



Brussels, 8.11.2018
C(2018) 7311 final

**Subject: State Aid SA.50844 – Austria
Broadband Styria**

Madam,

1. PROCEDURE

- (1) Following pre-notification discussions in spring 2018, the Republic of Austria notified the measure to the Commission on 27 August 2018 under Article 108(3) of the Treaty on the Functioning of the European Union (TFEU).
- (2) By letter of 9 August 2018, the Austrian authorities provided a language waiver and exceptionally agreed to waive their rights deriving from Article 342 TFEU in conjunction with Article 3 of the EC Regulation 1/1958¹ and that the decision following the formal notification be adopted in English as the authentic language.

2. THE EUROPEAN POLICY CONTEXT AND THE CURRENT STATE OF PLAY OF BROADBAND PROVISION IN THE FEDERAL STATE OF STYRIA

- (3) The Digital Agenda for Europe represents one of the seven flagship initiatives of the Europe 2020 Strategy.² The Digital Agenda proposes to better exploit the potential of Information and Communication Technologies (ICT) in order to foster innovation, economic growth and progress. The aim is to deliver sustainable economic and social benefits from a Digital Single Market based on fast and ultra fast internet and interoperable applications, with broadband access for all by 2013, access for all to much higher internet speeds (30 megabits per second (Mbps) or above) by 2020, and 50% or more of European households subscribing to internet connections of at least 100 Mbps by 2020.

¹ EEC Council: Regulation No 1 determining the languages to be used by the European Economic Community, OJ 17, 6.10.1958, p. 385.

² Communication from the Commission – EUROPE 2020: A strategy for smart, sustainable and inclusive growth, 3.3.2010, COM(2010) 2020 final.

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- (4) In addition, the Commission adopted a strategy on Connectivity for a European Gigabit Society in September 2016.³ This strategy addresses the availability and take-up of very high capacity networks, which will enable the widespread use of new products, services and applications in the Digital Single Market.
- (5) The strategic objectives for 2025 are:
- Gigabit connectivity for all main socio-economic drivers such as schools, transport hubs and main providers of public services⁴ as well as digitally intensive enterprises;
 - All urban areas and all major terrestrial transport paths to have uninterrupted 5G coverage (as an intermediate objective for 2020: 5G connectivity to be available as a fully-fledged commercial service in at least one major city in each Member State, building on commercial introduction in 2018);
 - All European households, rural or urban, will have access to internet connectivity offering a downlink of at least 100 Mbps, upgradable to gigabit speed.
- (6) The Federal State of Styria defined its broadband strategy in a policy measure called "Highway 2020"⁵ in October 2014. This strategy defines three goals:
- All households and undertakings in the Federal State of Styria shall be served with broadband connections with a speed of up to 30 Mbps by 2018;
 - All Styrian municipalities should have a fibre connection point by 2020;
 - All households and undertakings in the Federal State of Styria shall be served with ultrafast broadband connections with a speed of up to 100 Mbps by 2022.
- (7) The Austrian Federal State of Styria has one of the lowest broadband penetrations of all Federal States in Austria. The average coverage rate of next generation access ("NGA") broadband networks in the Federal State of Styria was at 74% in 2017. On average, 4% of all households and undertakings had only basic internet connections with a speed of less than 2 Mbps in 2017. The provinces of Eastern Styria and Western and Southern Styria had even less than 50% and 60% NGA coverage, respectively, still in 2017. At the same time 9.34% and 7.43% of all households and undertakings in these provinces had only basic internet access with a speed of up to 2 Mbps.
- (8) The only operator in Styria owning a region wide fixed (copper) network is A1 Telekom Austria. Overall, there are about 20 network operators active on the Styrian market for the provision of broadband services. However, these operators

³ 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, 14.9.2016, COM(2016) 587 final.

⁴ Covering: e.g. primary and secondary schools, train stations, ports and airports, local authority buildings, universities, research centres, doctors' surgeries, hospitals and stadiums.

⁵ <https://www.verwaltung.steiermark.at/cms/beitrag/12133225/110986524>.

are mainly active at local levels and cannot be seen as market players at the regional level of the Federal State of Styria.

