



EUROPEAN COMMISSION

Brussels, 10.3.2021
C(2021) 1532 final

PUBLIC VERSION

This document is made available for information purposes only.

**Subject: State Aid SA.56426 (2021/N)
High-performance mobile infrastructure roll-out Lower Saxony –
Germany**

1. PROCEDURE

- (1) Following pre-notification discussions, on 18 January 2021, the German authorities notified the European Commission of a new support scheme to promote the development of public mobile electronic communications networks in the German Federal State Lower Saxony (“Lower Saxony”).

2. DETAILED DESCRIPTION OF THE MEASURE

2.1. Objective and design of the measure

- (2) Unlike fixed networks, mobile networks offer the end user the option of continuously changing the location while communicating. There currently exist four generations of mobile communications technology with the fourth generation (4G) being based on LTE¹. A new fifth generation (5G) is currently in the process of being rolled out. While all mobile communications technology generations allow for mobile voice services, only the newer generations also allow for the provision of performant mobile data services. Mobile communications technology generations are very different in many aspects, their most important differentiating factor being the overall performance (newer generations provide for shorter latency and higher transmission capabilities).

¹ Long-Term Evolution (LTE) is a standard for high-speed wireless communication for mobile devices and data terminals.

Herrn Heiko MAAS
Bundesminister des Auswärtigen
Werderscher Markt 1
D 10117 Berlin

Commission européenne/Europese Commissie, 1049 Bruxelles/Brussel, BELGIQUE/BELGIË - Tel. +32 22991111

- (3) In the digital age, access to services that rely on mobile networks has become essential for businesses and consumers. However, currently mobile network coverage does not everywhere meet the continuously growing expectations of business and society.
- (4) In order to achieve the benefits of a Gigabit society, mobile voice and data services should be widely available - in households and for businesses, on roads, railways, waterways and tourist attractions as well as on agricultural areas. Thereby the provision of mobile voice and data services has to guarantee unrestricted mobility of the users².
- (5) In consideration of the above, the objective of the measure is to close the gaps in mobile coverage in Lower Saxony and to support the availability of high-performance mobile voice and data services in areas where no mobile services or only mobile voice services are available currently or in the short term. In such areas, the Lower Saxony Authorities aim to support the rolling out of terrestrial public mobile communications networks that will only be used to provide high-performance mobile voice and data services ("mobile networks").
- (6) To this end, the scheme aims at deploying passive infrastructure³ that will be used to support the deployment of mobile networks ("mobile passive infrastructure"). The aided mobile passive infrastructure should be capable to support the roll out of 4G mobile networks or above which can provide a wireless connection delivering at least a data rate of 50 Mbps download per antenna sector⁴ with a latency of no more than 150 milliseconds.
- (7) The intervention area will consist of areas in Lower Saxony where mobile networks have not yet been deployed or where only mobile networks capable of supporting 2G mobile services (based on GSM⁵ technology) and below are available and where there are no private plans to invest in deploying 4G (and above) mobile networks in the coming three years ("target areas")
- (8) The scheme may also support limited backhaul (ducts and dark fibre) deployment, only insofar as strictly necessary for the implementation of the scheme in the target areas. The aided backhaul will be used exclusively for these purposes. It is considered that an investment in backhaul is necessary if a new mast is to be connected (no backhaul exists). Existing ducts and dark fibre supporting the needed capacity will not be overbuilt.

² As set out in the Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions – Connectivity for a Competitive Digital Single Market: Towards a European Gigabit Society, COM(2016) 587 final, ("Gigabit Communication")

³ For the purposes of this scheme, passive infrastructure includes e.g. the towers, masts, and other supporting constructions (including foundations, and the electricity connection), ducts and access routes (*Zuwegung*). Active infrastructure is not included.

⁴ For a target of 50 Mbps per antenna sector, the Federal Network Agency assumes that a 10 Mbps access speed can be made available reliably to an end user in that sector even in peak-time periods.

⁵ Global System for Mobile Communications (GSM) is a standard developed by the European Telecommunications Standards Institute to describe the protocols for second-generation (2G) digital cellular networks used by mobile devices such as mobile phones and tablets.

- (9) Funding may only be granted for projects that have not yet started or that were not already planned to be started (under private or public initiative). One and the same area may receive funding only once under this scheme.
- (10) The scheme would help address the digital divide in Lower Saxony, increase the attractiveness for living and investing in the rural areas, stimulate economic growth and maintain and create jobs in structurally weaker regions. In this respect, living conditions would be aligned with those in better-served regions. The problems posed by the lack of a mobile service in emergency situations would equally be reduced.

2.2. Context

- (11) By virtue of existing mobile coverage obligations, by the end of 2019, 97% of the households in each Federal State in Germany had to be covered with mobile networks providing at least 50 Mbps per antenna sector. By the end of 2022, at least 98% of households per Land have to be covered with mobile networks providing at least 100 Mbps per antenna sector. In addition, 1000 5G base stations and 500 4G base stations with at least 100 Mbps are to be put into operation in "white spots" by the end of 2022.
- (12) However, these coverage obligations refer to households. Given the nature of the mobile services that have to be available "on the move", a more relevant proxy to determine the real territorial coverage is the areas that would remain uncovered following the implementation of the coverage obligations.
- (13) The scheme will provide support exclusively in target areas in Lower Saxony. These represent approximately 0.3% of all Lower Saxony households and 1.3% of its territory.

2.3. Legal Basis

- (14) The notified measure is based on the following legal bases:
 - Guidelines on the provision of grants to promote the development of mobile telecommunications services in Lower Saxony (Mobile Directive).⁶
 - Law on the "Special investment fund for the development of high-performance data transmission networks and for digitisation measures",⁷
 - Administrative provision on the State's budget (the VV/VV-Gk on §44 LHO).⁸
- (15) The current Decision is also part of the legal basis.

⁶ Richtlinie über die Gewährung von Zuwendungen zur Förderung des Ausbaus der Mobilfunkversorgung im Land Niedersachsen

⁷ <http://www.nds-voris.de/jportal/?quelle=jlink&query=DigitAusSVG+ND&psml=bsvorisprod.psml&max=true&aiz=true>

⁸ Verwaltungsvorschriften zur Landeshaushaltsordnung (VV-LHO): <http://www.nds-voris.de/jportal/?quelle=jlink&query=VVND-640000-MF-19720602-SFZu+%C2%A7+44:&psml=bsvorisprod.psml&max=true>

2.4. Standstill obligation

- (16) Lower Saxony Authorities have confirmed that the granting of the aid is conditional upon the authorisation of the Commission on the notified measure. Pursuant to the standstill clause of Article 108(3) TFEU, and to Article 3 of Council Regulation (EU) 2015/1589⁹, new aid measures must not be put into effect before the Commission has notified the decision not to raise objections to Germany.

