (12) Short-term strategic goals (2018-2022): deployment of the NGA/NGN network in the "NGA/NGN" white areas in the Federal State of Upper Austria up to Points of Presence (PoP) – typically a FTTC<sup>7</sup>/FTTB<sup>8</sup> deployment, as well as deployment of last mile/access infrastructure reaching the end-consumers in the target areas. The short-term aim is to reach approximately 52.000 end-users (households and companies) with NGA-technologies ("premises passed"), ensuring NGA/NGN coverage with speeds of at least of 30 Mbps download and at least 30 Mbps upload.
- (13) Medium-term strategic goals (2023-2027): deployment of further Points of Presence (PoPs) and premises passed with the aim to achieve approximately 64.000 "premises passed", ensuring NGA/NGN coverage with speeds of at least 30 Mbps download and at least 30 Mbps upload and progressively higher speeds, of at least 100 Mbps symmetrical.
- (14) Long-term strategic goals (2028-2033): further deployment of last mile/access infrastructure to ensure coverage with speeds of at least 100 Mbps symmetrical upgradeable to 1Gbps symmetrical. By 2028, about 77.000 "premises passed" should be achieved.
- (15) Overall, the NGA/NGN network aims to ensure the coverage of at least 50% of the target NGA/NGN white areas in the Federal State of Upper Austria.

### **3.3. Legal basis**

- (16) The notified measure is based on the following legal base, both at national and at the level of the Federal State of Upper Austria:
  - At national level

<sup>7</sup>  
<sup>8</sup>

Fiber to the Cabinet  
Fiber to the Building

- Federal Act enacting the Telecommunications Act (Telecommunications Act (TKG) 2003)<sup>9</sup>
  - Regulation of the Austrian Regulatory Authority for Broadcasting and Telecommunications (Rundfunk und Telekom Regulierungs-GmbH<sup>10</sup> - RTR);<sup>11</sup>
  - At Land level
    - Participation Guidelines of the Federal State of Upper Austria ("Beteiligungsrichtlinien des Landes Oberösterreich") of 20.06.2016;<sup>12</sup>
    - Resolution of the Landtag of the Federal State of Upper Austria.<sup>13</sup>
- (17) The Authorities of the Federal State of Upper Austria have confirmed that the current decision is part of the legal basis.

### 3.4. Stand still obligation

- (18) The authorities of the Federal State of Upper Austria 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 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<sup>14</sup>, according to which new aid measures must not be put into effect before the Commission has taken a decision authorising it.

### 3.5. Investment and business model

- (19) For the implementation of this broadband network deployment and to ensure non-discriminatory access to the network, the Federal State of Upper Austria created a coordinating and designating body, i.e. the *in house* company Fiber Service OÖ GmbH (FIS OÖ). The Federal State of Upper Austria is the sole shareholder of FIS OÖ.
- (20) FIS OÖ will only build passive next generation backhaul/backbone and access infrastructure (NGN and NGA). The passive infrastructure will include ducts, poles, cabinets/exchanges and dark fibre. FIS OÖ will build the passive infrastructure exclusively in white NGA and white NGN areas. FIS OÖ builds the passive infrastructure through a competitive selection process. FIS OÖ will also appoint an external consulting/planning firm (not a network provider or service provider, to avoid conflicts of interest) further to a competitive selection process for planning and supervision activities (e.g. planning, preparing funding applications and procurement procedure should FIS OÖ participate in selection

<sup>9</sup> <https://www.ris.bka.gv.at/GeltendeFassung.wxe?Abfrage=Bundesnormen&Gesetzesnummer=20002849>

<sup>10</sup> Telekomkontrollkommission (TKK), <https://www.rtr.at/de/tk/TKK>

<sup>11</sup> Central Information Authority Reporting Regulation, Federal Law Gazette II No 103/2016 - ZIS-EinmeldeV, BGBl. Teil II, Nr. 103/2016. [https://www.rtr.at/de/tk/ZIS\\_EinmeldeV](https://www.rtr.at/de/tk/ZIS_EinmeldeV)

<sup>12</sup> "Richtlinien für die Übernahme, die Bewirtschaftung und die Beendigung von direkt oder indirekt – im Wege der OÖ Landesholding GmbH – gehaltenen Beteiligungen des Landes Oberösterreich an Kapital- oder Personengesellschaften sowie an Genossenschaften." Oö. Landesholding GmbH, <http://www.landesholding.com/veroeffentlichungen>

<sup>13</sup> Beschlüsse des Oö. Landtags, <https://www.land-oberoesterreich.gv.at/12159.htm>

<sup>14</sup> OJ L 248 of 24.9.2015, p.9.

procedures under different State aid schemes, supervision and approval of the construction of the passive infrastructure.

- (21) The authorities of the Federal State of Upper Austria have explained that some portions of backbone and backhaul infrastructure are present but insufficient in Upper Austria.<sup>15</sup> Due to smaller structures in Upper Austria, the backbone network is often identical to the backhaul network and sometimes the backhaul/backbone infrastructures do not connect to the “Local exchange” but to a different POP or Node. According to the authorities of the Federal State of Upper Austria, to avoid unnecessary and wasteful duplication of resources, FIS OÖ will invest in backhaul/backbone infrastructure only in areas where it would not be possible to provide access (NGA) infrastructure in the target white NGA areas due to a lack of backhaul/backbone connectivity and where no other private or public provider can provide FIS OÖ with backhaul/backbone connectivity.
- (22) FIS OÖ will retain ownership over the passive infrastructure and will lease part of the passive infrastructure to one or several network providers (NPs). FIS OÖ operates as wholesale-only operator at passive level the part of the infrastructure it does not lease.
- (23) FIS OÖ will select, via a competitive selection process based on the most economically advantageous offer, at least one NP for each coverage area. The selected NP(s) will operate at wholesale level the part of the infrastructure thus leased both at passive and active level. The Austrian authorities envisage two possibilities:
- Option 1: the NP(s) would act as wholesale only operator(s), at passive and active level – the NP(s) would operate the active equipment and would be usually its owner(s). In this case, other service providers will operate at retail level by buying wholesale access from the NP(s)).
  - Option 2: the NP(s) would be an integrated network provider and service provider (SP)– and therefore also operate the infrastructure at retail level. In this case, the NPs will be required to grant access at least 6 months before the launch of such retail services, in line with the recommendation of the Broadband Guidelines (paragraph 78(g) and footnote 108).
- (24) Whether under Option 1 or 2, the selected NP(s) will be required to enable full open and non-discriminatory passive and active wholesale access (see Section 3.17 and 3.18 below) to other operators.
- (25) As owner of the infrastructure, FIS OÖ will generate revenues from the leasing of NGN and NGA infrastructure to the selected NPs and to other access seekers purchasing passive access to the infrastructure. FIS OÖ will sell passive wholesale access on an open, non-discriminatory basis (see Section 3.17 and 3.18 below).
- (26) The authorities of the Federal State of Upper Austria have designed this business model in order to allow FIS OÖ to ensure an open and non-discriminatory access for the network operators and service providers on all three layers (passive infrastructure, active equipment, retail service). The selection and award criteria defined by the Austrian authorities in the

<sup>15</sup>

Currently some fibre backbone connectivity already exists in most of the 440 cities/communities.

procurement procedure for the selection of NP(s) also cover the wholesale access conditions that NP(s) will have to respect.

(27) The main steps in the construction and operation of the passive infrastructure by FIS OÖ will be as follows:

- After a preselection of eligible NGA/NGN white areas, FIS OÖ will organise a competitive selection process to select an external contractor to carry out a detailed planning.
- Based on this detailed planning, FIS OÖ will organise a competitive selection process to select an external contractor to construct the NGA/NGN network.
- Once the infrastructure is built, FIS OÖ will operate and manage at passive wholesale access level part of the network and for the rest will organise a competitive selection process to select one or several NP(s) to operate and manage the network at passive and active wholesale level. Such NP(s) may also be SP(s) and offer internet products to the final users (integrated NPs). The NP(s) will sell passive and active access to any access seeker, including (other) SPs, only for the provision of NGA speeds in the "white" areas targeted by the measure.
- FIS OÖ will sell passive wholesale access, in accordance with the provisions of the Broadband Guidelines<sup>16</sup>, only for the provision of NGA speeds in the "white" areas targeted by the measure.