3. DETAILED DESCRIPTION OF THE MEASURE

3.1. Objective and design of the measure

- (9) The support measure aims to secure the long-term socio-economic viability of the Federal State of Styria, ensuring open and non-discriminatory access to a passive infrastructure⁶ supporting the deployment of ultrafast broadband networks in underserved rural areas of Styria (white NGA areas) and enabling competition at the active network and service provider levels. The measure thereby also aims at bridging any digital divide by stimulating disadvantaged rural areas in the Federal State of Styria.
- (10) The support measure consists of an individual support in the form of a direct grant in the total amount of €60 million to be paid in instalments over six years (in 2018: €500 000; in 2019-2023: €11.9 million/year). The support will be granted by the government of the Federal State of Styria from the regional budget of the State. The measure shall be implemented as soon as approval from the European Commission has been obtained. The last instalment will be paid in 2023.
- (11) The direct beneficiary is the fully state-owned *Steirische Breitband- und Digitalinfrastrukturgesellschaft m.b.H.* (hereafter "*the Beneficiary*"), a limited liability company newly established and controlled by the government of Styria with the objective of rolling-out passive infrastructure capable of supporting the deployment of ultrafast broadband networks in white NGA areas in Styria.
- (12) *The Beneficiary* will deploy passive infrastructure supporting the roll-out of ultrafast broadband networks capable of providing symmetrical access speeds of at least 100 Mbps that can be upgraded to provide download speeds of one Gigabit per second (Gbps) in selected white NGA areas in Styria through public procurement procedures in accordance with the applicable EU and national rules on public procurement. The roll-out is restricted to passive components and the network will be open for non-discriminatory access to network and service providers.
- (13) *The Beneficiary* will own the passive infrastructure and will limit its activities to maintenance and repair of this passive layer.

3.2. Legal basis

- (14) The notified measure is based on the following legal bases, both at national and at regional level of the Federal State of Styria:
 - National level:

⁶ Passive infrastructure is defined as ducts and dark fibre.

- Federal Act enacting the Telecommunications Act (*Telekommunikationsgesetz 2003 – TKG 2003*)⁷;
- Federal Act on the protection of personal data (*Datenschutzgesetz 2000 – DSGVO 2000*)⁸;
- Regional level:
 - Broadband Strategy of Styria – Highway 2020⁹.

3.3. Stand still obligation

- (15) The authorities of the Federal State of Styria have confirmed that the granting of the aid is conditional on the decision of the Commission on the notified measure, pursuant to the standstill clause of Article 108(3) TFEU and to Article 3 of Council Regulation (EU) 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 Union¹⁰, according to which new aid measures must not be put into effect before the Commission has taken a decision authorising it.

3.4. Investment and business model

- (16) The selected business model is a three-layer open model (3LOM). In this model, the roles of passive infrastructure provider, network provider and service provider are, as a general rule, separated from each other.
- (17) Whilst the direct beneficiary will build, own and maintain the supported passive infrastructure, the installation of the active layer on these new networks in different target areas will be awarded to network providers (NPs) by means of lease contracts following the applicable EU and national public procurement procedures.
- (18) The selected NPs, i.e. the lessees of the passive infrastructure, will place active equipment in all access nodes and build open, operator-neutral networks over which all interested service providers will be able to offer their services to end users.
- (19) By way of derogation from the rule of strict separation of the different roles in a 3LOM, it is foreseen by the government of the Federal State of Styria that the selected NPs, in addition to their activities at wholesale level, may also become active as service providers at retail level, if they so wish, and offer their services directly to end customers.

⁷ Austrian Federal Law Gazette I Nr. 70/2003; <https://www.ris.bka.gv.at/GeltendeFassung.wxe?Abfrage=Bundesnormen&Gesetzesnummer=20002849>.

⁸ Austrian Federal Law Gazette I Nr. 165/1999; <https://www.ris.bka.gv.at/GeltendeFassung.wxe?Abfrage=bundesnormen&Gesetzesnummer=10001597>.

⁹ <https://www.verwaltung.steiermark.at/cms/beitrag/12133225/110986524>.

¹⁰ OJ L 248, 24.9.2015, p.9.

- (20) *The Beneficiary*, as owner and lessor of the passive infrastructure, will provide for safeguards in the leasing contracts with NPs for preventing any anti-competitive behaviour towards other service providers when NPs are also active at retail level. Such contract clauses will have to be reflected already in the tender documents, and the award criteria in particular, of the procurement procedures to find suitable NPs for the active layers of the networks.

3.5. Overlap with other schemes

- (21) The measure will run in parallel with the federal Austrian aid scheme "Broadband Austria 2020 (BBA 2020)" (SA.41175)¹¹. The notified measure will only support passive infrastructure in white NGA areas in Styria. Potential overlaps with projects under BBA 2020 will be excluded by allowing funding under the measure at hand only in areas where no projects under BBA 2020 exist. Furthermore, a common Monitoring Committee comprised of representatives from the national and regional levels (*Breitbandlenkungsausschuss*) will discuss and coordinate all funding activities under the different existing support measures at national and regional level in order to ensure that there will be no overlaps. Hence, *the Beneficiary* may apply for financing of individual projects eligible under BBA 2020 as long as they are separate and different from the projects financed under the scheme at hand. *The Beneficiary* will maintain adequate separate accounting clearly identifying the different sources of financing and the projects for which those funds are used.

3.6. Mapping of the target areas

- (22) Support can be granted in white NGA areas, that is, areas where private investment into NGA is not available and not planned over the coming three years.
- (23) The measure encompasses all NUTS 3¹² regions of the Federal State of Styria. Within these, the potential target areas have been defined by way of market consultation and based on the Broadband Atlas¹³ of the Austrian Federal Ministry for Transport, Innovation and Technology (BMVIT) and the Central Infrastructure Register (ZIS) maintained by the Austrian regulatory authority for telecommunications. More concretely, the government of the Federal State of Styria uses the mapping as provided in the third call for financial aid for access networks published by the BMVIT on 15 February 2018.¹⁴
- (24) Definitive final target areas must be defined in such a way that they cover the white NGA areas without causing overlaps with planned or existing NGA infrastructure.