2.5. The Granting Authority

- (17) The competent granting authority is the investment and development bank of Lower Saxony, hereafter, “the Granting Authority” or “the NBank”.
- (18) NBank is responsible for the monetary execution of public promotion activities. Pursuant to the law¹⁰, NBank is entrusted to provide support for infrastructure measures. For the implementation of the scheme at hand, the State, Lower Saxony, entrusted NBank to carry out tasks of public authority in line with the given mandate. In particular, the NBank will select the beneficiaries, carry out the authorisations, payments and settlements of the aid. It will verify the use of funds, and it will check the fulfilment of the purpose of the aid (supply of the target area with at least 50Mbps download per antenna sector and with a latency of less than 150 milliseconds).
- (19) The Lower Saxony State Court of Auditors is responsible for auditing the overall budgetary and economic management of Lower Saxony, its special funds and holdings, including the NBank.

2.6. Investment and business model

- (20) Lower Saxony will support the deployment of mobile passive infrastructure to be used by mobile network operators (“MNOs”).¹¹
- (21) The scheme provides for two alternative support models:

2.6.1. Direct investment model

- (22) One model is where the local authorities or entities entrusted with public responsibilities build the passive infrastructure themselves (or put the construction out to tender). They own and operate the mobile passive infrastructure and provide full open, transparent, non-discriminatory access to all interested MNOs. There is no selection process in this model. However, selection procedures are carried out in order to determine the undertakings carrying out the construction and supplying the necessary components.
- (23) Under this model, the public authorities and the entities entrusted with public responsibilities will limit their activity on the predefined target areas and shall not

⁹ Council Regulation No 2015/1589 of 13 July 2015 laying down detailed rules for the application of Article 108 of the Treaty on the Functioning of the European Union OJ L 248 of 24.9.2015, p.9.

¹⁰ <http://www.voris.niedersachsen.de/jportal/?quelle=jlink&query=InvF%C3%B6rdBankG+ND&psml=bsvorisprod.psml&max=true&aiz=true>

¹¹ Use of the subsidised infrastructure for other purposes (e.g. the provision of fixed telephony or fixed broadband access services) is not covered by the current Decision.

expand to other commercially attractive regions. In addition, the public authorities or the entities entrusted with public responsibilities, as the case may be, will not engage in competition at the retail level with providers of mobile voice and data services. Finally, they will have an obligation of accounting separation between the funds used for the operation of the networks deployed as part of this scheme and the other funds at their disposal.

2.6.2. Investment grant model (Investitionskostenzuschussmodell)

- (24) Another model is where the local authorities decide to put the construction and operation of the passive infrastructure out to tender (competitive selection procedure). The winner of the tender will build, maintain, operate and lease the passive infrastructure and provide full open, non-discriminatory access to all interested MNOs. This entity also becomes the owner of the subsidised passive infrastructure.
- (25) If the direct beneficiaries are both present on the market at wholesale and retail level, they will provide for commitments in order to prevent undue discrimination or other hidden indirect advantages towards access seekers or other service providers.
- (26) Such safeguards shall be included in the tender conditions and the commitments in this regard shall be taken into account in the award criteria of the procurement procedures. In case a dispute between the beneficiary and other service providers (or the access seekers) cannot be solved by the Granting Authority, the national regulatory authority, the Federal Network Agency, shall solve the dispute.

2.7. Budget and duration

- (27) The support measure consists of direct non-repayable grants which amount to a maximum of EUR 70 million. The support scheme is foreseen to end on 31 December 2025.
- (28) The maximum intensity of the aid provided by Lower Saxony under the scheme is, as a general rule, limited at 90% of the eligible costs. Eligible costs are all expenses necessary for the construction of the passive infrastructure. Active equipment and data connections between the supported passive infrastructure and the infrastructure owned by the MNOs using the newly established passive infrastructure is excluded. Expenditure with the acquisition of land, including lease expenditure, is also excluded.
- (29) The maximum amount of support for each mobile radio tower is, as a rule, EUR 350.000. However, packages consisting of more radio towers can be tendered at once. Projects with eligible costs of less than EUR 10.000 will not be supported. The direct beneficiaries must each bear their own contribution of at least 10% of the eligible costs.
- (30) The investment is disbursed after the report on expenditure of funds was submitted by the local authorities and checked by the Granting Authority.
- (31) Funding under the scheme cannot be combined with funding under other schemes at federal level or at Union level.

- (32) The funding comes from the overall budget of Lower Saxony.

2.8. Beneficiaries

- (33) In the direct investment model, the local and regional authorities or any other entity entrusted with public responsibility are direct beneficiaries. In the investment grant model, the direct beneficiaries are the undertakings that plan, build and operate the elements of the mobile passive infrastructure under the scheme (e.g. the masts, ducts, dark fibre) and may include the MNOs, the special construction companies (such as the tower companies) and fibre companies.
- (34) In the investment grant model, the beneficiaries will be selected following an open, transparent and non-discriminatory procedure in the framework of a public tender, with publication at national¹² and Union¹³ level.

2.9. Target areas

- (35) The scheme will provide support exclusively in areas where no mobile network is available or where only mobile networks providing 2G capabilities and below are available currently or within the next three years.
- (36) Areas that have to be covered by virtue of the coverage obligations attached to the rights of use radio spectrum for MNOs are not part of the target areas. Supported infrastructure will not be taken into account to meet such coverage obligations and will therefore not be reported as such to the Federal Network Agency. MNOs using the supported infrastructure must make a commitment in this regard and confirm it in writing to the Federal Network Agency and the Granting Authority. This written commitment will be sent to the Federal Network Agency together with a documentation of (i) the current situation, and (ii) the planned situation following construction of the passive infrastructure and activation of stations in the target areas. This mechanism ensures that the aid scheme will complement the existing mobile coverage obligations imposed on the MNOs.

2.10. Mapping

- (37) The Broadband Centre of Lower Saxony-Bremen ("*Breitbandzentrum*") publishes a map covering the current state of mobile coverage and the planned roll-out over the next three years in Lower Saxony.¹⁴ Any funding under the scheme will be based on this map - a Broadband Atlas of mobile coverage in Lower Saxony.
- (38) This map identifies all mobile coverage gaps in Lower Saxony, i.e. areas in which no mobile passive infrastructure capable of supporting 4G and above is present currently or within the next 3 years. These areas, identified in the map as mobile coverage gaps, constitute potential target areas of the scheme. The determination of the final target areas for mobile network development will be done by the *Breitbandzentrum* only after conclusion of corresponding public consultations. This mapping will be updated once a year in order to take the progress of newly built and planned infrastructure into account.

¹² At: www.breitbandausschreibungen.de

¹³ At: www.ted.europa.eu

¹⁴ <http://www.breitband-Niedersachsen.de>.

- (39) Before the start of any individual investment project, the status of the area will be checked on the basis of the yearly updated mapping and the results of the public consultations (described below).