### **3.6. Duration, Budget, Granting authorities**

(28) According to the authorities of the Federal State of Upper Austria, the measure will be in place for 15 years (i.e. until 2033), aiming to ensure a substantive deployment of infrastructure by FIS OÖ during the first five years (2018-2022). This should be followed by a second five-year period (2023-2027) of densification of the deployment, largely through revenues generated from renting/leasing the infrastructure (therefore with little to no additional budget). In the remaining five years (2028-2033) no further investments are expected to be required and financing will be achieved through revenues made from the sale of passive wholesale access.

(29) The Federal State of Upper Austria is the granting authority responsible for the infrastructure built under the measure. the Federal State of Upper Austria will provide FIS OÖ with resources of two types, which correspond in total to a maximum State aid amount of EUR 120 million:

- in the form of equity capital in the amount of EUR 20 million annually between 2018 and 2022, so EUR 100 million in total for direct investments in broadband infrastructure projects; and
- EUR 20 million between 2018 and 2026 for operational costs.

<sup>16</sup>

Communication from the Commission, EU Guidelines for the application of State aid rules in relation to the rapid deployment of broadband networks, OJ C25, 26.01.2013, p.1, in particular paragraph 78(c) and footnote 96, paragraph 78(g) and paragraph 80.

### **3.7. Overlap with other schemes**

- (30) The authorities of the Federal State of Upper Austria have explained that, the measure will run in parallel to the recent federal scheme Broadband Austria 2020 (BBA2020)<sup>17</sup>). FIS OÖ may apply for financing for individual projects (separate and different from projects financed under this measure) eligible under those existing State aid schemes, under the conditions that apply to those schemes. FIS OÖ will maintain adequate separate accounting clearly identifying the different sources of financing and the projects for which they are used. Should any projects be awarded to FIS OÖ within a call under an existing State aid scheme, the authorities of the Federal State of Upper Austria confirmed that financing for that project under that scheme will be used to finance eligible costs for that individual projects only, in line with the requirements of that existing State aid scheme. The authorities of the Federal State of Upper Austria confirmed that public eligible expenditure under the other existing measures will not overlap with expenditure financed by FIS OÖ's own funds for the implementation of the present measure. To ensure that there will not be any undue overcompensation of FIS OÖ between financing from BBA2020 and financing provided to FIS OÖ by the Federal State of Upper Austria under the present measure, both the Federal State of Upper Austria and 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.

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

- (31) 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.
- (32) The Austrian NRA (TKK as supported by the RTR) has the following essential functions in relation to subsidies:
- review the standard reference offers of applicants for funding,
  - set prices and/or price setting rules for access products,
  - settle disputes in connection with access conditions: the settlement of disputes is regulated in the contract between the funding recipients and the funding providers, under which both parties are entitled to call on the RTR to settle disputes.
- (33) The Authorities of the Federal State of Upper Austria have explained that RTR has the necessary information for the price determination. The Federal State of Upper Austria will therefore refer to the information from the RTR regarding wholesale prices. RTR will also be involved in the monitoring process. In particular the RTR will provide information about certain access prices and will advise and assist the public authorities in determining the wholesale access prices. RTR was consulted on the design of the measure and has issued a positive opinion.

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



### 3.9. Mapping

- (34) The target areas for the realisation of the NGA/NGN network spread across the entire territory of the Federal State of Upper Austria. The expansion of the network with public funds is however restricted only to NGA/NGN white areas in the Federal State of Upper Austria, where there is currently no NGA/NGN network (i.e. capable of supporting download speeds above 30 Mbps) and where also there are no commercial investment plans to build such a network in the near future.
- (35) The target areas has been defined on the basis of mapping and public consultations which took place at federal level in the context of the federal scheme BBA2020 (covering the whole country including the Federal State of Upper Austria) and at the level of the Federal State of Upper Austria. Both the Federal Ministry of Transport, Innovation and Technology (BMVIT) and Federal State of Upper Austria have carried out different analyses of the broadband coverage and the NGA-broadband provision in Federal State of Upper Austria in the last few years.

#### At federal level:

- (36) The Federal State of Upper Austria based the mapping of the measure on the federal map which has been created under the country-wide State aid scheme BBA2020. This "Broadband Atlas"<sup>18</sup>, provided by the BMVIT, is updated annually. In the frame of the scheme BBA2020, the extensive consultation of all telecom operators resulted in a detailed mapping of the infrastructure: results are in the Broadband Atlas of the BMVIT and the Central Infrastructure Register ("ZIS") maintained by the RTR<sup>19</sup>. Subsequently, yearly consultations have been realized to identify newly built infrastructure for inclusion into the Broadband Atlas and to inquire about further upcoming investments in NGA planned by private operators. White NGA/NGN areas are adjusted annually according to the results of these consultations.
- (37) This Broadband Atlas was last updated in November 2017 and includes recent developments in the Federal State of Upper Austria. The Broadband Atlas shows that there are substantial differences in the NGA/NGN coverage in rural areas compared to urban areas, but also within urban in the Federal State of Upper Austria.

#### At Land level:

- (38) Further analyses of NGA/NGN coverage undertaken by the Federal State of Upper Austria in the last few years also evidence the digital divide within specific regions and give a much more detailed picture of the situation in the Federal State of Upper Austria than the Broadband Atlas. This Land-level mapping was realized at the level of the residential single unit (premise-level mapping) on the basis of premises passed<sup>20</sup> and is publicly available online.<sup>21</sup>

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<sup>18</sup> <https://www.breitbandatlas.info/map.php>. See also:  
<https://www.bmvit.gv.at/telekommunikation/breitband/publikationen/index.html>.

<sup>19</sup> All relevant information regarding broadband infrastructure is centralized at federal level in the "Central Information Office for Infrastructure Data" (the ZIS-database) of the Austrian regulatory authority for telecommunications (RTR): <https://www.rtr.at/de/tk/ZIS>.

<sup>20</sup> A premise "passed" is a premise that can potentially be connected in a short delay (e.g. a few weeks) without further installation of substantial infrastructure or without generating extensive costs. In case a dwelling contains multiple homes, they are all counted as "passed".

- (39) Based on this federal map and on the BBA2020 aid maps, the Federal State of Upper Austria will select NGN/NGA white areas (these are typically areas where also BBA2020 aid measures are possible – as BBA 2020 also addresses white NGA areas). The areas will either be covered by FIS-OÖ under this measure (in which case the rules of this measure will apply, and the financing of the network will be covered up to 100% by the Federal State of Upper Austria), or FIS OÖ will participate in a selection procedure under BBA2020 for covering certain areas (in which case the rules of BBA2020 apply and the financing of the network will be covered under BBA2020).
- (40) Before the start of any single investment measure, the status of the area will be checked on the basis of the current Land-level mapping and based on the results of the 2-level Land public consultations (described below). The area will be removed, if its status changes during the planning period. This ensures that investments are only realized in NGA/NGN white areas throughout the duration of the whole project.

### **3.10. Public consultation**

- (41) As a first level, the Federal State of Upper Austria carried out a public consultation between 7 August 2017 and 15 September 2017, inviting any interested operators to declare any investments into NGA/NGN infrastructure current or planned in the next three years. The consultation was published on the official journal of the European Union<sup>22</sup> and at Land level.<sup>23</sup> The public consultations contained a summary of the planned aid measure, a description of the targeted areas and a list of targeted areas that would be connected. A deadline for reply of one month has been granted to interested private investors. No private investors replied to the public consultation, so no project has been announced which would restrict the target areas.
- (42) On the basis of the Broadband Atlas and of the above mentioned public consultation of 2017, the Federal State of Upper Austria preliminarily identified the NGA/NGN white areas in the Land where a public intervention under this measure would be possible.
- (43) In addition, as a second level, the Federal State of Upper Austria committed to conduct further local public consultations for each white area before the competitive selection procedure for construction of the network in that area is organised. The objective is to consult again private operators active in that specific area and the new public consultations will also contain a summary of the planned aid measure and a description of the target area concerned. Should any adjustments be necessary to the intervention area (for instance if parts of the area have in the meantime become grey or black), the intervention will be readjusted: any grey or black areas will be removed from the intervention area and corresponding financing will be removed.
- (44) The construction of NGA/NGN broadband networks in Upper Austria extends over a period of several years. Before the respective individual projects are carried out, FIS OÖ GmbH will ensure that the NGA area status has not changed

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<sup>21</sup> The current situation is illustrated on the website of the broadband initiative "OÖ-LAN": <http://www.breitband-ooe.at/foerdergebiete-in-ooe/>.