¹¹ http://ec.europa.eu/competition/state_aid/cases/259470/259470_1726891_122_2.pdf.

¹² NUTS = Nomenclature of Territorial Units for Statistics.

¹³ <https://www.breitbandatlas.info/map.php>.

¹⁴ See at <https://www.bmvit.gv.at/telekommunikation/breitband/foerderungen/access/call03/index.html>.

3.7. Public consultation

- (25) A public consultation was conducted between 20 February 2018 and 23 March 2018.¹⁵ The consultation contained a summary of the planned support measure and a description of the potentially targeted areas. The consultation process brought forward one submission from a market participant in which the company Energie Steiermark GmbH expressly supported the approach taken by the government of the Federal State of Styria.
- (26) No information has been received from any market player concerning their intentions with regard to investing in one of the white NGA areas within the coming three years starting from the launch of the public consultation.

3.8. Competitive selection procedure

- (27) *Steirische Breitband- und Digitalinfrastrukturgesellschaft m.b.H.* as the direct beneficiary of the support measure will be awarded the funds as an inhouse company without public procurement procedure.
- (28) The construction of the passive infrastructure in the final target areas will be tendered out in pursuance of the applicable EU and national public procurement rules.
- (29) The supported passive infrastructure, once built, will be open for NPs and service providers on a non-discriminatory basis. NPs in charge of the installation and management of the active layer will be selected following competitive selection procedures as indicated in recital 17.
- (30) The direct beneficiary of the measure will publish calls for lease proposals in the Official Gazette of Styria, i.e. *Grazer Zeitung*. As a result of the ensuing public procurement procedures, the passive infrastructure in the various final target areas will each be leased to a network provider, who will set up and operate the active network.

3.9. Economically most advantageous offer

- (31) Bids submitted by NPs for the lease of the supported passive infrastructure must include a commitment to deploy an active network capable of providing in a reliable manner a symmetrical bandwidth of at least 100 Mbps that is upgradeable to download speeds of 1 Gbps. The network should also provide low latency and have sufficient capacity to satisfy future broadband demand.
- (32) In the selection procedures for the lease of the passive infrastructure, only lease offers will be taken into account where NPs can demonstrate a high economic, technical and financial performance. It will be necessary to demonstrate in each case (i) that the network provider has already successfully managed at least three reference projects that involved the operation of an active network and the provision of services to end customers, (ii) that the network provider meets the technical requirements and (iii) that the network provider has the necessary know-how.

¹⁵ *Grazer Zeitung*, Stück 8, issued on 23 February 2018.

- (33) The lease contract will be awarded to the bid that scores the highest number of points for three award criteria.¹⁶

3.10. Technological neutrality and step change

- (34) The support measure will allow for the use of any active network technology as long as the networks used allow for the reliable provision of a symmetrical bandwidth of at least 100 Mbps and are upgradeable to download speeds of 1 Gbps.
- (35) *The Beneficiary* will build the passive infrastructure for these ultrafast high capacity broadband networks in selected white NGA areas in Styria. That means, the rollout of the infrastructure will enable the delivery of additional capacity and speed on the market in the measure's target areas and might eventually lead to lower prices and better choice for consumers, with services offering higher quality and innovation. The measure will thus deliver an upgrade from basic to NGA broadband networks and is therefore supposed to ensure a step change.

3.11. National Regulatory Authority

- (36) The Austrian national regulatory authority is the Telecom-Control-Commission (TKK). The TKK is supported by RTR GmbH, which processes and edits the decisions of TKK and provides operational support to TKK.
- (37) TKK and RTR GmbH were involved in the public consultation that was conducted in February and March 2018 and did not submit any objections to the plans of the government of Styria.
- (38) Otherwise, TKK and RTR GmbH will be involved where their functions and responsibilities so require, e.g. for the provision of information from the infrastructure database ZIS, for resolving disputes that may arise with respect to wholesale access etc.

3.12. Use of existing infrastructure

- (39) In the planning process for the construction of the passive infrastructure account shall be taken of all existing infrastructure in the relevant target areas that can be accessed and used to realize optimal synergies. In order to keep the costs as low as possible, the government of Styria will require *the Beneficiary* to make use of existing infrastructure to the largest possible extent.
- (40) The ZIS database¹⁷ run by RTR GmbH will be used for information on existing infrastructure and on infrastructure planned by commercial operators within the coming three years.

¹⁶ 40% of the overall points can be achieved for award criterion "minimum rent per homes passed", where NPs can score with high price offers. Another 40% of the overall points can be achieved for award criterion "sales-based rent per homes activated", where NPs can equally score with high offers. The remaining 20% of the overall points can be achieved for award criterion "Qualitative criteria of the technological approach – e.g. capability to support download and upload speed, latency, reliability and scalability". On this basis bids will be ranked according to their score. The bid that achieved the highest number of overall points ranks first. If two or more bids achieve the same number of points the ranking will be made according to the points achieved for award criterion "sales-based rent per homes activated".