2.11. Public consultations

- (40) An initial public consultation took place between 6 August and 4 September 2020. Following the modification of the scheme, another public consultation took place between 4 December 2020 and 1 January 2021.¹⁵ The consultation contained a summary of the planned support measure, a description of the potentially targeted areas as well as a link to the previously performed mapping. The market operators were specifically asked for its view on the proposed measure.
- (41) The public consultations were each published for four weeks on the website of Ministry of Economy of Lower Saxony.¹⁶
- (42) During the second public consultation, Lower Saxony received one submission. The respondent raised concerns: (i) about the entities entrusted with public responsibilities being eligible as direct beneficiaries. As a result, as indicated in recital (23), specific safeguards are put in place so that the impact on competition is very limited. Notably, these entities cannot engage in competition at the retail level with providers of mobile voice and data services; (ii) with regard to the accuracy of the public consultations, where the Lower Saxony Authorities confirmed that they will organise project-specific public consultation (see recitals (43) and (44) below), and (iii) with regard to the use of the existing infrastructure where the Lower Saxony Authorities explained that overbuilding of existing infrastructure shall be avoided. If existing, suitable infrastructure is not used or if the market participants cannot reach an agreement with regard to the access conditions to the existing infrastructure, this should be reported to the Granting Authority. In case the dispute cannot be solved by the Granting Authority, the Federal Network Agency will take the final decision.
- (43) Following the public consultations, the local authorities with mobile coverage gaps in their territories, as identified by the map of mobile coverage in Lower Saxony, can declare their interest in receiving support. On the basis of the submitted declarations of interest the local authorities concerned will initiate specific public consultations. All specific public consultations will be published on both the local, and the central online portals.¹⁷ In the framework of these public consultations, all interested parties will be invited to comment and be requested to inform the Granting Authority within 8 weeks of their development plans in the mobile coverage gaps of these territories in the three coming years starting from the date of the initiation of the relevant specific public consultation. MNOs, in particular, are expected to outline their potential plans concerning the development of mobile network in those areas.
- (44) These specific public consultations are carried out in advance of the individual funding projects and are a prerequisite for a subsequent aid application. These specific public consultations will ensure that up-to-date mobile networks

¹⁵ https://www.mw.niedersachsen.de/startseite/themen/digitalisierung/mobilfunkausbau_niedersachsen/

¹⁶ <https://www.mw.niedersachsen.de>

¹⁷ Also on the website of *Breitbandzentrum* at: <https://www.bznb.de>

development projects are taken into account and thus ensure effective protection of investment and competition.

2.12. Competitive selection procedure

- (45) Lower Saxony Authorities confirmed that all selection procedures undertaken in the framework of the two models of implementation will be based on the economically most advantageous offer.
- (46) To this end, the local authorities will conduct transparent and non-discriminatory procedures in line with the spirit and the principles of the applicable public procurement rules. The supported passive infrastructure will be designed in such way that it can be used by all interested MNOs.
- (47) The Lower Saxony Authorities committed to ensure that the following requirements will be fulfilled for all selection procedures:
- All selection procedures must be organised in line with the spirit and principles of the EU public procurement directives.¹⁸
 - All selection procedures must ensure transparency for all interested bidders.
 - All selection procedures must ensure equal and non-discriminatory treatment of all bidders and must be based on objective criteria.
 - The call for tenders will be published at the regional, national and Union level.¹⁹
- (48) In cases where a competitive selection process does not generate at least three bidders, the Granting Authority will use the services of an external auditor for the assessment of the bid, in particular regarding cost calculations.

2.13. Economically most advantageous offer

- (49) Offers received in the course of the competitive selection procedures will be assessed using qualitative award criteria established and published in advance by the Granting Authority.
- (50) To this end, the Granting Authority will define minimum standards for the infrastructure to be built. This includes, inter alia, minimum bandwidths, but also the sizing of ducts, in order to ensure that all potential wholesale users can use the mobile passive infrastructure. In addition, the Granting Authority ensures that the tenders are carried out with at least three bidders. If this is not the case, it will have the selected offer tested by an external auditor.
- (51) The participants to the tender need to provide a detailed cost-benefit analysis to be able to participate in the call for tenders. To this end, the development measures

¹⁸ 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.

¹⁹ On the regional level, the call for tender will be published on the website www.BZNB.de. On the national level the call for tenders will be published on the central website www.breitbandausschreibungen.de. On the EU level, it will be published on: www.ted.europa.eu.

necessary for the implementation of the project and their costs must be set out, together with the expected demand and revenues.

- (52) The award criteria are: the requested State aid amount, technical specifications, timeframe for deployment, rental prices they expect for each site, possible synergies with existing infrastructure, impact of the proposed solution on competition, costs for the construction and operation, including the maintenance of the rolled-out infrastructure. The qualitative criteria have to be weighed against the requested aid amount. In order to minimise the amount of aid to be granted, the public authorities will award most priority points to the applicant who, at similar if not identical quality conditions (including technical specifications, timeframe for deployment, etc.), requests the lowest amount of aid. Bidders proposing a wholesale-only model will receive additional points.

2.14. Step change

- (53) The Lower Saxony Authorities confirmed that the measure will ensure a "step change" in that the investments in (at least) 4G networks will bring significant new capabilities to the market in terms of mobile services availability, capacity, speeds, latency and competition, compared to existing as well as concretely planned commercial network roll-outs.
- (54) A significant improvement of the mobile coverage is achieved by providing 4G (and above) capabilities where there is currently no mobile coverage or only 2G and below.
- (55) In terms of mobile data services, 2G technology allows for speeds merely up to 53.6 Kbps. The aim of the measure is to provide 4G capabilities of at least 50 Mbps download per antenna sector (1 Mbit = 1000 Kbit). This means that the implementation of the planned scheme will reach thousand times the data rates currently available.
- (56) This allows for the provision of services currently unavailable to the Union citizens living, working or travelling in the target areas. These include, for example, the possibility of accessing frequently used applications such as navigation apps, news portals, e-mail retrieval and or applications that are even more data-intensive, such as streaming services.
- (57) In terms of latency, i.e. the time it takes to transmit a data packet, a 2G network can have a latency of up to 1000 milliseconds. A 4G (and above) network would allow for a latency, under optimal conditions, of between 20 and 50 milliseconds which would make it up to 50 times faster than the latency currently available. Time-critical applications are thus only applicable with the 4G standard and above.
- (58) The measure will also support backhaul deployment in areas where no backhaul is present or where it is not suitable for enabling 4G capabilities. The backhaul capabilities will therefore also significantly improve.

2.15. Technological neutrality

- (59) Any local or regional authorities or any other entity entrusted with public responsibility as well as any undertaking that plans, builds and operates the elements of the mobile passive infrastructure capable of supporting speeds of at

least 50 Mbps download per antenna sector and latency of max. 150 milliseconds are eligible as beneficiaries. Also, wholesale access will be offered on open and non-discriminatory terms in line with the principle of technological neutrality.

