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**Subject: State aid N 336/2010 - Austria
Breitband Austria Zwanzigdreizehn**

Sir,

I. SUMMARY

- (1) I am pleased to be able to inform you that the European Commission has assessed the measure "Breitband Austria Zwanzigdreizehn" and decided not to raise objections as the State aid contained therein is compatible with Article 107 (3) c of the Treaty on the Functioning of the European Union (TFEU).

II. PROCEDURE

- (2) Austria notified on 28 July 2010 the above mentioned measure to the Commission, pursuant to Article 108 (3) of the TFEU. On 2 September 2010 the Commission requested additional information which was supplied by letters of 23 September and 15 October 2010.

III. DESCRIPTION OF THE MEASURE

- (3) **Context:** The broadband penetration rate in Austria was 22.7% in January 2010, below the EU average of 24.8%.¹ Austria has identified several areas where there is no broadband access at all available. These areas concern 0.72% of the population. Furthermore, the existing infrastructure in many, in particular rural, areas is not capable for high-speed broadband services. The establishment of next-generation access (NGA) networks and high-speed broadband services which rely on an optical fibre network is taking up in densely populated areas. However, in large parts of Austria, the establishment of high speed internet connections is not commercially viable for service providers.

¹ For details see the country report annexed to the 15th Progress Report on the Single European Electronic Communications Market – 2009, http://ec.europa.eu/information_society/policy/ecomms/doc/implementation_enforcement/annualreports/15threport/at.pdf.

- (4) Investments in infrastructure are expensive and necessitate a certain customer base to be profitable. The prospects for investments in broadband are poorer in more sparsely populated areas. The need for broadband is, however, just as great in these areas as in other parts of the country. Private operators have so far decided not to invest in these areas in the construction of high speed broadband connections, resulting in a "*digital divide*" between the urban and the peripheral areas.
- (5) **Objective:** The Austrian broadband strategy Austria Broadband Zwanzigdreizehn aims at closing the digital gap between rural and other areas and enabling access to high speed internet throughout the country. Objective is to increase social cohesion and to meet the challenges of economic growth, competitiveness and innovation. Austria set out that despite great efforts on regulatory and information measures, it is not possible to achieve the objective of the wide availability of high speed internet provision without State aid.
- (6) The strategy intends to attain this objective through three areas of activity. Firstly it intends to cover all areas where basic broadband services are still not available and where there are no plans of private operators to roll out such an infrastructure within the next three years ("*white areas*"). Secondly, the current measure aims to support the deployment of NGA networks and the upgrade of existing broadband infrastructure towards NGA networks in areas where such networks do not exist and are unlikely to be developed in the next three years ("*white NGA areas*"). Thirdly the measure wants to support the deployment of passive infrastructure for high speed broadband installations (e.g. civil engineering works such as ducts, and other network elements such as dark fibre, etc.) by commercial investors, also in synergy with other infrastructures (energy, transport, water, sewerage networks, etc.).
- (7) To justify the public support in particular of the deployment of NGA networks (even in areas where basic broadband services might exist) Austria refers to the Flagship Initiative: "A Digital Agenda for Europe" of the Europe 2020 strategy of 3 March 2010², 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. Austria also refers to Council Regulation (EC) No 473/2009 of 25 May 2009 amending Regulation (EC) No 1698/2005 on support for rural development by the European Agricultural Fund for Rural Development (EAFRD) and Regulation (EC) No 1290/2005 on the financing of the common agricultural policy.³ According to Article 16a of the amended Regulation (EC) No 1698/2005 Member States shall provide in their rural development programmes for strategies to develop, among other things, broadband Internet infrastructure in rural areas. Annex III to this Regulation describes as types of operations firstly the creation of and enabling access to broadband infrastructure, secondly the upgrade of existing broadband infrastructure and finally the laying down of passive broadband infrastructure (e.g. civil engineering works such as ducts, and other network elements such as dark fibre) also in synergy with other infrastructures (energy, transport, water, sewerage networks, etc.).
- (8) **Legal basis:** Sonderrichtlinie des Bundesministeriums für Verkehr, Innovation und Technologie (Ministry of transport, innovation and technology) Breitband Austria Zwanzigdreizehn, Regulation (EC) No 1698/2005 on support for rural development by the European Agricultural Fund for Rural Development (EAFRD)⁴, Regulation (EC) No