3.13. Wholesale access

- (41) The selected NPs that will lease the supported passive infrastructure from *the Beneficiary* and operate active networks on that infrastructure will have to provide and ensure fair and non-discriminatory access for all interested service providers.
- (42) The access obligation on NPs is an inherent part of the chosen business model and will include colocation, access to ducts, dark fibre, unbundled local loop and street cabinets as well as bitstream access. Access to ducts and dark fibre will be governed by a standard offer that will be audited by RTR GmbH.

3.14. Wholesale access pricing

- (43) Wholesale access prices are to be based on the price set or approved by 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 provider 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. Disputes between NPs and access seekers may also be brought before TKK.

3.15. Claw-back and monitoring mechanism

- (44) The Federal State of Styria will implement a claw-back mechanism with regard to the selected NPs who will lease the passive infrastructure from *the Beneficiary* and operate active networks on it.¹⁸
- (45) The claw-back mechanism will be linked to unanticipated gains by the NPs, which are obliged to present to *the Beneficiary*, as part of their bid in the competitive selection process, sufficient information regarding expected gains from sales of wholesale access and in case a network provider will at the same time act as service provider also regarding expected gains from take-up of services by consumers. If, after 3 years, the actual gains exceed the expected gains by more than 30%, the excessive gains have to be paid to the government of the Federal State of Styria.
- (46) The government of the Federal State of Styria will carry out an ongoing monitoring of the measure. Both *the Beneficiary* and the selected NPs are subject to extensive reporting obligations. Service providers will also have to report, to e.g. collect take-up-rates on an end customer basis, pricing of products, chosen products by end customers, etc. The NPs will be responsible for collecting that information from service providers and for reporting it to *the Beneficiary* on a contractual basis. *The Beneficiary* will report to the government of the Federal State of Styria.

¹⁷ <https://www.rtr.at/de/tk/ZIS>.

¹⁸ The Styrian authorities expect the direct beneficiary of the measure to fund around 50-70 projects by the end of 2023 and it cannot be excluded that one company wins several contracts for different projects, which would increase the overall amount of indirect support received by this network provider.

4. ASSESSMENT OF THE MEASURE

4.1. Existence of aid

- (47) According to Article 107(1) 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."
- (48) 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.

4.1.1. Undertaking

- (49) 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.¹⁹
- (50) The direct beneficiary of the support measure is *Steirische Breitband- und Digitalinfrastrukturgesellschaft m.b.H.*
- (51) *The Beneficiary* will receive a direct grant in order to establish passive infrastructure for broadband networks, which it will own and let to selected NPs. The construction of passive infrastructure for broadband networks with a view of its future commercial exploitation by third-party operators constitutes an economic activity. *The Beneficiary* is therefore considered an undertaking within the meaning of Article 107(1) TFEU.
- (52) Moreover, the selected NPs who will lease the supported passive infrastructure from *the Beneficiary* will be indirect beneficiaries of the measure as they will be allowed to benefit from the existence of the passive infrastructure without having to invest their own resources, except for the rental fees. The selected NPs are therefore also considered undertakings within the meaning of Article 107(1) TFEU.

4.1.2. State resources and imputability

- (53) State resources include all resources of the public sector²⁰, including resources of intra-State entities (decentralised, federated, regional or other)²¹ and, under certain circumstances, resources of private bodies. In cases where a public authority grants an advantage to a beneficiary, the measure is by definition

¹⁹ 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.

²⁰ Judgment of the General Court of 12 December 1996, *Air France v Commission*, T-358/94, ECLI:EU:T:1996:194, paragraph 56.

²¹ Judgment of the General Court of 6 March 2002, *Territorio Histórico de Álava and Others v Commission*, Joined Cases T-92/00 and 103/00, ECLI:EU:T:2002:61, paragraph 57.

imputable to the State, even if the authority in question enjoys legal autonomy from other public authorities.

- (54) In the case at hand the measure is financed by the government of the Austrian Federal State of Styria, an intra-State entity and public authority at regional level. The measure at stake is therefore considered to be granted through State resources and to be imputable to the Republic of Austria.

4.1.3. *Economic advantage*

- (55) 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.²²
- (56) *The Beneficiary* will be granted a direct investment in the amount of €60 million paid in instalments over six years. The public consultation that was conducted in the period from 20 February 2018 to 23 March 2018 has shown that no commercial investment in white NGA areas in the Federal State of Styria is envisaged in the near future. Given the topographic situation and the challenging environment for broadband infrastructure rollout in white NGA areas in Styria, which are characterized by a mountainous landscape, low population density and scattered settlements, such an investment is unlikely to be profitable from an ex-ante point of view. It is thus unlikely that a private investor of a comparable size operating in normal conditions of a market economy could have been prompted to invest €60 million in the roll-out of passive infrastructure for ultrafast broadband networks with symmetrical access speeds of at least 100 Mbps in selected white NGA areas in Styria.
- (57) It is hence considered that the Beneficiary has been granted an advantage by the Federal State of Styria which would not have occurred in normal market conditions.
- (58) Furthermore, NPs will be able to operate NGA networks in currently white NGA areas on conditions not otherwise available on the market which means that they will also have an economic advantage as indirect beneficiaries of the measure.