<sup>22</sup> [https://www.auftrag.at/ShowTender.aspx?action=SHOW&ENTRY\\_ID=ae63fcb7-f20f-45a1-a100-4291f1c28d88](https://www.auftrag.at/ShowTender.aspx?action=SHOW&ENTRY_ID=ae63fcb7-f20f-45a1-a100-4291f1c28d88).

<sup>23</sup> <https://www.land-oberoesterreich.gv.at/beschaffungsausschreibungen.htm>.

in comparison to the results of the public consultation in 2017, via the second-level public consultation described above. Further information about the status of each target area is continuously gathered through contacts with network operators and mayors of the areas where a new NGA/NGN broadband network is planned. Interventions will only be done if the area status is still "white".

### **3.11. Recipients**

- (45) The direct recipient of the aid will be the wholesale operator of the network, FIS OÖ and the selected NP(s). FIS OÖ is an in-house company of the Federal State of Upper Austria, which has been set-up as an ad hoc limited company (GmbH) 100% owned by Federal State of Upper Austria. Indirect beneficiaries will be wholesale access seekers purchasing access to the new network from FIS OÖ or from the NP(s).

### **3.12. Competitive selection process**

#### **1. Competitive selection procedure**

- (46) The intervention model chosen by the Federal State of Upper Austria relies on direct investment, where the public authorities deploy and manage the NGA/NGN network through the fully owned wholesale operator of the network, FIS OÖ. The authorities of the Federal State of Upper Austria have demonstrated that FIS OÖ is appointed in line with the requirements of paragraph 78(c) and footnote 96 of the Broadband Guidelines. Thus, the Authorities of the Federal State of Upper Austria have confirmed that (i) FIS OÖ shall limit its activity to the predefined target areas and shall not expand to other commercially attractive regions; (ii) FIS OÖ 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) FIS OÖ will maintain an accounting separation between the funds used for the operation of the network and the other funds at the disposal of FIS OÖ.
- (47) FIS OÖ will not operate the planned NGA network at the active level, neither on the wholesale, nor on the final-user level. FIS OÖ will only operate part of the network at the passive level. The operation/management of the infrastructure will be transferred to one or several NP(s), who will be selected via competitive selection processes. The construction of the physical infrastructure will also be subject to competitive selection process (as above described in Section 3.5).
- (48) The Federal State of Upper Austria 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. Tenders will be published in the European Union (EU) database and in the database of Land Oberösterreich.<sup>24</sup> All third-party operators, who are commissioned with the construction and operation of the subsidised infrastructure, have to be selected in an open, transparent and non-discriminatory process. The Federal State of Upper Austria committed to ensure that the following requirements will be fulfilled for all selection procedures:

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<sup>24</sup>

<https://www.land-oberoesterreich.gv.at/beschaffungsausschreibungen.htm>.  
<https://www.auftrag.at>

and

- All selection procedures must be in line with the spirit and principles of the EU public procurement directives<sup>25</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.

### **3.13. Economically most advantageous offer**

- (49) The Authorities of the Federal State of Upper Austria have confirmed that all selection procedures for the selection of NP(s) will be based on selecting the economically most advantageous offer. 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. 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.

### **3.14. Technological neutrality**

- (50) The authorities of the Federal State of Upper Austria have confirmed that while this is a direct investment model, FIS OÖ will ensure the deployment of the NGA/NGN network using or combining any technology suitable to deliver the objectives of the measure.
- (51) The authorities of the Federal State of Upper Austria have explained that they consider FTTH as a state of the art technology for allowing very high-speed (upgradeable to 1Gbps) access, based on an evaluation of 12 May 2017 commissioned by the BMVIT<sup>26</sup> as also supported by the "Guide to High-Speed Broadband Investment" published by the European Commission<sup>27</sup>. However, the Authorities of the Federal State of Upper Austria have clarified that alongside FTTH also other, similarly effective, technologies can be relied upon, such as microwave point-to-point network connections, as long as it is possible to ensure that the objectives of the measure will be achieved, i.e. to ensure by 2033 coverage with broadband internet access speeds of at least 100 Mbps symmetric, upgradeable without significant further investment to 1 Gbps symmetric.
- (52) Thus, according to the authorities of the Federal State of Upper Austria, where an FTTH network expansion would not be suitable for economic reasons (e.g. areas where houses are spread widely apart), other technologies, e.g. microwave

<sup>25</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.

<sup>26</sup> [https://www.bmvit.gv.at/telekommunikation/breitband/publikationen/evaluierung\\_initiative.html](https://www.bmvit.gv.at/telekommunikation/breitband/publikationen/evaluierung_initiative.html)

<sup>27</sup> <https://ec.europa.eu/digital-single-market/en/news/broadband-investment-guide>.

point-to-point technology could be used (e.g. for backhaul links). Given fast technological developments, the selection of the technology to be used will be made at the time of launching individual projects, according to the actual technological state of the art at the time of planning for the individual projects.

- (53) Irrespective of the ultimate choice of technology, the authorities of the Federal State of Upper Austria have committed to ensure that the chosen network topology will ensure the technological neutrality of the network. Several alternative platforms will be able to utilise the new network via wholesale access in order to offer their own services to end users. Wholesale access products will be offered on open and non-discriminatory terms in line with the principle of technological neutrality.

### **3.15. Step change**

- (54) The authorities of the Federal State of Upper Austria confirmed that in line with the paragraph 51 of the Broadband Guidelines the measure will ensure a "step change" in that the investments in the NGA/NGN network will bring significant new capabilities to the market in terms of broadband service availability, capacity, speeds and competition as a result of the public intervention, compared to existing as well as concretely planned commercial network roll-outs. Step change as a result of the public intervention will always be verified by the authorities of the Federal State of Upper Austria. Thus, the measure requires that by 2033 download access speeds have to be at least 100 Mbps symmetrical, upgradeable to 1 Gbps symmetrical, whereas interventions will only be made in NGA/NGN white areas, i.e. areas where there are no current or planned infrastructures able to support download speeds above 30 Mbps. Also as concerns the first stages of the implementation of the measure, where the aim is to ensure NGA/NGN coverage with access speeds of at least 30 Mbps download and at least 30 Mbps upload and progressively higher speeds, these interventions will take place in NGA/NGN white areas where there are no current or planned infrastructures able to support download speeds above 30 Mbps. The authorities of the Federal State of Upper Austria have explained that a step change will be ensured not only by offering access speeds of at least 30 Mbps download and at least 30 Mbps upload and progressively higher speeds, but that at the same time it will be verified that there is always at least a doubling of speeds currently offered or planned in the near future (e.g. if current/planned speeds are up to X [where  $X < 30\text{Mbps}$ ] Mbps download and Y [where  $Y < 30\text{Mbps}$ ] lower upload, a step change could be ensured by offering speeds of at least  $2X$  [ $2X$  must always be  $> 30\text{Mbps}$ ] download and at least  $2Y$  upload and progressively higher speeds).<sup>28</sup> Therefore, in meeting the speed requirements, all projects must meet the step change requirements of the Broadband Guidelines.

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For instance, if current/planned speeds are of up to 15Mbps download and 5 upload, a step change could be ensured by offering speeds of at least 30 Mbps download and at least 30 Mbps upload and progressively higher speeds. If however current/planned speeds are of e.g. up to 25 Mbps download and 15 upload, a step change could be ensured by offering speeds of at least 50 Mbps download and at least 30 Mbps upload and progressively higher speeds; etc.