² EUROPE 2020 - A strategy for smart, sustainable and inclusive growth, COM(2010) 2020, page 12.

³ OJ L 144 of 9.6.2009, p.3.

⁴ Cf. previous footnote.

1290/2005 on the financing of the common agricultural policy⁵ and the Austrian Rural Development Programme⁶.

- (9) **Duration of the measure:** The scheme will be put into effect as soon as possible after the Commission's decision to approve the aid scheme. Aid may be granted until 31 December 2013.
- (10) **Budget and granting authorities:** The overall budget foreseen for the scheme is Euro 26 million. The planned budget for 2011 is Euro 10 million, for 2012 and 2013 Euro 8 million each. The funds come from the Ministry of transport, innovation and technology and the Ministry for agriculture and the environment (Bundesministerium für Land- und Forstwirtschaft, Umwelt und Wasserwirtschaft). The Landeshauptmann (the office of the Head of the Government of the Austrian Federal States) is the granting decision making authority for his respective territory. The office designated by the Landeshauptmann will decide on applications for aid and the payment of the aid.
- (11) **Identification of the target areas and consultation with operators:** To ensure that state aid is only used in areas where no basic broadband or NGA broadband networks are available and not planned by private operators in the near future (three years), Austria has conducted a mapping and coverage analysis by consulting all stakeholders. In order to map the existing networks and to identify areas which have no broadband coverage at all or no NGA coverage, information was collected on all operators' networks. The future plans of operators to invest into the deployment of broadband or NGA networks were collected. Areas which are served by more than one basic broadband operator were not included in the map defining areas eligible for the support of the introduction of NGA infrastructure.
- (12) **Tender procedure:** The aid will be allocated by the Landeshauptmann on the basis of an open and transparent public tender procedure which ensures equal and non-discriminatory treatment of all bidders. The Landeshauptmann's administration will publish the call for tenders for its respective area on the web.
- (13) **Award criteria:** Among the award criteria of the scheme Breitband Austria Zwanzigdreizehn are the amount of aid requested, the capacity of the broadband, and the criteria for determining wholesale and end user prices. Austria also encourages the use of existing infrastructure to avoid unnecessary and wasteful duplication. In order to choose the most economically advantageous offer, priority will be given to the bidder that offers the lowest price for the comparable quality and quantity. The maximum aid intensity is limited to 75% of the investment costs.
- (14) **Technology:** The selection procedures will be technology neutral, allowing applicants to propose any suitable technological solution.
- (15) **Wholesale access:** Third party operators will have effective wholesale access to the subsidised broadband infrastructure in a non-discriminatory way during a period of 7 years from the completion of the project. This includes the right to use ducts or street cabinets in order to allow third parties to have access to the active and to the passive infrastructure. The NGA architecture will have to support full unbundling and satisfy all different types of

⁵ Council Regulation (EC) No 1290/2005 of 21 June 2005 on the financing of the common agricultural policy. OJ L 209, 11.8.2005, p.1.

⁶ Commission decision K (2007) 5163 of 25.10.2007 on the approval of the Austrian Rural Development Programme, as amended by Decision K (2009) 10217 of 14.12.2009.

network access that operators may seek. The Austrian regulatory authority (NRA) Rundfunk- und Telekom-Regulierungsbehörde has been consulted in the drafting of the access conditions and has approved them. The NRA will also regulate ex ante or monitor very closely the competitive conditions of the overall broadband market and impose where appropriate the necessary remedies provided by the applicable regulatory framework.

