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**Subject: State Aid SA.46731 (2016/N) – Austria
Aid to fast broadband infrastructure in rural areas in
Niederösterreich**

Sir,

1. PROCEDURE

- (1) Following informal pre-notification contacts, Austria notified the Commission of the proposed aid measure by letter dated 28 October 2016. It provided the Commission with further information by letters dated 20 December 2016 and 1 March 2017.

2. DETAILED DESCRIPTION OF THE MEASURE

2.1. The measure

- (2) The measure concerns individual aid for a total amount of EUR 30 million to finance the start-up (proof-of-concept) phase of Niederösterreichische Glasfaserinfrastrukturgesellschaft mbH in order to implement the so-called 'Three-layer open model' (3LOM) in NGA white areas in four pilot regions in Lower Austria. In particular, the notified measure will fund the roll-out of fast broadband (at least 30 Mbps upload/download speed) in the four pilot regions that lack NGA speed connections. Austria expects that the notified measure concerning these four pilot regions will amount to the first successful broadband networks in rural areas, thus triggering private investors to roll out similar broadband infrastructure in the future without public funds. This will allow to

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build reliable broadband infrastructure with extremely low latency and high capacity suitable to provide symmetrical connectivity and satisfy future bandwidth demand. Austria wishes to supply nearly 100% of its households with 100 Mbit/s download speeds by 2020.

- (3) The start-up phase 2016-2018 aims to attract private investors and equity-investment providers. It requires an investment of approximately EUR 200 million. The onward roll-out phase of the project shall not be financed with public funds, but be financed solely by private investors and debt funding (e.g. EIB-loans). This subsequent phase is not part of the present notification and shall be the subject of a separate notification, as appropriate. The whole project (start-up and roll-out) will have a projected total volume of approximately EUR 1 billion. According to the financial model, a long-term positive return on equity can be expected.

2.2. Objective

- (4) The aid measure aims to secure the long-term socio-economic viability of Lower Austria, ensuring open, non-discriminatory access to a high capacity network in underserved rural areas of Lower Austria (NGA white areas) and competition at the active network and service providers' level¹.

2.3. Recipient

- (5) Beneficiaries of the aid are the publicly owned Niederösterreichische Glasfaserinfrastrukturgesellschaft mbH ("NÖGIG"), which was set up for the implementation of the project and is integrated into existing structures (shareholders are ecoplus Niederösterreichs Wirtschaftsagentur GmbH (10%) and ecoplus Beteiligungen GmbH (90%), and the wholesale operator which will be selected by a public tender (see also paragraphs 14 and 23 below).

2.4. Duration

- (6) The measure covers the period from 1 December 2016 until 31 December 2018, subject to Commission approval of the aid.

2.5. Legal basis

- (7) By decision of 14 December 2016², the Federal Government of Lower Austria authorised a capital increase of NÖGIG in the amount of EUR 10 million, for the specific purpose of the envisaged expansion of the passive broadband infrastructure in Lower Austria³.

1 According to the notification, a reliable broadband infrastructure with extremely low latency and high capacity suitable to provide symmetrical connectivity and satisfy future bandwidth demand is available to less than 10% of households in the Federal State of Lower Austria.

2 As submitted in final draft form.

3 It is foreseen by the Austrian authorities that two additional capital increases will take place to reach the total of EUR 30 million of the required capital needs.

2.6. Budget

- (8) The Austrian authorities confirmed that the overall budget amounts to EUR 30 million and shall be paid to beneficiary, NÖGIG, in three tranches of EUR 10 million per year in the form of an equity contribution⁴.

2.7. Aid intensity

- (9) The expected aid intensity is 100%, considering that share capital of 30 EUR million is paid to the beneficiary.

2.8. Target areas

- (10) Support shall be granted for deployment of broadband networks exclusively in "NGA-white" areas, that is, areas where private investment into next generation access networks is not available and not planned over the coming three years.
- (11) The measure targets four pilot areas within the Federal State of Lower Austria which have been identified as NGA-white, namely: Kleinregion Waldviertler StadtLand, Zukunftsraum Thayaland, Triestingtal and Ybbstal.

2.9. Mapping and Public consultation

- (12) The Austrian authorities have carried out a detailed mapping exercise - from 15.04.2015 until 09.11.2016 - and engaged in a public consultation on the basis of an updated broadband map (as similarly in previous state aid case SA.41175), showing NGA white areas. They have verified that no private investor would roll out its own infrastructure in the four target areas in the next three years⁵. No objections have been raised to the proposed intervention by market participants.