2.16. Use of existing infrastructure

- (60) All existing mobile masts in Germany can be viewed on the Federal Network Agency's website database.²⁰ Mobile network providers will indicate the deployment of any mobile passive infrastructure planned within the coming three years in the framework of the public consultations carried out in Lower Saxony.
- (61) In the planning process for the construction of the mobile passive infrastructure, the Granting Authority will take into account all existing and reported infrastructure in the relevant target areas that can be accessed and used to realize synergies. This would help reduce investment costs for the development of the network and minimise the amount of public funding needed for each project. Specifically in the investment grant model, the Granting Authority will include to the best extent possible all available information on existing infrastructure in the procurement documents (in particular in "invitations to tender").
- (62) Bidders should explicitly include existing infrastructure in their network deployment planning. This applies in particular to the use of existing infrastructures for the fibre-based connection of the base stations. The information from the central information office of the Federal Government (in particular, the information from the Federal Infrastructure Atlas) must be taken into account as part of the network deployment planning. Such information covers planning information (overview of facilities that can be used for electronic communication purposes), shared use information (for the shared use of passive public utility infrastructure) and information on civil works (for the coordination of civil works on public utility networks).
- (63) Any operator that owns or controls infrastructure (irrespective of whether it is actually used) in the target area and which wishes to participate in the competitive selection procedure will (i) inform the local authorities about the existence of that infrastructure during the public consultation and (ii) provide all relevant information to other bidders at a point in time which would allow the latter to include such infrastructure in their bid. Where a bidder does not provide this information, it will be excluded from the procurement procedure. The procurement procedure will be conducted in accordance with a timetable that allows sufficient time for bidders to compile bids on the basis of information provided by other suppliers, and allows for any non-compliance issues to be resolved efficiently. All operators participating in the public consultation will be required to provide data on the available existing infrastructure that may be used for building the network, including conditions and prices for access.

2.17. Wholesale access conditions

- (64) Lower Saxony Authorities will ensure that the beneficiaries will provide wholesale access on an open, non-discriminatory basis.

²⁰ <http://emf3.bundesnetzagentur.de/karte/>

- (65) With regard to the backhaul, the Granting Authority specified that ducts financed under the measure shall be large enough to cater for at least all MNOs present on the market.
- (66) The direct beneficiaries will provide passive wholesale access, including but not limited to: access to masts, ducts, dark fibre, electricity connections, and all passive equipment supported by aid. Access to all (new and existing) passive network infrastructure will be granted for an unlimited amount of time.
- (67) The Granting Authority will clearly define the conditions for the beneficiaries to ensure wholesale access to third-party operators and will ensure that the requirements for wholesale access will be outlined in a transparent manner in the tender documents. The same access conditions will apply on the entirety of the supported network including the part of it where existing infrastructure will be used.
- (68) The Commission further notes that Germany has transposed Directive 2014/61/EU²¹ into German law²², and in particular its Articles 3(2) and 3(4) which ensure that any network operator, within the meaning of that Directive, will meet all reasonable requests for access to its physical infrastructure under fair and reasonable terms and conditions, including price, with a view to deploying elements of high-speed electronic communications networks and that disputes regarding access to such physical infrastructure can be referred to the competent national dispute settlement body.²³
- (69) The exact rental fee to be paid by the access seekers will, for each project, be subject to negotiation between the access seekers and the direct beneficiary and may therefore be different for each project/location. However, all access seekers, including the direct beneficiaries if active on this level, will always pay the same rental fee for each location (mobile site which also includes the mobile backhaul i.e. ducts and dark fibre connecting the masts). That is to say, whilst rental fees may differ from location to location, at the same location the fees are applied in a non-discriminatory manner to all access seekers.
- (70) All information will be permanently available on the website of the Granting Authority.²⁴
- (71) Disputes among operators regarding wholesale access conditions, including pricing, if they are not solved by the Granting Authority will be submitted to the Federal Network Agency that should take the final decision.
- (72) Operation of the subsidised mobile passive infrastructure will be ensured for at least seven years (earmarking period). The access obligation shall not expire after the expiry of the earmarking period. In the event of a sale, the open access obligation shall be transferred to the buyer.

²¹ Directive 2014/61/EU of the European Parliament and of the Council of 15 May 2014 on measures to reduce the cost of deploying high-speed electronic communications networks, OJ L 155, 23.5.2014, p. 1.

²² Gesetz zur Erleichterung des Ausbaus digitaler Hochgeschwindigkeitsnetze (DigiNetzG) vom 4. November 2016, Bgbl. 2016 Teil I Nr. 52, S. 2473.

²³ Cf. Sections 77d(1) and (2) and 77n(1) of the Telekommunikationsgesetz (TKG) vom 22. Juni 2004.

²⁴ www.nbank.de.

2.18. National Regulatory Authority

- (73) The Federal Network Agency (*Bundesnetzagentur*) has been informed of the planned support scheme and was given the possibility to comment, took note of it but had no comments.
- (74) In addition, the Federal Network Agency assumes a dispute settlement role in the implementation of open access (including the rental fees) and access to existing infrastructure. In case the Granting Authority cannot solve disputes, Federal Network Agency's dispute resolution chambers will decide.
- (75) Also, all MNOs using infrastructure supported under the aid scheme must commit not to notify this infrastructure as part of their coverage obligations and confirm in writing this commitment to the State Government of Lower Saxony. This commitment, together with a documentation of the current and planned situation after the construction of the mobile passive infrastructure will be sent to the Federal Network Agency. This mechanism ensures that the support programme is indeed complementary to the existing mobile networks coverage and is not used to comply with the coverage obligations attached to spectrum use.

2.19. Clawback and monitoring mechanism

- (76) The correct use of the funds will be monitored by the Granting Authority. In case of improper use, those funds will be recovered by the Granting Authority.
- (77) The Granting Authority will monitor in particular the tendering processes and the construction of the mobile passive infrastructure as well as the improvement of the mobile coverage in the target areas.
- (78) A clawback mechanism is not necessary in the direct investment model.
- (79) Lower Saxony will implement a clawback mechanism with regard to the operators taking part in the investment grant model. The clawback mechanism will be based on rental revenues and will be only implemented in projects with an aid amount of EUR 3 million or more.
- (80) The clawback mechanism will be linked to unanticipated gains (rental revenues) by the companies which are obliged to present to the local authorities as part of their bid in the competitive selection process. If, after seven years, the actual rental revenues of the entities granting access to the infrastructure exceed the expected rental revenues by more than 30%, the excessive gains have to be paid to the respective local authority. If a reimbursement is made, the local authority shall reimburse the Granting Authority the corresponding part of the authorised grant.