### 3.16. Use of existing infrastructure

- (55) As the reusability of existing infrastructure is one of the main determinants of the cost of broadband expansion, the business model of FIS OÖ is based on the inclusion of existing broadband infrastructure where possible to be used for the targeted NGA/NGN network expansion. This would help reduce investments costs for the development of the OÖ-LAN project and minimise the amount of public funding needed for the project.
- (56) The identification of the existing infrastructure is facilitated through two instruments provided at federal level:
- RTR has established a "Central Information Office for Infrastructure Data" (the ZIS-database), which is updated in real-time through infrastructure data from network providers and public institutions. This Information Office owns specific geodata information on broadband infrastructure in Austria (see also Section 3.9 above). Public authorities and network providers are required to send infrastructure information to this office. The online published ZIS-database records all existing broadband infrastructure in the Federal State of Upper Austria. Any interested third parties can access the relevant information at any point in time (including bidders in the selection process for the construction of the network).
  - The Broadband Atlas (see also Section 3.9 above), indicates the relevant status of broadband supply throughout Austria, including the infrastructure planned by commercial operators within the next three years. The map is updated and consulted annually and is based on the national funding measures. On this basis, it enables network operators and service providers to plan and coordinate their own investments.

### 3.17. Wholesale access

- (57) The authorities of the Federal State of Upper Austria have confirmed that the new network will offer wholesale access on an open, non-discriminatory basis, respecting the principle of technological neutrality, in line with the requirements of paragraphs 78(g) and 80 of the Broadband Guidelines.
- (58) FIS OÖ will build the infrastructure in accordance with the recommendations of the BMVIT<sup>29</sup> and in accordance with the BBA 2020 aid-rules<sup>30</sup>. To provide enough capacity on the last mile, sufficient duct and fibre capacity will be planned according to the requirements outlined by the BMVIT<sup>31</sup>, where four fibres (or equivalent duct capacity) per household/unit and four fusion splice positions are required.

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<sup>29</sup> <https://www.bmvit.gv.at/telekommunikation/breitband/publikationen/index.html>

<sup>30</sup> "Planungsleitfaden Breitband Leitfaden zur Planung und Errichtung von Glasfaser-Zugangsnetzen"  
([https://www.bmvit.gv.at/service/publikationen/telekommunikation/downloads/planungsleitfaden\\_outdoor\\_ua.pdf](https://www.bmvit.gv.at/service/publikationen/telekommunikation/downloads/planungsleitfaden_outdoor_ua.pdf)).

<sup>31</sup> "Planungsleitfaden Indoor Technischer Leitfaden zur Planung und Errichtung von gebäudeinternen passiven Breitbandinfrastrukturen"  
([https://www.bmvit.gv.at/service/publikationen/telekommunikation/downloads/planungsleitfaden\\_indoor2017.pdf](https://www.bmvit.gv.at/service/publikationen/telekommunikation/downloads/planungsleitfaden_indoor2017.pdf))

- (59) The authorities of the Federal State of Upper Austria will ensure that FIS OÖ and the NPs will provide full open access to the subsidized network on an open, non-discriminatory basis.
- (60) FIS OÖ will not offer any retail services. FIS OÖ will act as wholesale-only operator and will sell passive wholesale access to wholesale access seekers, in accordance with the provisions of the broadband guidelines (including paragraph 78(c) and footnote 96). Such passive wholesale access will include but not be limited to: access to ducts, poles, dark fiber, street cabinets, including full and effective unbundled access.
- (61) NP(s) will provide both active and passive wholesale access<sup>32</sup>, including but not limited to: bitstream, access to ducts, poles, dark fiber, street cabinets, including full and effective unbundled access. The granting authority will clearly define the conditions for NP(s) 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. To prohibit discrimination of third-party operators, the obligation to provide wholesale access will be mandatory. In case an NP is also an SP (vertically integrated), that NP will be required to grant access 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).
- (62) Both as concerns access sold by FIS OÖ and/or the NP(s), the following will be observed:
- Electronic communication operators will be able to use the wholesale access purchased from either FI OÖ or the NP(s) and will be able to connect end users via any access technology of their choice. Access will be granted (either by FIS OÖ or NP(s) only for the provision of NGA speeds in the "white" NGA/NGN areas targeted by the measure.
  - Both as concerns FIS OÖ and NP(s), the authorities of the Federal State of Upper Austria will ensure that effective wholesale access to the subsidised network will be granted for at least seven years and effective wholesale access to the new passive infrastructure (such as ducts, poles, dark fibre) 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.

### **3.18. Wholesale access pricing**

- (63) The authorities of the Federal State of Upper Austria have not yet defined a complete mechanism for setting wholesale access prices for all wholesale access products. This mechanism is now in the process of being prepared as concerns both FIS OÖ and the NP(s).
- (64) The authorities of the Federal State of Upper Austria have committed to ensure that the following requirements will be observed at all times: Wholesale access prices will be based on the pricing principles set by the NRA and on

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<sup>32</sup> Referring to the passive infrastructure they would lease from FI OÖ further to the competitive selection process for the operation/management of the network.

benchmarks and will take into account the aid received by FIS OÖ and the NP(s). For the benchmarks, the average published wholesale prices that prevail in other comparable, more competitive areas of Austria or the European Union will be taken into account, or, if no such published prices are available, prices already set or approved by the NRA for the markets and services concerned. If there are no published or regulated prices available for certain wholesale access products to benchmark against, the pricing will follow the principles of cost orientation, pursuant to the methodology established in accordance with the sectorial regulatory framework. The authorities of the Federal State of Upper Austria have confirmed that they will seek advice from RTR with regard to the pricing mechanism.

### **3.19. Claw-back and monitoring mechanisms**

- (65) 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, in line with the Broadband Guidelines (paragraph 78(i) and footnote 113). Therefore the Federal State of Upper Austria does not intend to apply a claw-back mechanism to FIS OÖ.
- (66) However, the Federal State of Upper Austria will implement a claw-back mechanism with regard to the NP(s) to be selected to operate the network. The claw-back mechanism will be linked to unanticipated gains by the NP(s), which are obliged to present to the granting authority, as part of their bid in the competitive selection process, sufficient information regarding expected gains from sales of wholesale access and in case an NP is also an SP also 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 excessive gains have to be paid to Federal State of Upper Austria. It will therefore be guaranteed that NP(s) cannot generate unreasonably excessive profit by making use of the publicly funded infrastructure.
- (67) The Federal State of Upper Austria will carry out an ongoing monitoring of the measure. Both FIS OÖ and the selected NPs are subject to extensive reporting obligations. These reporting obligations should provide the granting authority with detailed insight into the development, operations, use of the broadband network, and proof of fulfilment of all obligations by FIS OÖ and the NP(s). This ensures that e.g. wholesale access is guaranteed and the profits that are subject to the claw-back mechanism can be determined. 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 NP(s) will be responsible for collecting that information from SP(s) and reporting to FIS OÖ on a contractual basis. FIS OÖ will report to the Federal State of Upper Austria.

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

- (68) The Federal State of Upper Austria 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 Land website<sup>33</sup> and in the online ZIS database of the RTR<sup>34</sup>

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<sup>33</sup> <http://www.land-oberoesterreich.gv.at/49302.htm>



which will allow easy access to all relevant acts and information regarding the project. The following information will be published: the full text of the approved aid scheme and its implementing provisions, 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. FIS OÖ as well as the selected NP(s) are obliged to provide entitled third parties with comprehensive and non-discriminatory access to information on the infrastructure (including ducts, poles, street cabinets, fiber, etc.) built within the scope of the measure, which will facilitate other operators' access to the infrastructure. FIS OÖ and the NP(s) will also published detailed information concerning wholesale-access conditions and prices applied by FIS OÖ and by the selected NP(s), in line with paragraph 78(j) of the Broadband Guidelines.

- (69) The Federal State of Upper Austria 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.
- (70) The authorities of the Federal State of Upper Austria 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/AID**

##### **4.1. Existence of aid within the meaning of Article 107(1) of the TFEU**

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

### State resources

- (72) 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>35</sup> Resources of local and regional authorities are for the application of Article 107(1) of the TFEU State resources.<sup>36</sup> As described in Section 3.6 above, the measure at stake is financed from the budget of the Federal State of Upper Austria 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.