2.10. Obligations imposed on the network owner and operator

- (13) Publicly owned company NÖGIG manages, coordinates and tenders the construction and installation of the passive infrastructure.
- (14) A wholesale-only operator will be publicly tendered. The operator may not provide end customer services and must ensure access to end customers by all service providers under equal, non-discriminatory terms. If vertically integrated broadband operators apply, adequate safeguards will be put in place, in particular an obligation of accounting separation and it may also include the setting up of a structurally and legally separate entity. As a result, the access obligation is an inherent part of the business model and will include access to ducts, dark fibre, bitstream access, unbundled local loop and street cabinets.

2.11. Technological neutrality

- (15) The measure is technologically neutral considering that it can support the roll-out of Next Generation Access (NGA) networks, as long as it allows for symmetrical

4 For the remainder of the capital needs of the start-up phase bank loans shall be attracted on commercial terms.

5 The consultation ended on 11.12.2016; the official link of the map is:
<https://www.bmvit.gv.at/telekommunikation/breitband/foerderungen/LeRohr/call03/gebiete/index.html>

bandwidths of at least 30 Mbps of upload and download with extremely low latency and high capacities, able to satisfy future broadband demand.

2.12. Wholesale access pricing

- (16) Wholesale access prices are to be based on the price set or approved by the national regulatory authority RTR GmbH or benchmarked against average wholesale prices of comparable access services in other, more competitive, parts of the country. In case of disputes between the network operator and access seekers or where the price is not regulated, RTR GmbH must be consulted with the objective to keep prices at a reasonable and non-discriminatory level.
- (17) Wholesale access shall be ensured for a period of seven years while access to the passive infrastructure shall be unlimited in time.

2.13. Monitoring, control, reporting

- (18) The broadband coordination centre of the Federal State of Lower Austria will monitor the process during the entire building phase of the proof-of-concept (start-up) phase (planned until 2018), whilst the costs involved shall be audited by a public auditor. The respective construction areas will be entered into the ZIS Database of the Austrian regulatory authority, RTR⁶. Furthermore, the State aid granting authority shall, every two years, report key information on the measure, starting from the date when the network is put into use, for the duration of the aid measure.

2.14. Opinion of the National Regulatory Authority

- (19) By letter of 23 August 2016 the national regulatory authorities, Telekom-Control-Kommission and RTR GmbH, declared that no objections had been raised to the proposed model of the Federal State of Lower Austria for the roll-out of the broadband infrastructure.

2.15. Language waiver

- (20) Austria has provided a language waiver and agrees that the decision will be adopted and notified in English as the authentic language.

3. ASSESSMENT OF THE MEASURE

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

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

- (22) *State resources*: The support comes from the budget of the Federal State of Lower Austria and thus from State resources (see recital (8)).
- (23) *Selective economic advantage*: The measure provides an economic advantage to the direct recipient of the aid, NÖGIG, and favours the network operator, as without the State intervention it would not be in the position to offer NGA services in the target areas. Future operators that may benefit from open access to the network may also become beneficiaries.
- (24) *Distortion of competition*: although the Austrian authorities intervene only in areas in which private initiatives are not going to take place in the next three years, it cannot be excluded that commercial operators may find it viable to invest in some of the targeted areas in the longer term. As a result, the aid beneficiary will enjoy a first mover advantage.
- (25) *Effect on trade*: Insofar as the intervention affects providers of electronic communication services from other Member States, 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.
- (26) The Commission therefore concludes that the notified aid measure constitutes State aid within the meaning of Article 107(1) TFEU, as moreover confirmed by the Member State in the notification.
- (27) The Commission has assessed the compatibility of the measure according to Article 107(3)(c) TFEU and in the light of the EU Guidelines for the application of State aid rules in relation to rapid deployment of broadband networks (the "Broadband Guidelines")⁷. As explained in paragraphs 33 and following of the Broadband Guidelines, for aid to be found compatible with Article 107(3)(c) TFEU, the following conditions must be fulfilled:
1. The aid must contribute to the achievement of objectives of common interest
 2. Absence of market delivery due to market failures or important inequalities
 3. The aid must be appropriate as a policy instrument
 4. The aid must have an incentive effect
 5. The aid is limited to the minimum necessary
 6. Any negative effects of the aid must be limited
 7. The aid measure must be transparent.
- (28) If those conditions are fulfilled, the Commission balances the positive effects of the aid measure in reaching the objective of common interest against the potential negative effects.
- (29) The Commission defined in its Europe 2020 strategy of 3 March 2010 the Flagship Initiative: "A Digital Agenda for Europe", which has the *aim to deliver*