- (16) **Pricing:** The price for wholesale access will be based on average prices for comparable services in more competitive areas. Benchmark is the level of prices set by the NRA for the markets and services concerned. The decisions on these prices are published.
- (17) **Beneficiaries:** The direct beneficiaries of the aid will be electronic communications operators rolling out the broadband infrastructure and offering broadband services. In the case of the mere deployment of passive infrastructure for high speed broadband installations (in particular ducts), the beneficiaries will be the owner of the infrastructure. Furthermore, the measure aims at improving the provision of existing broadband services to business users and residential users. Whereas residential users are not subject to State aid rules, businesses in the targeted areas will therefore ultimately benefit from the improved broadband services and coverage in comparison with what would be provided on a purely commercial basis.
- (18) **Monitoring and claw back mechanism:** The granting authority will, for a period of seven years, be responsible to monitor the compliance of the direct beneficiaries with the conditions of the grant and the financial results of the subsidized network. A claw-back mechanism will also be part of the contracts: the bidders must commit themselves to pay back the entire aid if the demand for broadband connections in the target area grows 30% beyond the anticipated number of new customers within three years after the completion of the investment.
- (19) **Cumulation:** The aid cannot be cumulated with aid received from other local, regional, national or Community schemes to cover the same costs.

IV. PRESENCE OF AID

- (20) The support envisaged by Austria for the investment in broadband infrastructure constitutes aid in the sense of Article 107 (1) TFEU, according to which support by a Member State to undertakings qualifies as State aid, which has to be notified, if it meets the cumulative conditions that 1) the measure has to be granted out of State resources, 2) it has to confer an economic advantage to undertakings, 3) the advantage has to be selective and distort or threaten to distort competition, and 4) the measure has to affect intra-Community trade.
- (21) The current measure will be directly financed by Austria. It will provide a selective economic advantage to the electronic communication operators and infrastructure investors selected via the tender procedure and also for third party electronic communication operators that will be able to offer their services via wholesale access to the subsidised network. It enables undertakings to subscribe to the services offered via the subsidised network instead of more expensive market-based solutions. Thereby the support from the State strengthens the position of a selected number of beneficiaries of a specific sector in relation to their competitors and has the potential to distort competition. Insofar as the intervention is liable to affect providers of electronic communications services from other Member States and distorts competition between end users located in Austria and elsewhere in Europe, the measure has an effect on trade. The markets for

electronic communication services are open to competition between operators and service providers, which generally engage in activities that are subject to trade between Member States. Thus, the principle beneficiaries are active in deploying and operating broadband networks, a market which is, at least potentially, subject to trade between Member States. Therefore this support is also likely to affect trade between Member States.

V. COMPATIBILITY ASSESSMENT

- (22) The Commission has assessed the compatibility of the scheme according to Article 107 (3) (c) TFEU and in the light of the Community Guidelines for the application of State aid rules in relation to rapid deployment of broadband networks⁷ (hereinafter the "Broadband Guidelines") which guide the application of Article 107(3)c by the Commission for aid with this objective.

The balancing test and its application to aid for broadband network deployment

- (23) As described in points 34 and 35 of the Broadband Guidelines, in assessing whether an aid measure can be deemed compatible with the common market, the Commission balances the positive impact of the aid measure in reaching an objective of common interest against its potential negative side effects, such as distortions of trade and competition.
- (24) In applying this balancing test, the Commission will assess the following questions:
- a. Is the aid measure aimed at a well-defined objective of common interest (i.e. does the proposed aid address a market failure or other objective)?
 - b. Is the aid well designed to deliver the objective of common interest? In particular:
 1. Is the aid measure an appropriate instrument, i.e. are there other, better placed instruments?
 2. Is there an incentive effect, i.e. does the aid change the behaviour of firms?
 3. Is the aid measure proportional, i.e. could the same change in behaviour be obtained with less aid?
 - c. Are the distortions of competition and the effect on trade limited, so that the overall balance is positive?