2.20. Transparency and reporting of the measure

- (81) Lower Saxony will ensure, for the entire duration of the project, that all transparency requirements are met at each phase of the project. The relevant information about the mobile network expansion will be published on the regional website²⁵ which will allow easy access to all relevant acts and information regarding the project.

²⁵ <https://www.mw.niedersachsen.de>

- (82) The following information will be published: the full text of the approved aid scheme and its implementing provisions, the date of granting, the name of the aid beneficiaries, aid amounts and aid intensities, the technology used. This information must remain published for at least ten years and be available for the general public without restrictions.
- (83) The Granting Authority as well as the beneficiaries are obliged to provide entitled third parties with comprehensive and non-discriminatory access to information on the mobile passive infrastructure (including electricity connection and masts) deployed under the measure, which will facilitate other operators' access to the infrastructure.
- (84) The Granting Authority and the beneficiaries will also publish detailed information concerning wholesale access conditions and prices.
- (85) Lower Saxony will report to the Commission about the application and the progress of the measure every year. The report will contain the following key data concerning the aid project: the information already published in accordance with the transparency requirements (as above); the date on which the networks are expected to become operational; the wholesale products and access conditions, including pricing; the number of parties seeking access and service providers in the network; information regarding any disputes regarding the project, if any, and in particular concerning wholesale access, as well as how such disputes were resolved.

3. ASSESSMENT OF THE MEASURE

3.1. Existence of aid

- (86) According to Article 107(1) of the Treaty on the Functioning of the European Union (TFEU), "[s]ave as otherwise provided in the Treaties, any aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods shall, in so far as it affects trade between Member States, be incompatible with the internal market."
- (87) It follows that in order for a measure to qualify as State aid, the following cumulative conditions have to be met: (i) the beneficiary of the measure has to be an 'undertaking', (ii) the measure has to be granted through State resources and be imputable to the State, (iii) the measure has to confer an economic advantage, (iv) which is selective, (v) and has an effect on trade and competition.

3.1.1. Undertaking

- (88) Undertakings within the meaning of Article 107(1) TFEU are entities engaged in an economic activity, regardless of their legal status and the way in which they are financed.²⁶
- (89) The construction of mobile passive infrastructure with a view of its future commercial exploitation constitutes an economic activity. The operation of an electronic communication network, even if limited to the provision of passive network elements, is an economic activity within the meaning of Article 107(1)

²⁶ Judgment of the Court of Justice of 10 January 2006, Cassa di Risparmio di Firenze SpA and Others, C-222/04, ECLI:EU:C:2006:8, paragraph 107.

TFEU.²⁷ As direct beneficiaries, the local authorities (in the direct investment model) and the MNOs, the specialised construction companies (such as the tower companies) or the fibre optic companies (in the investment grant model) engage in activities consisting in offering goods and services on the electronic communications market i.e. construction and operation of passive mobile infrastructure. They are thereby considered undertakings within the meaning of Article 107(1) TFEU.

3.1.2. *State resources and imputability*

(90) 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.²⁸ Resources of local and regional authorities and other entities entrusted with public responsibilities are State resources for the purposes of Article 107(1) of the TFEU.²⁹ As described in recital (32), the measure is financed from the budget of Lower Saxony. The financing is allocated to the beneficiaries under the control of the Granting Authority, which, as shown in recital (18), has a public mandate to provide support for (mobile) passive infrastructure measures.

(91) Hence, State resources are involved and the measure is imputable to the State.

3.1.3. *Economic advantage*

(92) An advantage, within the meaning of Article 107(1) TFEU, is any economic benefit which an undertaking could not have obtained under normal market conditions, that is to say in the absence of State intervention.³⁰

(93) Direct beneficiaries will be granted direct grants amounting up to EUR 70 million for the rolling out of mobile passive infrastructure in Lower Saxony. This enables the direct beneficiaries to provide goods and services in the target areas on conditions that would otherwise not be available.

(94) The measure thus confers an advantage as compared to companies investing only on the basis of private funds under the same technical, commercial and legal conditions i.e. in the liberalised market.

(95) It is hence considered that Lower Saxony grants an advantage to the direct beneficiaries which would not have occurred in normal market conditions.

3.1.4. *Selectivity*

(96) To fall within the scope of Article 107(1) TFEU, a State measure must favour "certain undertakings or the production of certain goods". In the case at hand, the measure is aimed at the direct beneficiaries.

²⁷ Judgment by the General Court of 24 March 2011, *Mitteldeutsche Flughafen and Flughafen Leipzig/Halle v Commission*, T-455/08, ECLI:EU:T:2011:117, paragraph 90 and following.

²⁸ Case C-482/99 *France v Commission* (hereafter: "*Stardust Marine*") ECLI:EU:C:2002:294.

²⁹ Judgment of 12 May 2011 in Joined Cases T-267/08 and T-279/08 *Nord-Pas-de-Calais*, ECLI:EU:T:2011:209, paragraph 108.

³⁰ Judgment of the Court of Justice of 29 April 1999, *Spain v Commission*, C-342/96, ECLI:EU:C:1999:210, paragraph 41.

- (97) The measure thus targets only certain undertakings that are active in the electronic communications sector, in particular MNOs and special construction companies or fibre optic companies specialised in the provision of passive infrastructure for mobile networks. It excludes, in principle, other electronic communications network and service providers, such as the fixed network or services providers, or other construction and fibre companies active rather in the general industrial or other sectors of the construction industry, when these cannot provide the mobile communications services.
- (98) As concerns the identification of the particular legal framework against which selectivity can be assessed, it is noted that the construction and operation of mobile networks is a liberalised economic activity usually conducted by commercial operators on the basis of private investments in the market. In such a framework, economic activities normally do not receive subsidies. Indeed, the deployment and operation of mobile passive infrastructure in the target areas is not justified by the nature of the liberalised market and the regulatory framework. In any event, the features of this legal framework cannot provide any justification for the granting of subsidies.
- (99) The measure is moreover territorially selective. The scheme is set up with the aim of rolling out mobile passive infrastructure in the target areas in Lower Saxony.
- (100) The measure is therefore selective.

3.1.5. Effect on trade and competition

- (101) As regards the construction of infrastructure, the Commission considers that an effect on trade between Member States or a distortion of competition is normally excluded in cases where at the same time (i) an infrastructure typically faces no direct competition, (ii) private financing is insignificant in the sector and Member State concerned and (iii) the infrastructure is not designed to selectively favour a specific undertaking or sector but provides benefits for society at large.
- (102) The present case concerns the development of mobile passive infrastructure to be used only for the provision of mobile services in target areas in Lower Saxony. When looking at the mobile communications sector in Germany in general, it must be concluded that there is significant private financing of the deployment of mobile passive infrastructure all over the country.
- (103) Also, the markets for electronic communications networks and services are open to competition between operators, which generally engage in activities that are subject to trade between Member States. Two of the three MNOs in Germany belong to groups of companies with headquarters in another Member State. Also, the construction and operation of the mobile passive infrastructure may be delivered by a company from other Member States having cross-border activities.
- (104) It must therefore be considered that the support scheme in question is capable of distorting competition and has an effect on trade between Member States.