7 OJ C 25, 26.1.2013, p.1.

sustainable economic and social benefits from a Digital Single Market based on fast and ultrafast internet and interoperable applications, with broadband access for all by 2013, access for all to much higher internet speeds (30 Mbps or above) by 2020, and 50% or more of European households subscribing to internet connections above 100 Mbps".⁸ In its Communication "Connectivity for a Competitive Digital Single Market - Towards a European Gigabit Society" the Commission confirmed the importance of Internet connectivity for the Digital Single Market and, building on the Digital Agenda for Europe goals, set out a vision for a European Gigabit society operationalised through three strategic objectives for 2025⁹.

- (30) Austria aims to supply nearly 100% of its households with 100 Mbit/s download speeds by 2020. In the same vein, the Federal State of Lower Austria wishes to provide the infrastructure to connect almost every household with reliable broadband infrastructure with extremely low latency and high capacity suitable to provide symmetrical connectivity that will also satisfy future bandwidth demand.
- (31) Without the financing of the province of Lower Austria in the start-up phase, the project would not be able to come into existence because the private capital market is only entering the project if a proof-of-concept has been made, in the form of the first successful broadband networks in rural areas. Austria expects that the notified measure concerning the four pilot regions will trigger private investors to roll out similar broadband infrastructure in the future without public funds.
- (32) The Commission therefore concludes that the planned intervention contributes to the *achievement of objectives of common interest*.
- (33) As explained in recital (2), the measure targets the deployment of broadband networks solely in 'NGA white areas', where high speed broadband is not available to date and where it is established, by way of detailed market consultation (see recital (12)), that there are no plans by private investors to roll out such infrastructure in the next three years. A *market failure* is therefore deemed to exist.
- (34) The passive infrastructure will only be deployed in those areas where there is insufficient broadband availability to the population and companies (no NGA-supply) to date and the market consultation carried out by the Federal State of Lower Austria has shown that no private telecommunications provider can ensure NGA coverage within three years. It is furthermore envisaged to expand only to those areas in which there is also a corresponding demand. Against this background the planned public intervention is considered to be an *appropriate policy instrument*.
- (35) The results of the public consultation have shown that in the targeted areas, no comparable investment would take place without public funding within three years (see recital (12)). Hence, the investment would not be made within the same

8 EUROPE 2020 - A strategy for smart, sustainable and inclusive growth, COM(2010)2020 final

9 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

timeframe without the aid. Moreover, as noted before, without the financing of the province of Lower Austria in the start-up phase, the project would not be able to come into existence because the private capital market is only entering the project if a proof-of-concept has been made, in the form of the first successful broadband networks in rural areas. The condition of *incentive effect* of the measure is therefore regarded as fulfilled.

- (36) The aid measure is designed in such a way as to *limit any aid to the minimum necessary*. It consists in a capital investment of EUR 30 million in newly established company NÖGIG, which is used only in the start-up phase of the project, with the aim of attracting private investors and equity investment providers for the subsequent roll-out phase without public funds.¹⁰
- (37) With reference to recital 12, a detailed mapping exercise and a thorough public consultation have taken place on the basis of an updated broadband map. A third party operator is contracted to operate the subsidised infrastructure, following a selection process that shall be conducted in line with spirit and the principles of the EU Public Procurement Directives. As confirmed by the Austrian authorities, the aid granting authority sets the qualitative award criteria on which bids submitted will be assessed, with a view to selecting the most economically advantageous offer. The technological neutrality criterion is regarded as fulfilled (recital 15). Austria has confirmed that in the course of the general and detailed plans for the networks, account shall be taken of all existing passive infrastructures that can be accessed and used to exploit synergies to a maximum. Effective wholesale access shall be provided to the subsidised infrastructure for at least a period of 7 years (recital 17). Wholesale access pricing is to be based on the principles set by the NRA (recital 16). A monitoring process shall be put into effect, as noted in recital 18. A clawback mechanism will also apply. More precisely, the contribution of the share capital by the Federal State of Lower Austria will be tied to usage for the building of the passive infrastructure in NGA white areas only, in accordance with the company's objective. This condition shall be proven by NÖGIG on a continuous basis, and if not complied with, recovery of the public funds shall be demanded¹¹. In relation to the wholesale operation to be tendered out, Austria has confirmed that if any aid to the operator exceeds the threshold of EUR 10 million, it will be reclaimed (thus ensuring that there will be no overcompensation)¹². Austria will respect the transparency requirements of the Broadband Guidelines (recital 39 below). Lastly, every two years, the State aid granting authority shall report to the Commission key information on the aid projects (recital 18).