4.1.4. *Selectivity*

- (59) 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 Beneficiary* as the only recipient.
- (60) The measure thus targets one single undertaking active in the telecommunications industry to the exclusion of all other undertakings active in this sector. Furthermore, the measure does not concern general infrastructure which would be open on a non-discriminatory basis to anyone but is limited to the use by providers of ultrafast broadband networks.
- (61) As concerns the identification of the particular legal framework against which selectivity can be assessed, it is noted that the construction and operation of

²² Judgment of the Court of Justice of 29 April 1999, *Spain v Commission*, C-342/96, ECLI:EU:C:1999:210, paragraph 41.

passive infrastructure for broadband 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.

- (62) In the context of this particular legal regime the measure has the effect of conferring an advantage on *the Beneficiary* over other companies in the electronic telecommunications market, which are, in the light of this legal regime, in a comparable factual and legal situation.
- (63) This advantage cannot be justified on the basis of the framework system (i.e., economic activity relying on private investments) since the outcome of market consultation and public consultation identifies the target areas of the support measure as areas where no company wants to make an investment.
- (64) The measure is therefore selective.

4.1.5. *Effect on trade and competition*

- (65) 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.
- (66) The present case concerns the development of passive infrastructure for NGA broadband networks in white NGA areas in Styria. When looking at the broadband sector in Austria in general, it must be concluded that there is significant private financing of the development of passive infrastructure for NGA broadband networks all over the country. An effect on trade and a distortion of competition is therefore not excluded.
- (67) The construction of passive infrastructure for NGA broadband networks constitutes a service in a liberalised sector where usually is, or could be, competition. *The Beneficiary* is active in this sector and has been granted a financial advantage by the Federal State of Styria which is liable to improve its competitive position compared to other undertakings active in this sector. The measure therefore threatens to distort competition.
- (68) Undertakings active in the construction of passive infrastructure for broadband networks are competing in intra-Union trade as many of them are active in more than one Member State. These undertakings must be considered affected by the financial advantage for *the Beneficiary* as they might have been interested in providing the service under the same conditions as *the Beneficiary* but were not given the opportunity.
- (69) It must therefore be considered that the measure in question is capable of distorting competition and is liable to affect trade between Member States.

4.1.6. *Conclusion*

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

4.2. Compatibility

- (71) The Commission has to assess whether the aid can be found compatible with the internal market. 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. The aid in question can only be assessed on the basis of Article 107(3)(c) TFEU, which stipulates that: "*aid to facilitate the development of certain economic activities or of certain economic areas, where such aid does not adversely affect trading conditions to an extent contrary to the common interest*", may be considered to be compatible with the internal market. In its assessment, the Commission has taken into account the Broadband Guidelines²³, which contain a detailed interpretation of Article 107(3)(c) TFEU as it applies to that area of State aid law.
- (72) In the assessment under Article 107(3)(c) TFEU the Commission ensures that the positive impact of the aid measure in reaching an objective of common interest outweighs its potential negative side effects, such as distortions of trade and competition. This exercise is conducted in two steps.
- (73) First, every aid measure has to comply with the below necessary conditions. Failure to comply with one of the following conditions will result in declaring the aid incompatible with the internal market.
- The aid must contribute to the achievement of objectives of common interest;
 - Absence of market delivery due to market failures or important inequalities;
 - The aid must be appropriate as a policy instrument;
 - The aid must have an incentive effect;
 - The aid is limited to the minimum necessary;
 - Negative effects must be limited;
 - The aid measure must be transparent.
- (74) Second, if all these conditions are fulfilled, the Commission balances the positive effects of the aid measure in reaching the objective of common interest against its potential negative effects.

4.2.1. Contribution to the achievement of objectives of common interest

- (75) In its Europe 2020 Strategy²⁴, the Commission stated that the Digital Agenda for Europe flagship initiative has the "*aim to deliver sustainable economic and social*

²³ 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").

²⁴ See fn. 2.

benefits from a Digital Single Market based on fast and ultra-fast internet and interoperable applications [...]". In pursuing this aim, "at national level, Member States will need [...] to draw up operational high speed internet strategies and target public funding, including structural funds, on areas not fully served by private investments."