Objective of the measure

The aid is in line with the Community policy

- (25) One minor part of the current measure targets "white areas"⁸, where adequate broadband is currently not available at all and where there are no plans by private investors to roll out such infrastructure in the near future. Hence this objective of the measure is in line with

⁷ *Community Guidelines for the application of State aid rules in relation to rapid deployment of broadband networks*, OJ C 235, 30.9.2009, p.7.

⁸ See paras 41 and 42 of the Broadband Guidelines.

paragraphs 37-40 of the Broadband Guidelines. By extending broadband coverage to such unserved areas, Austria pursues genuine cohesion and economic development objectives.

- (26) The main part of the scheme concerns the rollout of NGA infrastructure and of passive infrastructure for high speed broadband installations. This follows the Commission's Flagship Initiative: "A Digital Agenda for Europe" of the Europe 2020 strategy of 3 March 2010⁹, 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. The Strategy explicitly invites Member States to draw up operational high speed internet strategies and target public funding on areas not fully served by private investments. Accordingly, Austria pursues with the notified measure an important objective of Community policy.

Aid is the appropriate instrument

- (27) Despite efforts of the Austrian authorities to address the identified problem by alternative instruments (such as regulatory measures concerning unbundling and third party access), no private investments have taken place in the targeted areas or will take place during the next three years. Without further public intervention, no progress could be expected in the reduction of the digital divide between rural and urban areas. As set out in the previous paragraph, Member States are invited to address public funding to non-served areas. Hence, State aid is an appropriate instrument to achieve the set objectives, pursuant to paragraphs 47 and 48 of the Broadband Guidelines.

The aid provides the right incentives to operators

- (28) As set out in paragraph 50 of the Broadband Guidelines, regarding the incentive effect of the measure, it needs to be examined whether the broadband network investment concerned would not have been undertaken within the same timeframe without any State aid. According to the results of the public consultation and market research conducted by the Austrian authorities in the targeted areas no investment would take place without public funding, hence the aid will trigger a change in the investment decisions of the operators. Therefore, the aid should provide a real investment incentive for operators.

Design of the measure and the need to limit distortions of competition

- (29) As set out in paragraph 51 of the Broadband Guidelines, in assessing the proportional character of the notified measures in "white" or "grey" areas a number of conditions has to be met in order to minimise the State aid involved and the potential distortions of competition:

(a) *Detailed mapping and coverage analysis, consultation with stakeholders:* the Austrian authorities have undertaken an analysis of the existing broadband infrastructures in order to clearly identify the areas where state intervention is necessary. By consulting existing operators and updating the target areas accordingly and by consulting with the relevant stakeholders (such as the National Regulatory Authority) in an open and transparent manner, the scheme ensures that public funds are used only in areas where it is necessary and limits the possibility of crowding out private investments and distortion of competition to the minimum possible.

⁹ Cf. footnote 2.