3.1.6. Conclusion

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

3.2. Compatibility

- (106) The Commission has to assess whether the aid can be found compatible with the internal market.
- (107) Given the specificity of mobile networks (as opposed to the fixed networks which do not allow for the provision of voice and data services “on the move”³¹), the measure is not directly assessed under the Broadband Guidelines.³² Therefore, the Commission assesses the compatibility of the scheme pursuant to Article 107(3)(c) TFEU and in analogue application of the Broadband Guidelines, where appropriate.³³
- (108) Article 107(3) TFEU provides for certain exemptions to the general rule set out in Article 107(1) TFEU that State aid is not compatible with the internal market. In particular, pursuant Article 107(3)(c) TFEU it may be considered compatible : "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. Thus, in order to be declared compatible, first, the aid must be intended to facilitate the development of certain economic activities or of certain economic areas and, second, the aid must not adversely affect trading conditions to an extent contrary to the common interest.³⁴
- (109) Under the first condition, the Commission examines whether the aid is intended to facilitate the development of certain economic activities. Under the second condition, the Commission weighs up the positive effects of the planned aid for the development of the activities that the aid is intended to support and the negative effects that the aid may have on the internal market, in terms of distortions of competition and adverse effects on trade caused by the aid. In this regard, and also by analogy with the Broadband Guidelines, the Commission assesses whether the aid remedies market failures or important inequalities, is appropriate as a policy instrument, and is necessary as well as proportionate.

3.2.1. Contribution to the development of an economic activity

- (110) The Lower Saxony Authorities have submitted that the scheme supports the development of an economic activity consisting in the deployment and operation of

³¹ Performance gaps persist between fixed and mobile technologies in terms of capabilities (speed, latency, sensitivity to external electromagnetic and meteorological interferences). Therefore, mobile broadband was found to be complementary (not substitutable) to fixed broadband. See Study prepared for the European Commission DG Communications Networks, Content & Technology by WIK Consult, “Future electronic communications product and service markets subject to ex-ante regulation Recommendation on relevant markets, Final report” page 29-33, (“WIK Study”) available at: <https://ec.europa.eu/digital-single-market/en/news/study-future-electronic-communications-product-and-service-markets-subject-ex-ante-regulation>. The Commission reach a similar conclusion underlining also differences in price, stability on the network connection and secured access, in merger case M.8864 Vodafone / Certain Liberty Global Assets, paragraph 53, available at:

https://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=2_M_8864

³² Communication from the Commission – EU Guidelines for the application of State aid rules in relation to the rapid deployment of broadband networks, OJ C 25, 26.1.2013, p.1 (hereafter the "Broadband Guidelines").

³³ See also State Aid SA.48324 (2018/N) – Germany Mobilfunk Bayern available at: https://ec.europa.eu/competition/state_aid/cases/275029/275029_2029861_118_2.pdf.

³⁴ Judgment of 22 September 2020, Case C-594/18 P, Austria v Commission (Hinkley Point C), ECLI:EU:C:2020:742, para. 19.

mobile passive infrastructure for the provision of high-performance mobile voice and data services of 4G and above in the target areas. To this end, the private operators will be incentivised to deploy elements of mobile passive infrastructure such as foundations, masts, electricity connections, ducts, dark fibre or access routes and also contribute with at least 10% of the costs in areas where they would have not invested otherwise. The MNOs would be also incentivised to provide high-performance mobile voice and data services in areas where they would have not served otherwise.

- (111) Indeed, as shown in recital (35) and sections 2.10 and 2.11, the scheme would facilitated the development of the above mentioned economic activity in areas where such activity was either not present or only ensured at a level that would not fulfil the needs of a modern society. In those areas the private operators would not invest within the next 3 years absent public intervention.
- (112) To ensure an incentive effect for the development of the indicated economic activity, operators in the German market will be asked if they intend to invest in mobile passive infrastructure in the scheme's potential target areas during the next three years. Also, Lower Saxony Authorities will ensure that the target areas would have not been supplied on the basis of the coverage obligations attached to spectrum use. Only in case such investments are not foreseen in the target areas can the aid be granted.
- (113) The Commission therefore considers the aid scheme to have an incentive effect to further develop this economic activity in a manner that promotes connectivity and access to high-performance mobile voice and data services by citizens and businesses in the Union.

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

3.2.2.1. Positive effects of the aid

- (114) The scheme will facilitate access to high-performance mobile voice and data services which forms a part of the fundamental needs of a modern society. It will ensure such access for up to 0.3% of households and 1.3% of territory in Lower Saxony (recital (13)). In such areas, internet connectivity can play an essential role in preventing digital divide, isolation and depopulation.
- (115) Many Europeans own a smartphone but cannot always use its full potential given the gaps in mobile coverage or poor service quality. This also holds true for the aid scheme's potential target areas. The measure will allow for people living, working or travelling in the target areas to receive access to high-performance mobile voice and data services. It will also allow people entering and moving through such areas to continue communicating seamlessly.
- (116) Also, mobile coverage gaps pose obstacles to the work of emergency doctors who regularly have to use their mobile phones when in the car. The abrupt termination of telephone conversations when being into an area without mobile coverage can have serious consequences for patients. Other examples include cardiac pacemakers, which can be digitally monitored, provided they are reliably connected to the internet.

- (117) This can be seen against a wider ambition that there should be access to mobile data connectivity throughout the territory, in all places where people live, work, travel and gather.³⁵ The European Electronic Communication Code also identifies the general objective of promoting connectivity and access to, and take-up of, very high capacity networks, including mobile networks, by all citizens and businesses of the Union.³⁶
- (118) Therefore, public intervention for rolling out mobile passive infrastructure would be beneficial for the target areas.

3.2.2.2. Limited negative effects: the aid measure does not unduly affect trading conditions to an extent contrary to the common interest

- (119) Article 107(3)(c) requires the assessment of any negative effects on competition and on trade in the relevant product markets, that is, in this case, concerning the deployment and operation of and access to mobile passive infrastructure, and the provision of mobile voice and data services .
- (120) When designing the measure, Lower Saxony Authorities ensured that the negative effects of the measure are limited. Indeed, Lower Saxony Authorities ensured intervention in market failures areas only, and ensured that the State aid is (a) necessary, (b) appropriate as a policy instrument, (c) proportionate and (d) transparent.
- (a) Necessity of the aid: absence of market delivery due to market failures or important inequalities
- (121) A market failure exists if markets, left on their own, without intervention, fail to deliver an efficient outcome for society. This may arise, for instance, when certain investments are not being undertaken even though the economic benefit for society exceeds the cost.
- (122) Existing and future applications of the Gigabit society rely on performant mobile networks that are available on a balanced geographical basis. The need for mobility but also for having access to information “on the go”, together with the development of new forms of economic activity and ways of working which rely on seamless online access, require both data and voice mobile services with increasingly higher performance. In the potential target areas there is either no mobile network or only a 2G network, which cannot satisfy the above mentioned needs.
- (123) As shown by the current mapping and verified in the public consultation, private companies do not find it profitable to invest in remote or less densely populated areas of Lower Saxony. Also, the target areas fall outside of the coverage obligations attached to spectrum use. Indeed, as shown in recital (36), the MNOs will not report subsidised infrastructure to the Federal Network Agency under their coverage obligations arising out of their spectrum rights of use. Furthermore,

³⁵ Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions – Connectivity for a Competitive Digital Single Market: Towards a European Gigabit Society, COM(2016) 587 final, (“Gigabit Communication”) page 8.