- (76) The strategic objectives of the Digital Agenda for Europe were complemented by the Commission's Communication "Connectivity for a Competitive Digital Single Market – Towards a European Gigabit Society"²⁵ which sets a vision of Europe where availability and take-up of very high capacity broadband networks enable the widespread use of products, services and applications in the Digital Single Market. To this end, the Commission proposes that by 2025 all European households, rural or urban, should have access to broadband networks offering a download speed of at least 100 Mbps, which can be upgraded to 1 Gbps.
- (77) The government of the Federal State of Styria is faced with large white NGA areas in several districts of the Federal State while the capital Graz and its surroundings are largely served with NGA broadband networks. This demonstrates a "digital divide" within the Federal State of Styria, which may lead to rural depopulation and does mean decreased sustainability for commercial activities of enterprises. The underserved districts contain sparsely populated areas where private operators have no commercial interest to invest in the near future. Furthermore, the population structure and the topography of Styria imply that there are many small villages in mountainous and forested regions.
- (78) With the aid measure at hand, the Federal State of Styria will provide the passive infrastructure required for the provision of NGA broadband services in selected white NGA areas in Styria. It will also require NPs to provide symmetrical access speeds of at least 100 Mbps at any eligible location served by the supported networks. The aid measure will therefore bridge the digital divide between areas already covered by NGA networks and some areas that are not yet connected at such speeds.
- (79) Therefore, the measure intends to address the digital divide in Styria and allow more citizens and households to have access to very high-speed broadband services. The measure therefore pursues genuine cohesion and economic development objectives and will make a significant contribution to the achievement of the objectives of the Digital Agenda for Europe and of the Communication "Connectivity for a Competitive Digital Single Market – Towards a European Gigabit Society". The aid measure thus contributes to the achievement of objectives of common interest.

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

- (80) According to paragraph 37 of the Broadband Guidelines, "*a market failure exists if markets, left to their own devices, 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.*"

²⁵ See fn. 3.

(81) The intervention of the Federal State of Styria targets so-called white NGA areas within the meaning of paragraph 75 of the Broadband Guidelines, i.e. areas where NGA networks do not at present exist and where they are not likely to be built within the next three years. The market therefore fails to deliver full NGA broadband network coverage in Styria and generates, in light of the targets of the Digital Agenda for Europe and the Commission's Communication "Connectivity for a Competitive Digital Single Market – Towards a European Gigabit Society", only insufficient private investment in NGA broadband networks in Styria. This has been ensured in the public consultation exercise as described above in section 3.7. and will continue to be ensured by the government of the Federal State of Styria throughout the remaining stages of the mapping exercise as described above in section 3.6. The market in Styria also fails to deliver an efficient outcome for society with a view to the increasing social inequalities within Styria generated by the lack of access to high-speed internet networks in rural areas in Styria. The intervention of the Federal State of Styria will help to correct this development.

(82) It can therefore be concluded that the notified measure addresses a market failure in rural areas in Styria where private operators will not invest in establishing passive infrastructure for NGA broadband networks.

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

(83) So that the aid measure is properly designed, it is required that State aid is an appropriate policy instrument to address the problem. Alternative instruments include ex ante regulation and demand-side measures. Moreover, coordination of all state interventions is essential to avoid duplications and incoherence.

(84) The government of the Federal State of Styria has previously undertaken other activities such as de minimis support for enterprises installing broadband connections, the financing of regional masterplans and the cooperation with regional utilities like the regional Energy supplier. These alternative measures, whilst having had a significantly smaller financial volume, could not help to overcome the underlying problem of missing passive infrastructure for NGA broadband networks in the target areas.

(85) The national Austrian aid scheme "Broadband Austria 2020 (BBA 2020)" (see above in section 3.5.) has led to some improvements in terms of reducing the number of white NGA areas in Styria but there remain numerous large white NGA areas where private operators have refused to invest despite of the funding opportunity under the national aid scheme. The main reason for this can be seen in the fact that the maximum aid intensity under BBA 2020 is 65% of the eligible costs, meaning that an own contribution to the costs of the project in the amount of at least 35% is required from aid recipients under BBA 2020. These conditions did not create the interest amongst private operators and Styrian municipalities concerned with NGA white areas that had been pursued by the Austrian authorities. Many of the Styrian municipalities concerned with white NGA areas in their territory are located in very rural and mountainous areas, have to deal with strained budgets and were not willing to handle such infrastructure projects by themselves. Against this background the Styrian authorities considered the notified aid measure with a direct investment model necessary and appropriate. However, in order to avoid any potential overlaps in funding with a view to

projects and target areas under the measure at hand and BBA 2020 a common Monitoring Committee comprised of representatives from the national and regional levels (*Breitbandlenkungsausschuss*) will meet four times per year and discuss and coordinate all funding activities under the different existing support measures at national and regional level (see above in section 3.5.).

- (86) As regards demand-side measures, these are not appropriate means to solve the problem as the required passive infrastructure in the potential target areas does not yet exist and its construction would not be profitable for NPs, even with existing demand-side measures, due to the low population density in the target areas.
- (87) The implementation of the measure, on the other hand, will guarantee the roll-out of passive infrastructure for NGA networks according to the needs of the Federal State of Styria. The aid measure makes it possible to achieve the objective of ensuring NGA network coverage in many white NGA areas in Styria effectively, efficiently and within the planned time scale.
- (88) The Commission therefore considers the aid measure to be an appropriate policy instrument and agrees that without further public intervention it seems impossible to prevent the deepening of the "digital divide" between urban and rural areas in Styria, which could lead to the economic and social exclusion of local citizens and businesses.