10 See also: <https://noegig.at/modell/>

11 The control of the capital increase for the intended use is carried out by the Transport Department on the basis of the following documents: 1.) Quarterly reports of the NÖGIG management on the roll-out progress. These reports must include, in particular, a cost allocation by municipalities as well as detailed GIS data of the established broadband infrastructure. 2.) Annual confirmation of a tax consultant or auditor on the dedication of this capital increase. If such evidence cannot be provided or if examinations of authorised organs of the Federal State of Lower Austria, the Federal Republic of Austria or the European Union are refused, the capital increase must be repaid within 30 days.

12 The contractor is required to submit to the granting authority all the annual accounts and to allow access to the account books so that the development of the profitability of the project can be monitored on an ongoing basis. The granting authority will foresee that any extra profit will be reclaimed and spent for further broadband network expansion at the same conditions of the original aid measure.

- (38) Moreover, due to the chosen 3LOM model¹³, allowing for new competition at operator level and more intense competition at service level¹⁴, and the market research carried out by the Austrian State Broadband Coordination Centre prior to the construction of a white NGA area, *any negative effect of the aid is likely to be limited*. It is recalled in this context that the passive infrastructure will be built only in NGA white areas according to the Broadband map, which is updated on a yearly basis by the Ministry for Transport, Innovation and Technology ("BMVIT").
- (39) Austria has confirmed that the *transparency* requirements of the Broadband Guidelines will be complied with and that the notification shall be published in the central transparency database "Transparency Award Module" (TAM).
- (40) Given the characteristics of the project and of the safeguards applied, the *overall impact on competition is deemed to be positive*. In particular, the following is noted in this respect.
- (41) The proposed measure results in a 'step change', in terms of broadband availability in the target areas, in line with the requirements of paragraph 51 of the Broadband Guidelines. As indicated, the measure solely targets NGA white areas, where no other NGA service provider is present and no private investment is planned within the next three years. Moreover, due to the design of the measure, a crowding out effect on private investments is considered unlikely. The chosen model minimises the amount of public funding: a publicly owned entity owns the infrastructure which is leased out to a broadband network operator, selected through a competitive tender. Also, the construction of the network shall be tendered out in line with EU public procurement rules. The access and pricing conditions and standards applied concerning transparency, monitoring and control ensure that the subsidised infrastructure enables the provision of competitive services at retail level.
- (42) An effect on trade, if any, is considered to be limited only. Therefore, the measure is designed in a way that does not distort competition or adversely affect trading conditions to an extent contrary to the common interest and is in line with the objectives of Article 107(3)(c) TFEU.
- (43) The Commission concludes that the measure notified by Austria meets the compatibility criteria set out in the Broadband Guidelines.

13 The advantages of the 3LOM model are that it opens up the market to new competition at operator level and leads to more intense competition at service level. Local and national service providers will be able to offer their services on the new network on an equal basis.

14 Austria has explained that the selected business model corresponds to the 3 Layer Open Model (3LOM) set forth in the Commission's Guide to High-Speed Broadband Investment, Version 1.3 – 7 May 2015, page 30. Its aim to provide internet coverage of 100 Mbps virtually throughout Austria by 2020 requires substantial investments in telecommunication infrastructure. However, given that, for economic reasons, private providers do not want to invest in comprehensive FTTH/FTTB supply to rural areas, the Land of Lower Austria has decided not to apply the classic support model involving a tender any longer, but to set up itself the passive optical fibre cable infrastructure in regions so far not provided for and to lease these to private neutral operators.

4. CONCLUSION

- (44) 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.

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Your request should be sent electronically to the following address:

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Yours faithfully
For the Commission

Margrethe VESTAGER
Member of the Commission