### Selective economic advantage

- (73) In geographic areas where no equivalent commercial investment exist or is envisaged in the near future, the intervention of the public authorities cannot be perceived as being carried out on market terms. FIS OÖ will construct the passive infrastructure in the interest of the public interest with a view to attracting and supporting broadband investments in those areas. Unlike a private market investor, the Federal State of Upper Austria through its in-house company FIS OÖ pursues the wider policy interests to increase NGA broadband access to the benefit of Upper Austria citizens and businesses.
- (74) In line with the functional character of the notion of "economic activity" in Article 107(1) TFEU, it is irrelevant whether the recipient of the funds is an entity with a separate legal status or an integrated part of the Land administration.<sup>37</sup> The public operation of a broadband network, even if limited to a passive network infrastructure, is an economic activity within the meaning of Article 107(1) TFEU.<sup>38</sup> Therefore, FIS OÖ exercises an economic activity.
- (75) The measure at stake is selective:
- 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>39</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>40</sup> The measure is therefore sector-specific. The measure is moreover territorially selective. The scheme is set up with the aim of improving NGA/NGN

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<sup>35</sup> Case C-482/99 *France v Commission* (hereafter: "*Stardust Marine*") [2002] ECR I-4397.

<sup>36</sup> Judgment of 12 May 2011 in Joined Cases T-267/08 and T-279/08 *Nord-Pas-de-Calais*, not yet published, paragraph 108.

<sup>37</sup> Case C-188/85, *Commission v. Italy*, ECR 1987 p. 2599, paragraph 13; see also, with further references in this regard, judgment by the General Court, *Freistaat Sachsen and Land Sachsen-Anhalt v Commission*, T-455/08, ECLI:EU:T:2011:117, paragraphs 88 and 89.

<sup>38</sup> Judgment by the General Court, *Freistaat Sachsen and Land Sachsen-Anhalt v Commission*, T-455/08, ECLI:EU:T:2011:117, paragraph 90 and following.

<sup>39</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.

<sup>40</sup> See also N 383/09 – Germany – Amendment of N 150/08 Broadband in the rural areas of Saxony. See also Commission Decision 2003/227/EC of 2 August 2002 on various measures and the State aid invested by Spain in "*Terra Mítica SA*", a theme park near Benidorm (Alicante) (OB L 91, 8.4.2003r., crp. 23—37).

broadband coverage in certain underserved (white) areas in the Federal State of Upper Austria. The public authorities exercise discretionary power to determine the beneficiary and the conditions of the measure, allowing them notably to modulate the aid amount and/or the conditions for granting the aid in question.<sup>41</sup>

- As concerns the identification of the particular legal framework against which selectivity can be assessed, it is noted that the construction and operation of broadband networks is a liberalized economic activity conducted by commercial operators on the basis of private investments in the market. In such a framework, economic activities normally do not receive subsidies. The main economic regulation provisions of the framework are based on market analysis by national regulatory authorities (NRAs), which impose ex-ante remedies to ensure effective competition in the presence of significant market power (or dominance) of one or more operators. The current regulatory framework has been broadly successful in creating the conditions for effective competition in the distinct national markets. However, against this particular legal framework, the granting of State support measures for the deployment and operation of broadband networks and services in underserved areas is not justified by the nature or economy of the liberalized market and the regulatory framework. In any event, the features of this legal framework cannot provide any justification for the granting of subsidies.<sup>42</sup>
- The measure attributes a selective economic advantage to individual companies who exercise commercial activities – to FIS OÖ as main beneficiary, to the NP(s) which will be selected in the tendering procedures to maintain and operate the network and to SP(s)/third parties who gain wholesale access to the subsidised network and can consequently offer their services on conditions not otherwise available on the market). The public financing will grant a selective competitive advantage to those undertaking by 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, hence these are in a comparable (factual and legal) situation to the potential beneficiaries of the aid.

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<sup>41</sup> See also Judgment of the Court of 26 September 1996, French Republic v Commission of the European Communities, Case C-241/94, European Court Reports 1996 I-04551, ECLI identifier: ECLI:EU:C:1996:353; Judgment of the Court of 29 June 1999, Déménagements-Manutention Transport SA (DMT), Case C-256/97, European Court reports 1999 Page I-03913, ECLI identifier: ECLI:EU:C:1999:332; Judgment of the Court of First Instance of 6 March 2002, Territorio Histórico de Álava - Diputación Foral de Álava (T-127/99), Comunidad Autónoma del País Vasco and Gasteizko Industria Lurra, SA (T-129/99) and Daewoo Electronics Manufacturing España, SA (T-148/99) v Commission of the European Communities, Joined cases T-127/99, T-129/99 and T-148/99, European Court Reports 2002 II-01275, ECLI identifier: ECLI:EU:T:2002:59; Judgment of the Court of First Instance of 21 October 2004, Lenzing AG v Commission of the European Communities, Case T-36/99, Reports of Cases 2004 II-03597 (and Appeal - Case C-525/04 P: Judgment of the Court of 22 November 2007, Kingdom of Spain v Commission of the European Communities, OJ C 8, 12.1.2008, p. 2–2).

<sup>42</sup> See point (13) of the Broadband Guidelines.

### Distortion of competition and effect on trade

- (76) The markets for electronic communications services (including the wholesale markets and the retail broadband markets) are open to competition between operators and service providers, which generally engage in activities that are subject to trade between Member States. By favouring certain operators and service providers, the notified intervention of the Federal State of Upper Austria 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. 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.
- (77) The Commission concludes that the notified measure constitutes State aid within the meaning of Article 107(1) TFEU, as moreover confirmed in the notification. It has then to be assessed whether the measure can be found to be compatible with the internal market.

### **4.2. Compatibility assessment**

- (78) The Commission has assessed whether the aid can be found compatible with the internal market. Article 107(3) of the Treaty provides for certain exemptions to the general rule set out in Article 107(1) of the Treaty. The aid in question can only be assessed on the basis of Article 107(3)(c) of the Treaty, 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, which contain a detailed interpretation of Article 107(3)(c) TFEU as it applies to that area of State aid law.
- (79) As explained in paragraph 33 and following of the Broadband Guidelines, for aid to be found compatible with the internal market pursuant to Article 107(3)(c) TFEU, the following cumulative conditions must be fulfilled:
- The aid must contribute to the achievement of objectives of common 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 (proportionality);<sup>43</sup>
  - Negative effects must be limited
  - The aid measure must be transparent
- (80) If 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, such as distortions of trade and competition.

#### **4.2.1. The aid contributes to the achievement of objectives of common interest**

- (81) In its EU2020 strategy, the Commission defined the DAE Flagship Initiative, which has the *"aim to deliver sustainable economic and social benefits from a Digital Single Market based on fast and ultra-fast internet and interoperable applications, with broadband access for all by 2013, access for all to much higher internet speeds (30 Mbps or above) by 2020, and 50% or more of European households subscribing to internet connections above 100 Mbps"*. In pursuing this aim, *"at EU level, the Commission will work /.../to facilitate the use of the EU's structural funds in pursuit of this agenda"*, and *"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."* Key Action 8 of the DAE calls Member States *"to use public financing in line with EU competition and State aid rules"* in order to meet the coverage, speed and take-up targets.
- (82) In 2016, the Commission adopted a set of initiatives and legislative proposals to place the EU at the forefront of internet connectivity. The strategic objectives of the DAE were complemented by the Gigabit Communication which, while restating the importance of Internet connectivity for the Digital Single Market sets out a vision for a European Gigabit society, where availability and take-up of very high capacity networks (VHCN) enable the widespread use of products, services and applications in the Digital Single Market. The EU2020 strategy for more growth, the DAE and the Common EU broadband targets for 2025<sup>44</sup> all address future broadband needs.
- (83) In its Communication Connectivity for a Competitive Digital Single Market – Towards a European Gigabit Society<sup>45</sup> on common EU broadband targets for 2025, the Commission proposes that by 2025 all schools, transport hubs and main providers of public services as well as digitally intensive enterprises should have access to internet connections with download/upload speeds of 1 Gigabit of data per second. In addition, all European households, rural or urban, should have access to networks offering a download speed of at least 100 Mbps, which can be upgraded to 1 Gigabit and all urban areas as well as major roads and railways should have uninterrupted 5G wireless broadband coverage, starting with a fully-fledged commercial service in at least one major city in each EU Member State by 2020.

<sup>43</sup> As regards limiting the distortions of competition, the Commission also examines in the context of the proportionality of the measure whether such measure fulfils the conditions listed in paragraph 78 of the Broadband Guidelines.

<sup>44</sup> <https://ec.europa.eu/digital-single-market/en/broadband-europe>.

<sup>45</sup> [http://ec.europa.eu/newsroom/dae/document.cfm?doc\\_id=17182](http://ec.europa.eu/newsroom/dae/document.cfm?doc_id=17182).