- (b) *Open tender process*: the Austrian authorities will select the undertakings for the construction and the maintenance of the network in an open tender procedure ensuring transparency, and equal and non-discriminatory treatment, with the objective to minimise the aid necessary for the measure.
- (c) *Most economically advantageous offers*: within the context of the open tender, the Austrian authorities will select the most economically advantageous offers. For the purpose of determining the most economically advantageous offer, the awarding authority will specify in advance the relative weighting which it will give to each of the qualitative criteria chosen. The bidder which requests the lowest amount of aid for otherwise comparable quality and quantity will be chosen.
- (d) *Technology neutrality*: The current measure does not favour any particular technology or network platform leaving it to commercial operators to come up with the most appropriate technological solutions to provide broadband services to end users.
- (e) *Use of existing infrastructures*: the Austrian authorities will ensure during the tender procedure that existing civil infrastructures are considered by the bidders in the design of their offers. The Austrian Telekommunikationsgesetz (telecommunication law) has been revised in 2009 with a view to enable access to existing infrastructure. Moreover, coordination with other civil works shall be taken into account by the tenderers in order to limit the use of public funds.
- (f) *Open wholesale access*: the operator of the new network will be obliged to provide during 7 years following completion of the infrastructure open wholesale access to all interested parties in an open, transparent, non-discriminatory manner. To support the development of competition by third parties, information on the creation of the subsidised infrastructure will be published.
- (g) *Price benchmarking*: In order to ensure effective wholesale access and to minimise potential distortion of competition, wholesale prices on the subsidized network will be based on the average wholesale published (regulated) price prevailing in more competitive areas of Austria and will be monitored by the National Regulatory Authority. The objective is to have an offer of retail access prices similar to those charged in non-subsidised areas. The benchmarking criteria will be clearly indicated in the tender documents.
- (h) *Claw-back mechanism to avoid over-compensation*: the project will be examined on a regular basis and the monitoring mechanisms implemented will ensure that if the beneficiary fails to comply with the rules, the granting authorities will be in the position to recover the aid granted. To avoid overcompensation, the contract with the successful bidder will contain a reverse payment mechanism, according to which the entire amount of aid has to be paid back if the demand for broadband connections in the target area grows 30% beyond the anticipated number of new customers within three years after the completion of the investment.

The conditions listed in paragraph 51 of the broadband guidelines are therefore fulfilled.

- (30) Regarding identified "white" NGA areas where already one basic broadband service provider is present and where operators do not have plans to invest in NGA networks during the coming three years, Austria intends to support an upgrade of the existing network or, where this is not feasible, the construction of new NGA active or passive infrastructure.

- (31) In line with paragraph 73 of the Broadband Guidelines, Austria firstly verified that such upgrade of existing or installation of new infrastructure is necessary to meet the needs of the areas not served by NGA networks. In this context Austria referred to explicit statements of the Commission in the Europe 2020 communication that such rollout is necessary for all areas of the Union¹⁰. Secondly Austria had demonstrated that there are no other, possibly less distortive, means to reach this goal.
- (32) Furthermore, pursuant to paragraph 79 of the Broadband Guidelines, Austria requires effective third party wholesale access for 7 years, including the right to use ducts and street cabinets in order to allow third parties to have access to active and passive infrastructure. Austria also consulted the NRA, which is closely monitoring the competitive conditions on the broadband market and which may impose the necessary remedies provided by the applicable regulatory framework. The access conditions are approved or set by the NRA under the applicable Community rules. Finally, the NGA architecture has to be designed in a way that it supports effective and full unbundling and satisfies all types of network access that operators may seek.

Conclusion

- (33) The Commission concludes that the compatibility criteria set out in the Broadband Guidelines are met, hence the aid involved in the notified measure is compatible with Article 107(3)(c) TFEU.

VI. DECISION

- (34) The Commission has accordingly decided to consider the aid measure "Breitband Austria Zwanzigdreizehn" to be compatible with Article 107(3)(c) of the Treaty on the Functioning of the European Union and not to raise objections to it.
- (35) Austria is reminded that, pursuant to Article 108(3) of the Treaty on the Functioning of the European Union, it is obliged to inform the Commission of any plan to extend or amend the measure.
- (36) 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/community_law/state_aids/state_aids_texts_en.htm.

¹⁰ Cf. footnote 2.

- (37) Your request should be sent by encrypted e-mail to stateaidgreffe@ec.europa.eu or, alternatively, by registered letter or fax to:

European Commission
Directorate-General for Competition
State Aid Greffe
Rue Joseph II 70
B-1049 Brussels
Fax No: +32 2 2961242

Yours faithfully,

For the Commission

Joaquín ALMUNIA
Vice-President