³⁶ See Article 3 (2) (a) and (d) of Directive (EU) 2018/1972 of the European Parliament and of the Council of 11 December 2018 establishing the European Electronic Communications Code.

potential fixed broadband services in those areas cannot meet the needs covered by mobile services, namely to provide access to voice and data mobile services "on the move". Fixed broadband was found to be complementary (not substitutable) to mobile broadband.³⁷

- (124) It can therefore be concluded that the notified measure contributes to address a market failure in sparsely populated and topographically difficult areas of Lower Saxony where private operators do not provide mobile services with technologies above 2G and are not willing to invest on a commercial basis in the near future, resulting in a positive development of the economic activity at issue.

(b) Appropriateness of State aid as a policy instrument and the design of the measure

- (125) It should also be assessed whether State aid is an appropriate policy instrument to further develop the economic activity at issue or whether there are alternative, better-placed instruments. Alternative instruments include mobile coverage obligations attached to spectrum licenses and demand-side measures.
- (126) Mobile coverage obligations aiming at promoting further mobile coverage of the German territory have been attached to spectrum rights of use assigned to the mobile operators. By virtue of these obligations, by the end of 2019 97% of the households in each Federal State in Germany must have mobile coverage with at least 50 Mbps per antenna sector. By the end of 2022, at least 98% of households per Land have to be covered with at least 100 Mbps per antenna sector. Compliance with these obligations, however, will not provide full geographical coverage and, thus, will not be able to ensure a proper development of this economic activity within the target areas.
- (127) Furthermore, demand-side measures are not appropriate means to develop the economic activity. In fact, the required mobile passive infrastructure for the provision of mobile services on 4G (or above) networks in the target areas does not yet exist and its construction would not be economically viable for network providers due to the low population density in these areas.
- (128) The Commission therefore considers the aid scheme to be an appropriate policy instrument for developing the economic activity by closing mobile coverage gaps in Lower Saxony.

(c) Proportionality: aid limited to the minimum necessary

- (129) The Lower Saxony Authorities have designed the scheme in such a way as to minimise the State aid involved and potential distortions of competition arising from the public intervention. In this respect, and by analogy with the Broadband Guidelines³⁸ (see also recital (107)) the Commission notes the following elements in the design of the State aid scheme:
- (130) **Detailed mapping and public consultation:** Lower Saxony identified all potential target areas in a map displaying the mobile coverage in Lower Saxony (see recitals (37) and (38)). Also, the main characteristics of the measure have been made public

³⁷ See WIK Study, page 29-33 and Merger case M.8864 Vodafone/Certain Liberty Global Assets, paragraph 53.

³⁸ See in particular recital 78 of the Broadband Guidelines.

in the public consultations of 6 August 2020 and 4 December 2020, as described in recitals (40) to (41). The final target areas will be identified following specific public consultations (see recitals (43) and (44)). The Commission considers this to be sufficient to ensure proper publicity and identify which geographic areas will be covered by the measure.

- (131) **Competitive selection process and most economically advantageous offer:** Competitive selection processes as described in recitals (45) to (52) ensure that there is transparency for all investors wishing to bid for the rolling out and/or operation of the subsidised projects.
- (132) As mentioned in recital (23), in the direct investment model, where the local and regional authorities and other entities entrusted with public responsibilities deploy and operate the network directly, they are not chosen by way of a competitive selection process. However, the Commission considers that the necessary safeguards are in place to ensure that no distortion of competition occurs. In particular, the local and regional authorities and other entities entrusted with the public responsibilities shall not engage in competition at the retail level and shall ensure accounting separation between the funds used for the operation of the network and other funds at their disposal. They will moreover select the companies that will build the passive infrastructure via an open, transparent and non-discriminatory competitive selection procedure.
- (133) In the investment gap model, the beneficiaries will be chosen in a fair, transparent and non-discriminatory selection procedure in line with the spirit and the principles of the applicable rules on public procurement as described in recitals (45) to (48). On the basis of the detailed explanation in recitals (49) to (52) above, the Commission is satisfied that all tender participants will be assessed according to pre-established qualitative award criteria that will be weighed against the price offered in the bid.
- (134) The Commission considers this to be sufficient to ensure for a competitive selection processes and the most economically advantageous offers.
- (135) **Step change:** A step change can be demonstrated if, as the result of the public intervention: (1) significant new investments are undertaken by the beneficiaries and (2) the subsidised infrastructure brings significant new capabilities to the market in terms of service availability, capacity, speeds and/or competition. As mentioned in recitals (53) to (58), the measure allows for significant new investments capable of providing high-performance voice and data mobile services in areas where no services or only voice services based on 2G technology were offered. It also allows for upgrading the backhaul infrastructure to provide for high-performance voice and data mobile services. The aid is therefore not marginal and clearly allows for a step change.
- (136) **Technological neutrality:** As described in recital (59), any technology capable of supporting the provision of mobile broadband services at speeds of at least 50 Mbps download per antenna sector and latency of max. 150 milliseconds is eligible. Also, wholesale access will be offered on open and non-discriminatory terms in line with the principle of technological neutrality.
- (137) At the current stage, LTE technology and above are capable to offer the required speed and latency per antenna sector. LTE-based mobile networks and the

following generations offer a superior performance for the combination of the essential qualitative criteria of voice and data transmission as well as unrestricted mobility. Namely, the LTE and following generations of mobile networks fulfil the following requirements: (i) they enable operators to provide services of advanced voice communication and high-speed data transmission, (ii) allow the use of a single device widely available for receiving both types of services, (iii) allow a wider range of roaming possibilities and (iv) can operate on the basis of increasingly more available (also re-farmed) spectrum allocations.³⁹