4.2.4. *Existence of incentive effect*

- (89) As set out in paragraph 45 of the Broadband Guidelines, regarding the existence of an incentive effect, it needs to be examined whether the broadband network investment concerned would not be undertaken within the same timeframe without any state aid.
- (90) The measure ensures that aid can only be provided if it is established that in the targeted areas no comparable investment would take place without public funding within the next three years. This has been confirmed by the public consultation carried out by the government of the Federal State of Styria (see above in section 3.7.). It follows from this that the supported investment in passive infrastructure for NGA broadband networks in white NGA areas in Styria would not be made within the same timeframe without the aid.
- (91) The Commission therefore considers the aid scheme to have an incentive effect.

4.2.5. *Aid limited to the minimum necessary*

- (92) In assessing the proportional character of the notified measure, the Commission has highlighted a number of necessary conditions to minimise the State aid involved and the potential distortions of competition.

4.2.5.1. Detailed mapping and analysis of coverage

- (93) It should be clearly identified which geographic areas will be covered by the support measure.
- (94) As described in section 3.6. above, the measure will provide support exclusively in white NGA areas in Styria. All potential target areas have been identified in the

mapping as provided in the third call for financial aid for access networks in the framework of the national aid scheme BBA 2020 published by the BMVIT on 15 February 2018.²⁶ The final target areas will be chosen by the government of Styria taking into account economic conditions in all potential target areas.

- (95) It should be noted in this context, that the amount of €60 million of State aid provided by the notified measure will not suffice to serve all white NGA areas in Styria with passive infrastructure for NGA broadband networks. In fact, the government of Styria estimates that an amount of €1.3 billion would be needed in order to serve all white NGA areas in Styria with passive infrastructure for NGA broadband networks. The government of Styria will therefore focus on those areas and municipalities with the most pressing need. These will be municipalities with white NGA areas in their territory whose overall share of inhabitants with NGA access is below 30%.
- (96) The Commission considers this to be sufficient to clearly identify which geographic areas will be covered by the support measure.

4.2.5.2. Public consultation

- (97) It should also be given adequate publicity to the main characteristics of the measure and to the list of target areas by publishing the relevant information of the project and inviting to comment.
- (98) The main characteristics of the aid measure have been made public in a public consultation conducted between 20 February 2018 and 23 March 2018, as described above in section 3.7. The consultation was made public in the Official Gazette of Styria (Grazer Zeitung), as well as online²⁷ and contained a summary of the planned support measure as well as a description of the potentially targeted areas, inviting all interested parties to comment. The government of Styria did not receive any feedback that would have required an update of the results of the mapping exercise (see above in sections 3.6. and 4.2.5.1.) concerning the potential target areas.
- (99) The Commission considers this approach to be sufficient to ensure proper publicity.

4.2.5.3. Competitive selection process and most economically advantageous offer

- (100) A competitive selection process should ensure that there is transparency for all investors wishing to bid for the implementation and/or management of the subsidised project and the aid granting authority shall establish qualitative award criteria on which the submitted bids are assessed.
- (101) The government of the Federal State of Styria chose to implement the measure via a direct investment model in which the government of the Federal State of Styria builds and maintains the passive infrastructure for NGA broadband networks through a fully-owned private entity, the in-house company *Steirische*

²⁶ See at <https://www.bmvit.gv.at/telekommunikation/breitband/foerderungen/access/call03/index.html>.

²⁷ <http://www.verwlatung.steiermark.at/markterkundung>.

Breitband- und Digitalinfrastrukturgesellschaft m.b.H. In order to ensure that the recourse to a direct investment model does not disproportionately distort competition but, to the contrary, ensures a pro-competitive use of the subsidised infrastructure, the government of the Federal State of Styria put in place, in line with the Broadband Guidelines²⁸, a number of competitive safeguards:

- *The Beneficiary* as the owner of the subsidised passive infrastructure for NGA broadband networks will limit its activities on the predefined target areas and will not expand to other commercially attractive regions;
- *The Beneficiary* will limit its activities to maintaining and repairing the passive infrastructure and to granting access to it, but will not engage in competition on the retail levels with commercial operators.
- *The Beneficiary* will have an accounting separation between the funds used for the operation of the passive infrastructure and the other funds at its disposal.

The Commission concludes that these safeguards are sufficient to avoid undue distortions of competition as far as the selection of *the Beneficiary* without public procurement procedure is concerned.