- (84) With the State aid scheme at stake, the Federal State of Upper Austria targets the comprehensive provision of NGA/NGN broadband connections to white NGA/NGN areas in the entire territory and to guarantee symmetrical download and upload access speeds of at least 100 Mbit/s at any eligible location in the Federal State of Upper Austria. The State aid scheme will therefore bridge the digital divide between areas already covered by NGA speeds and areas that are not connected; these particularly concern rural areas in the Federal State of Upper Austria, which have been shown to be significantly underserved by NGA broadband connections compared with urban areas and regional metropolises.
- (85) A well targeted public intervention in the broadband field contributes to bridging the 'digital divide' that sets apart areas or regions within a country where affordable and competitive broadband services are on offer and areas where such services are not. Therefore, by promoting the development of NGA/NGN networks able to provide to end-users with reliable symmetrical speeds of at least 100 MBit/s to up to 50% of the intervention area, where private operators have no commercial interest to invest in the near future, the Authorities of the Federal State of Upper Austria intend to address the digital divide and allow all citizens and households to have access to very high-speed services. The State aid scheme will therefore pursue genuine cohesion and economic development objectives, will make a significant contribution to the achievement of the objectives of the Digital Agenda and of the Gigabit Society and therefore to an objective of common interest.

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

- (86) According to paragraph 37 of the Broadband Guidelines, *"a market failure exists if markets, left to their own devices, 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 costs. In such cases, the granting of State aid may produce positive effects and overall efficiency can be improved by adjusting the economic incentives for firms. In the broadband sector, one form of market failure is related to positive externalities. Such externalities arise where market players do not internalise the whole benefit of their actions. For example, the availability of broadband networks paves the way for the provision of more services and for innovation, both of these are likely to benefit more people than the immediate investors and subscribers to the network. The market outcome would therefore generate insufficient private investment in broadband networks."*
- (87) The intervention of the Federal State of Upper Austria in the present case aims to address a market failure as it targets the so called NGA "white" NGA/NGN areas in the sense of paragraph 75) of the Broadband Guidelines, where there is currently no NGA/NGN network able of sustaining download speeds above 30 Mbps (including no ultrafast-network able of sustaining download speeds above 100 Mbps) and where also no such broadband network will be built in the next three years. This was verified and will continue to be verified throughout the mapping and public consultation exercise, which took place at Land and federal levels, and the planned consultations, as described in Sections 3.9 and 3.10. Federal State of Upper Austria. Those elements demonstrate the absence of market delivery due to market failures and/or important inequalities in the targeted areas, which justifies public intervention.

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

- (88) 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. 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.
- (89) The implementation of the State aid scheme will therefore guarantee network roll-out according to the needs of Federal State of Upper Austria. 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.
- (90) 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.

#### **4.2.4. Existence of an incentive effect**

- (91) As set out in paragraph 45 of the Broadband Guidelines, regarding the incentive effect of the State aid scheme, it needs to be examined whether the broadband network investment concerned would not be undertaken within the same timeframe without any State aid.
- (92) The scheme 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 is confirmed according to the results of the mapping exercise and public consultations carried out by the authorities of the Federal State of Upper Austria. The mapping and the public consultation described in Sections 3.9 and 3.10 above will ensure that in the intervention area no comparable investment would take place without public funding in the near future. Furthermore, the authorities of the Federal State of Upper Austria have set up mechanisms in order to retain flexibility in addressing future changes to take into account the evolution of the market (see recital (43) above). It follows from this that the investment would not be made within the same timeframe without the aid, which produces a change in the investment decisions of the operators.
- (93) The establishment of the NGA/NGN network by FIS OÖ, with non-discriminatory and open access will prompt access-seekers to make their own significant investments in further connectivity, which would not be made without the passive infrastructure. By granting access to the subsidised network to third party operators, the scheme facilitates competition and encourages investments in the provision of the retail services in the white target areas.
- (94) Therefore, the Commission is satisfied that the state aid scheme is going to provide a direct and appropriate investment incentive for FIS OÖ and for the selected NP(s), as well as for access seekers.

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

- (95) The authorities of the Federal State of Upper Austria have designed the State aid scheme in such a way as to minimise the State aid involved and potential distortions of competition arising from the measure. In this respect, as provided by paragraph 78 of the Broadband Guidelines, the Commission notes the following positive elements in the design of the measure<sup>46</sup>:

**(a) *Detailed mapping and coverage analysis, public consultation with stakeholders:***

- (96) As described in Sections 3.9 and 3.10 above, the Federal State of Upper Austria has demonstrated that a thorough analysis of the existing NGA/NGN broadband infrastructure as well as investment plans for the next three years has been conducted in order to identify the areas where public intervention is necessary, and further analyses will be still carried out. The Federal State of Upper Austria has performed a range of analyses of broadband provision and NGA/NGN network coverage during the last few years, which demonstrate a detailed picture of the situation on the territory, making it possible to identify precisely the "white" NGA/NGN areas. This is based on thorough mapping and public consultations involving all stakeholders and published on a central online website, ensuring a high degree of transparency. The authorities of the Federal State of Upper Austria have confirmed in their notification that no objections to this measure and to the identification of target areas have been raised to this date. The detailed mapping and public consultation exercise already performed will be validated via further public consultations organized for each target white area as the project progresses (see recital 43 above), in line with the requirements of the Broadband Guidelines. The authorities of the Federal State of Upper Austria have confirmed that, should any adjustments be necessary to the intervention area (for instance if parts of the area have in the meantime become grey or black), the intervention will be readjusted: any grey or black areas will be removed from the intervention area and corresponding financing of those areas will be removed. The authorities of the Federal State of Upper Austria have confirmed that when implementing the measure, only NGN/NGA white areas will be targeted, i.e. areas where no objections are raised during the public consultations. This will ensure that only areas where there is no interest for commercial NGA/NGN deployment are developed and no overlapping infrastructures are created. This will help reduce to a minimum the aid amount and will serve to avoid risks of crowding-out private investments and distorting competition vis-à-vis existing operators.

**(b) *Competitive selection process:***

- (97) *Direct attribution of aid to FIS OÖ with competitive safeguards:* In line with footnote 96 to paragraph 78 (c) of the Broadband Guidelines, the authorities of the Federal State of Upper Austria have chosen to deploy the measure via a direct investment model where the public authorities deploy and manage the network through a fully owned entity, the in-house company FIS OÖ. 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 authorities of the Federal State of Upper Austria have put in place a number of competitive safeguards, in line with the Broadband

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In accordance with points 78-80 of the Broadband Guidelines.



Guidelines (paragraph 78(c) and footnote 96). The authorities of the Federal State of Upper Austria have confirmed that the following safeguards will be respected by FIS OÖ within the project:

- The Authorities of the Federal State of Upper Austria have confirmed that the publicly owned network operator FIS OÖ will limit its activity on the predefined target areas and shall not expand to other commercially attractive regions.
- The Authorities of the Federal State of Upper Austria have confirmed that FIS OÖ shall limit its activity to maintain the passive infrastructure and to grant access to it, but shall not engage in competition on the retail levels with commercial operators. FIS OÖ cannot act as retail broadband operator, and therefore cannot provide broadband services to final users, but organises and manages passive wholesale access to the infrastructure and selects the NP(s). FIS OÖ is obliged to grant an open access at fair, transparent and non-discriminatory conditions.
- The Authorities of the Federal State of Upper Austria have confirmed that FIS OÖ will maintain an accounting separation for the funds used for the operation of the networks (separate from any other funds at the disposal of FIS OÖ). Thus, this system eliminates at the root one of the potential risks for competition deriving from management of the network by operators, i.e. the incentive to exclude or degrade competitors on the same infrastructure. The Commission can thus conclude that the safeguard mechanism is sufficient to avoid undue distortions of competition and no selection procedure is required.