- (138) In view of the requirements of Lower Saxony, other possible wireless technologies do not seem generally capable of offering an access equivalent, in terms of its characteristics and quality, to the access provided by mobile networks.
- (139) WIFI technologies are, as a general rule, not equivalent as they do not provide full mobility. LTE technology networks (and above) offer much more coverage and wider reach than WIFI solutions, which force users to depend upon hotspots in each area and to switch after a short distance to another hotspot and possibly provider. With (at least) LTE technology, on the other hand, users will be afforded seamless wide-area connectivity. In other words, whilst users would have to log in to a new WIFI network once they are leaving their current network, connectivity with LTE technology is not interrupted when moving into another antenna sector.
- (140) WIFI networks are also inferior in terms of online security, which is particularly important for business users. Whilst LTE (and above) networks offer enhanced privacy, security, and safety, WIFI solutions do not, especially on mobile devices. Finally, WIFI solutions have much higher latency and varying quality of the services offered.
- (141) As regards satellite technology solutions, whilst being a full mobile solution from the technological point of view⁴⁰, it has become in practice rather a substitute for fixed-line electronic communications services since the devices are of larger size and weight than mobile devices, which makes them unsuitable for the use as mass market mobile device in the gigabit society. A user using a mobile device with one of the nation-wide mobile networks, who enters one of the target areas, would not be able to use that device by connecting to the satellite. He would therefore not be able to continue communicating seamlessly if a satellite connection were the only one available in the target area. Finally, in addition to their much higher latency, mobile satellite services and devices are generally also much more expensive than LTE services and devices, which raises issues of affordability.
- (142) The Commission considers this to be sufficient to ensure the respect of the principle of technology neutrality.
- (143) **Use of existing infrastructure:** As stated in recitals (60) to (63), the Lower Saxony Authorities encourage recourse to any existing infrastructure so as to avoid

³⁹ The envisaged deployment of LTE corresponds to the requirement laid down in Article 6(3) of the Commission's Radio Spectrum Policy Programme (Decision No 243/2012/EU of the European Parliament and of the Council of 14 March 2012, establishing a multiannual radio spectrum policy programme, OJ L 81, 21.3.2012, p.7) to foster network upgrades to the latest most efficient technology.

⁴⁰ Mostly used in areas not covered by mobile communications services, for example on oceans, in deserts and other regions without human settlement.

unnecessary and wasteful duplication of resources and to reduce the amount of public funding.

- (144) The Lower Saxony Authorities clarified that, in addition to the mapping and public consultation exercises, there will also be public access to the database encompassing all existing mobile masts in Germany.⁴¹
- (145) In the planning process for the construction of the mobile passive infrastructure, the Granting Authority will take into account all existing infrastructure in the relevant target areas that can be accessed and used to realize synergies. Also, the option of upgrading existing masts will be duly considered in each single project.
- (146) The Commission considers that this approach allows for finding the best and most cost-efficient solution and for avoiding unnecessary duplication of infrastructure.
- (147) **Wholesale access and pricing:** As explained above in recitals (64) to (72), all interested parties will have fair, transparent and non-discriminatory access to the subsidised mobile passive infrastructure. The rent for using the mobile passive infrastructure is in all cases subject to negotiation between the mobile passive infrastructure providers and the MNOs.
- (148) Effective wholesale access to the mobile passive infrastructure will not be limited in time. The same access conditions will apply on the entirety of the network including 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.
- (149) The Commission considers this to be sufficient to ensure for a fair, transparent and non-discriminatory access to the subsidised mobile passive infrastructure.
- (150) **Monitoring and clawback mechanism:** As shown in recital (76), the Granting Authority shall closely monitor the implementation of aid schemes during the entire duration of the projects.
- (151) Concerning the clawback, as shown in recitals (79) and (80), the Lower Saxony Authorities will implement a clawback mechanism. This will guarantee that direct beneficiaries cannot generate unreasonably excessive profits.

(d) Transparency and reporting

- (152) The Lower Saxony Authorities shall publish on a central website the necessary information as indicated in recitals (81) to (84). Direct beneficiaries are obliged to provide entitled third parties with comprehensive and non-discriminatory access to information on their infrastructure deployed under the aid scheme. Furthermore, as indicated in recital (85), for the duration of the aid scheme, the Lower Saxony Authorities will consolidate key information on the individual aid projects and report every year to the Commission.⁴² These are important tools to minimise the

⁴¹ <http://emf3.bundesnetzagentur.de/karte/>

⁴² Such information should at least include besides the information already made public on the central website, the date when the supported infrastructure is put into use, the number of mobile network providers using it, the number of houses covered by the mobile communications networks, take-up rates.

scheme's impact on the internal market since stakeholders or the Commission will be able to react against possible unlawful aid.

3.2.2.3. Conclusion on limited negative effects

- (153) As shown above, the aid scheme is designed to avoid crowding out private investment and its effects are confined to areas in Lower Saxony that are characterized by mobile coverage gaps, i.e. areas where no high-performance voice and data mobile services are available currently or within the following three years.
- (154) In the light of the above arguments, it can be concluded that negative effects of the aid scheme on the electronic communications market, if any, are limited. Thereby, the aid measure cannot unduly affect trading conditions to an extent contrary to the common interest.

3.2.2.4. Weighing the positive effects of the aid with any negative effects in terms of distortions of competition and adverse effects on trade

- (155) A carefully designed State aid scheme should ensure that the overall balance of the effects of the measure is positive in terms of avoiding adversely affecting trading conditions to an extent contrary to the common interest.
- (156) As shown in section 3.2.2.1., the subsidised mobile passive infrastructure will enable the provision of high-performance voice and data mobile services to end-users, and bring about significant mobile network capabilities in terms of availability and capacity in the target areas. It will thereby help reducing the inequalities and digital divide, allow for seamless communication and reduce obstacles in emergency situations. The measure will deliver broadband access “on the move”, better choice for consumers, higher quality and innovation. Hence, consumers' access to mobile voice and data services in these areas will be strongly improved.
- (157) Also, as shown in section 3.2.2.2, the Lower Saxony Authorities have designed the notified measure in such a way as to minimise the potential distortion of competition arising from the measure.
- (158) Furthermore, by granting access to the supported mobile passive infrastructure to all interested parties as described in recitals (64) to (69) the measure avoids the creation of local monopolies and aims at creating additional competition in target areas. The overall impact on competition is deemed to be positive. The negative effects on competition, if any, should be very limited.
- (159) In light of the above, the positive impact of the aid measure in developing the economic activity at issue outweighs any potential negative effects on competition and trade. On balance, the measure is in line with the objectives of Article 107 (3) (c) TFEU as it facilitates the deployment and operation of mobile passive infrastructure and the provision of high-performance mobile voice and data services of 4G and above. Moreover, such aid does not adversely affect competition to an extent contrary to the common interest.

4. CONCLUSION

The Commission has accordingly decided not to raise objections to the aid on the grounds that it is compatible with the internal market pursuant to Article 107(3)(c) of the Treaty on the Functioning of the European Union.

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

Yours faithfully,

For the Commission

Margrethe VESTAGER
Executive Vice-President