(98) *Competitive Selection processes:* As described in Sections 3.5 and 3.12 above, the network will remain in public ownership. FIS OÖ will ensure the deployment of the network by selecting constructors via competitive selection processes, and will manage the network directly at passive wholesale level. FIS OÖ will also select planning experts via competitive selection processes. The State aid scheme foresees the transfer of the operation of part of the passive/physical to one or several NP(s), to be selected via competitive selection procedures. The NP(s) will operate the part of physical infrastructure that it/they each leased and ensure wholesale access at both passive and active level on it. The contracts for the construction of the infrastructure and for the selection of NP(s) will be tendered out according to national and EU public procurement rules aiming to select the most economically advantageous offer and respecting the principles of openness, non-discrimination and transparency. This will help minimize budgetary costs and the potential State aid involved. The following minimum requirements must be fulfilled for all competitive selection processes, whether for the construction of the network, for planning purposes, or for the selection of NP(s):

- All selection procedures must be in line with the spirit and principles of the EU public procurement directives.
- 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.

**(c) *Most economically advantageous offer:***

- (99) The Commission is satisfied that all bids received within the scope of the competitive selection procedures regarding the construction of the network, planning and the selection of NP(s) will be assessed according to pre-established and weighted qualitative award criteria (see Section 3.13 above), in line with paragraph 78(d) of the Broadband Guidelines. In order to minimize the amount of aid to be granted, the bidder requesting the lowest amount of aid under comparable or even identical quality conditions will receive the most priority points within the overall assessment of its bid.

**(d) *Technology neutrality:***

- (100) As confirmed by the authorities of the Federal State of Upper Austria authorities (see Section 3.14 above), the chosen network topology will ensure the technological neutrality of the network. Several alternative platforms will be able to use the new network to offer their own services to end users. Wholesale access products will be offered on open and non-discriminatory terms in line with the principle of technological neutrality.
- (101) As described in Section 3.14 above, and as confirmed by the authorities of the Federal State of Upper Austria, FTTH has been identified as a potential future-proof technology to be taken into account in the deployment of the subsidised network. The authorities of the Federal State of Upper Austria have based this finding on the evaluation of 12 May 2017 commissioned by the BMVIT and also on the "Guide to High-Speed Broadband Investment" published by the European Commission. Nevertheless, the business model of FIS OÖ is defined in such a way that, alongside FTTH, other similarly capable technologies are also permitted, such as microwave point-to-point network connections, as long as it is possible to ensure the completion of the objectives of the measure (i.e. to ensure by 2033 access speeds of at least 100 Mbit/s symmetric, upgradeable without significant further investment to 1 Gbit/s symmetric). This would be the case where an FTTH network expansion is not suitable for economic reasons (e.g. areas where houses are spread widely apart). The possibility to opt for different solutions ensures technological neutrality, but also achieves a reduction/optimization of investment costs in individual cases, such as when connecting end-customers in remote locations. As the authorities of the Federal State of Upper Austria have confirmed, to accommodate fast technological developments, the selection of the technology to be used will be made at the time of launching individual projects, according to the actual technological state of the art at the time of planning the individual projects.
- (102) The Commission therefore considers that the State aid scheme fulfils the condition regarding the principle of technology neutrality.

**(e) *Step change requirements:***

- (103) A step change can be demonstrated if, as the result of the public *intervention*: (1) significant new investments in the broadband network are undertaken by the beneficiaries (i.e. investments that must include civil works and installation of new passive elements) and (2) the subsidised infrastructure brings significant new capabilities to the market in terms of broadband service availability, capacity, speeds and/or competition.
- (104) The scheme does not foresee the grant of aid for marginal investments related merely to the upgrade of active components of the network, which, as indicated in paragraph 51 and footnote 64 of the Broadband Guidelines, do not normally

ensure a "step change" and are therefore not eligible for State aid. As described in Section 3.15 above, the authorities of the Federal State of Upper Austria will make State aid available to support a "step change" compared to existing as well as concretely planned network roll-outs. Step change as a result of the public intervention will always be verified by the Federal State of Upper Austria.

- (105) Thus, the measure requires that by 2033 download access speeds have to be at least 100 Mbps symmetrical, upgradeable to 1 Gbps symmetrical, whereas interventions will only be made in NGA/NGN white areas, i.e. areas where there are no current or planned infrastructures able to support download speeds above 30 Mbps. Also as concerns the first stages of the implementation of the measure, where the aim is to ensure NGA/NGN coverage with access speeds of at least 30 Mbps download and at least 30 Mbps upload and progressively higher speeds, these interventions will take place in NGA/NGN white areas where there are no current or planned infrastructures able to support download speeds above 30 Mbps. The Commission is therefore satisfied that a step change will be ensured not only by ensuring access speeds of at least 30 Mbps download and at least 30 Mbps upload and progressively higher speeds, but that at the same time it will be verified that there is always at least a doubling of speeds currently offered or planned in the near future (see also Section 3.15 above). Therefore, in meeting the speed requirements, all projects will meet the step change requirements as set out in the the Broadband Guidelines.

**(f) *Use of existing infrastructure:***

- (106) The business model of FIS OÖ is based on the use of existing broadband infrastructure to the best extent possible used for the NGA/NGN network roll-out. Consequently, the investment costs should be kept as low as possible and the use of State resources should remain limited to the minimum necessary.
- (107) The Broadband Guidelines also recommend that Member States should set up a national database on the availability of existing infrastructure that could be reused for broadband rollout.
- (108) In this respect, in line with the requirements of paragraph 78(f) of the Broadband Guidelines, as described in Section 3.16 above, the authorities of the Federal State of Upper Austria clarified that, in addition to the mapping and public consultation exercises carried out (the results of which are made available on the website for the Broadband Atlas), the ZIS database of the RTR is published online and records the existing broadband infrastructure of Upper Austria. The Commission agrees that it is ensured that existing infrastructure is adequately taken into account and that it can be used in subsequent network roll-out. Unnecessary and wasteful duplication of resources should in this way be avoided and the funding should thus be minimised.

**(g) *Wholesale access:***

- (109) In line with the requirements of paragraph 78(g) and 80 of the Broadband Guidelines, the authorities of the Federal State of Upper Austria have confirmed that the new network will offer wholesale access on an open, non-discriminatory basis, respecting the principle of technological neutrality (see Section 3.17 above). FIS OÖ and the NP(s) will provide full open access to the subsidised network (including but not limited bitstream [for the NP(s)], access to ducts, dark fiber, street cabinets, and full and effective unbundled access). Electronic communication operators 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 effective wholesale 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.

- (110) As concerns the sale of wholesale access by FIS OÖ, the authorities of the Federal State of Upper Austria have confirmed that FIS OÖ will act as wholesale-only operator and will sell passive wholesale access on an open, non-discriminatory basis. FIS OÖ will thus be able to lease passive infrastructure to wholesale access seekers, in accordance with the provisions of the Broadband Guidelines (paragraph 78(c) and footnote 96), only for the provision of NGA speeds in the "white" areas targeted by the measure. FIS OÖ will not offer retail services.
- (111) As concerns the sale of wholesale access by the NP(s), the authorities of the Federal State of Upper Austria have confirmed that NP(s) renting passive infrastructure from FIS OÖ will sell passive wholesale access to that passive infrastructure, as well as active wholesale access, only for the provision of NGA speeds in the "white" areas targeted by the measure. In case an NP is also an SP (vertically integrated), that NP will be required to grant access 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).
- (112) The above limitation which concerns only NGA speeds is aimed at reducing the risk of distortion of competition in the basic broadband market, while supporting competition in the NGA market. The Commission therefore concludes that it supports the assessment of the measure as compatible with the State aid requirements regarding wholesale access.

**(h) Wholesale access pricing and price benchmarking:**

- (113) The authorities of the Federal State of Upper Austria have not yet defined a complete mechanism for setting wholesale access prices for all wholesale access products. This mechanism is now in the process of being prepared as concerns both FIS OÖ and the NP(s).
- (114) However, as described in Section 3.18 above and in accordance with paragraph 78(h) of the Broadband Guidelines, the authorities of the Federal State of Upper Austria have committed to ensure that the following requirements will be observed at all times: the wholesale access prices to be used by either FIS OÖ or NP(s) will be based on the pricing principles set by the NRA and on benchmarks and will take into account the aid received by FIS OÖ and the NP(s). For the benchmarks, the average published wholesale prices that prevail in other comparable, more competitive areas of Austria or the European Union will be taken into account, or, if no such published prices are available, prices already set or approved by the NRA for the markets and services concerned. If there are no published or regulated prices available for certain wholesale access products to benchmark against, the pricing will follow the principles of cost orientation, pursuant to the methodology established in accordance with the sectorial regulatory framework. The authorities of the Federal State of Upper Austria have confirmed that they will seek advice from RTR in setting the wholesale access pricing mechanism and conditions.

**(i) *Monitoring and clawback mechanism:***

- (115) As described in Section 3.19 above, the authorities of the Federal State of Upper Austria have committed to closely monitor the implementation of the broadband project during the entire duration of the project in accordance with paragraph 78(i) of the Broadband Guidelines.
- (116) The authorities of the Federal State of Upper Austria will monitor the implementation of the State aid scheme by FIS OÖ, the NP(s) and the SP(s) and will assess and verify compliance with the requirements of this Decision. Implementation will be examined on a regular basis and the monitoring mechanism will ensure that if the beneficiaries fail to comply with the rules, the granting authorities will be in the position to recover the aid granted. The output of the monitoring mechanism will also be used for clawback purposes. The clawback mechanism will ensure a balanced sharing of unanticipated profits made by NP(s). Any re-investment of clawed-back amounts to fund new projects under the scheme has to comply with the terms of this decision (including new mapping and public consultation exercises, new selection procedures, etc.).
- (117) The fact that a clawback mechanism is not foreseen in relation to FIS OÖ does not change in the view of the Commission the assessment of the compatibility of the State aid scheme with the State aid requirements regarding clawback, as this is indeed 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, in line with paragraph 78(i) and footnote 113 of the Broadband Guidelines.

**(j) *Transparency and Reporting:***

- (118) As described in Section 3.20, the Federal State of Upper Austria will ensure, for the duration of the project, that all transparency requirements are met in each phase of the project. In line with paragraph 78(j) of the Broadband Guidelines, all relevant information regarding the scheme and any aid granted will be published on a central online website. FIS OÖ as well as the selected NP(s) are obliged to provide entitled third parties with comprehensive and non-discriminatory access to information on the infrastructure (including ducts, poles, street cabinets, fiber, etc.) built within the scope of the measure, which will facilitate other operators' access to the infrastructure. FIS OÖ and the NP(s) will also published detailed information concerning wholesale-access conditions and prices applied by FIS OÖ and by the selected NP(s), in line with paragraph 78(j) of the Broadband Guidelines.
- (119) The Federal State of Upper Austria will provide to the Commission information on the application of the State aid scheme every two years, as provided for in paragraph 78(k) of the Broadband Guidelines. These reports will at least contain information on: the information made public in line with transparency obligations and in particular: the date when the network is put into use, the wholesale access products offered and access conditions and pricing, the number of access seekers and type of technology used to connect to the network, the number of houses passed, take-up rates, information regarding any disputes regarding the project, if any, and in particular concerning wholesale access, as well as how such disputes were resolved. The Authorities of the Federal State of Upper Austria also committed to submit to the Commission annual reports, as required under Article 26 of Council Regulation (EU) 2015/1589.

#### **4.2.6. The aid has limited negative effects**

- (120) Given the design of the measure and its compliance with the conditions of paragraph 78 of the Broadband Guidelines (Section 4.2.5 above), the State aid scheme is unlikely to generate a crowding-out effect on private investments. In particular, the aid is confined to "white" NGA/NGN areas, where no operator is willing to invest in NGA/NGN infrastructure without State aid in the next three years. As described above (Section 3.15 and Section 4.2.5(e)), the authorities of the Federal State of Upper Austria confirmed that in line with the paragraph (51) of the Broadband Guidelines the planned networks will ensure a "step change" in that FIS OÖ will make significant new investments and the subsidised infrastructure will provide significant new capabilities to the market in terms of broadband service availability, capacity, speeds and competition as a result of the public intervention into white NGA/NGN areas. The State aid scheme will support further NGA connectivity in the target white areas by various private operators, via wholesale access. These conditions ensure that the public intervention does not crowd out comparable private investments. Indeed, the measure supports only white NGA/NGN areas where no broadband connection is available and where without the public support the investment would not take place. Therefore the Commission concludes that negative effects of the State aid scheme on competition and trade, if any, are expected to be limited.

#### **4.2.7. Transparency**

- (121) As described in Section 3.20 above, the State aid scheme ensures that the interested public and the European Commission have easy access to all relevant acts and pertinent information about the aid awarded thereunder. Section 4.2.5(j) above records the compliance of the State aid scheme with the requirements set out in paragraph 78(j) of the Broadband Guidelines in that respect. The authorities of the Federal State of Upper Austria will publish all information relative to the notified aid measure on the Land website. The information will include objectives of the measure, the full text of the final aid scheme and the implementing provisions, the beneficiary of the aid and the amounts of State aid granted, as well as the aid intensity and technology used. Furthermore, FIS OÖ as well as the selected NP(s) are obliged to provide entitled third parties with comprehensive and non-discriminatory access to information on the infrastructure (including ducts, poles, street cabinets, fiber, etc.) built within the scope of the measure, which will facilitate other operators' access to the infrastructure. FIS OÖ and the NP(s) will also published detailed information concerning wholesale-access conditions and prices applied by FIS OÖ and by the selected NP(s), in line with paragraph 78(j) of the Broadband Guidelines. Regarding the reporting obligation the Authorities of the Federal State of Upper Austria will submit to the Commission annual reports, as required under Article 26 of Council Regulation (EU) 2015/1589 as well as reports on the implementation of the measure every two years from the date the network is put in use in line with the requirements set in the paragraph 78 (k) of the Broadband Guidelines. As a result, the Commission considers that the aid will be awarded in a transparent manner.

**4.2.8. Overall balancing: the positive effects of the aid measure are expected to outweigh its potential negative effects**

- (122) The Commission notes that the notified State aid scheme will offset a geographical social, economic and commercial handicap and is objectively justified to address the lack of availability of high speed broadband services in the targeted areas.
- (123) As mentioned above, the objective of the measure is to bridge the "digital divide" and provide access to NGA 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.
- (124) The design of the State aid scheme ensures open access to the subsidised network on equal and non-discriminatory terms in favour of all access seekers, thus favouring competition among operators, positive at retail level. The provision of a comprehensive NGA/NGN network, by creating a high quality and capacity infrastructure, has a pro-competitive impact, as it allows several network operators and service providers to use the subsidized 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 service providers and the provision of a larger variety of services.
- (125) The Commission notes that the Authorities of the Federal State of Upper Austria have paid particular attention to ensure the presence of an adequate step change by foreseeing the deployment of NGA/NGN networks able to support by 2033 access speeds above 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.
- (126) The usage of the centralized data base of existing infrastructure, the online published ZIS-database run by the RTR will likely reduce the overall cost of development of new infrastructure by allowing an efficient re-use of the ones already deployed. The planned measure will limit administrative costs, achieve economies of scale in purchasing and ensure synergy effects: in the State aid scheme at stake, funding will take the form of both provision of financial resources from the Federal State of Upper Austria to FIS OÖ and subsequent income from the sale of wholesale access to the passive infrastructure.
- (127) The authorities of the Federal State of Upper Austria have designed the measure under examination in such a way as to minimise the State aid involved and potential distortion of competition arising from the measure.
- (128) In view of the characteristics of the project and of the safeguards applied, the Commission considers, based on the information available, that the overall impact on competition is expected to be positive. The risk of crowding out private investments and the negative effects of the State aid scheme are expected to be limited and there does not appear to be any significant negative spill-over for other Member States.
- (129) Accordingly, on balance the State aid scheme is in line with the objectives of Article 107(3)(c) TFEU as it facilitates the development of certain economic activities (wholesale and indirectly retail broadband services) in underserved areas, where such aid does not distort competition or adversely affect trading conditions to an extent contrary to the common interest.

## 5. DECISION

On the basis of the foregoing assessment, the Commission has accordingly decided not to raise objections and consider the measure "NGA-Broadband project in Upper Austria – OÖ-LAN" compatible with the internal market, pursuant to Article 107(3)(c) of the Treaty on the Functioning of the European Union.

The Commission reminds the Austrian authorities of the requirement to submit annual reports on the application of the aid measure and to inform the Commission pursuant to Article 108(3) TFEU of all plans to amend/extend this measure.

By letter of 15 June 2018 the authorities of the Federal State of Upper Austria have 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).

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  
Member of the Commission