- (102) The subsidised passive infrastructure will be leased to NPs, who will be chosen in each case in a fair, transparent and non-discriminatory selection procedure in line with the applicable rules on public procurement at EU and national levels and who will operate the active networks and grant fair and non-discriminatory access to service providers. For more details regarding the selection procedure it is referred to section 3.8. above. This approach will ensure transparency for all NPs wishing to bid for the operation of the active layer of the subsidised infrastructure and equal and non-discriminatory treatment of all bidders.
- (103) On the basis of the detailed explanation in section 3.9. above, the Commission is satisfied that all bids received within the scope of the competitive selection procedures regarding the selection of NPs but also the construction of the passive infrastructure will be assessed according to pre-established qualitative award criteria that will be weighed against the price offered in the bid, in line with paragraph 78(d) of the Broadband Guidelines. As is foreseen by the score system explained in section 3.9. above, in order to minimise the amount of aid indirectly received by NPs, the bidder offering the highest rent under comparable or even identical quality conditions will receive the most priority points within the overall assessment of its bid.
- (104) The Commission considers the requirements with regard to the competitive selection process and the most economically advantageous offer fulfilled.

4.2.5.4. Technological neutrality

- (105) As different technological solutions exist to provide broadband services, no particular technology or network platform should be favoured.

²⁸ See paragraph 78(c) and footnote 96 of the Broadband Guidelines.

- (106) The aid measure aims to serve selected white NGA areas in Styria with passive infrastructure for NGA broadband networks that must allow for the reliable provision of symmetrical bandwidth of at least 100 Mbps and are upgradeable to download speeds of 1 Gbps.
- (107) As is described in section 3.10. above, the aid measure will allow for the use of any active network technology as long as the network technology used meets the requirements described above.
- (108) The Commission therefore considers that the aid measure fulfils the requirements of the Broadband Guidelines regarding technological neutrality.

4.2.5.5. Use of existing infrastructure

- (109) It should be encouraged to have recourse to any existing infrastructure so as to avoid unnecessary and wasteful duplication of resources and to reduce the amount of public funding.
- (110) The Commission considers that the approach taken by the government of Styria (see above in section 3.12.) allows for finding the best and most cost-efficient solution and for avoiding unnecessary duplication of infrastructure.

4.2.5.6. Wholesale access

- (111) All interested third parties should have effective wholesale access under fair and non-discriminatory conditions to a subsidised NGA network for at least a period of seven years and get the possibility of effective and full unbundling. Access to new passive infrastructure such as ducts or poles should be granted and be unlimited in time. The same access conditions shall apply on the entirety of the subsidised network, including on the parts of such network where existing infrastructures have been used. Newly constructed ducts should be large enough to cater for several cable networks and to host point-to-multipoint as well as point-to-point solutions. Where the NPs also provide retail services, access should be granted at least six months before the launch of such retail services.
- (112) In line with the requirements of paragraph 78(g) and 80 of the Broadband Guidelines, the government of the Federal State of Styria confirmed that the new networks will offer wholesale access on an open, non-discriminatory basis, respecting the principle of technological neutrality. In the case at hand, the obligation to grant wholesale access is on the selected NPs.²⁹ Selected NPs will provide full open access to the subsidised network including but not limited to full and effective unbundled access, bitstream access, access to ducts, dark fibre and street cabinets. Service providers will be able to use such wholesale access in order to connect end users via any access technology of their choice. Effective wholesale access to the subsidised network will be granted for at least seven years and the right of access to the new passive infrastructure (such as ducts or poles) will not be limited in time. The same access conditions will apply on the entirety of the network including on the part of it where existing infrastructure will be used. The access obligations shall be enforced irrespective of any change in ownership, management or operation of the subsidised infrastructure.

²⁹ *The Beneficiary's* activities are limited to the construction, maintenance and repair of the subsidised passive infrastructure.

- (113) Furthermore, the selected NPs renting passive infrastructure from *the Beneficiary* will sell passive wholesale access to that passive infrastructure, as well as active wholesale access, only for the provision of NGA speeds in the "white" areas targeted by the measure. In case a selected network provider is also a service provider (vertically integrated), that network provider will be required to grant access to the network to other service providers at least 6 months before the launch of its retail services, in line with the recommendation of the Broadband Guidelines (paragraph 78(g) and footnote 108).
- (114) The above limitation concerning the provision of only NGA speeds aims at reducing the risk of distortion of competition. The Commission therefore concludes that it supports the assessment of the measure as compatible with the State aid requirements regarding wholesale access.

4.2.5.7. Wholesale access pricing

- (115) Wholesale access prices should be made under market conditions. They should be based on the pricing principles set by TKK and RTR GmbH and on benchmarks. If there are no published or regulated prices available for certain wholesale access products to benchmark against, the pricing should follow the principles of cost orientation pursuant to the methodology established in accordance with the sectorial regulatory framework.
- (116) As described in section 3.14. and in accordance with paragraph 78(h) of the Broadband Guidelines, the government of the Federal State of Styria committed itself to ensure that wholesale access prices will be based on the price set or approved by RTR GmbH or benchmarked against average wholesale prices of comparable access services in other, more competitive parts of the country.
- (117) The Commission considers this to be in line with the Broadband Guidelines.

4.2.5.8. Fair and non-discriminatory treatment

- (118) The subsidised infrastructure must enable the provision of competitive and affordable services to end-users by competing operators. Where the network operator is vertically integrated, adequate safeguards must be put in place to prevent any conflict of interest, undue discrimination towards access seekers or content providers and any other hidden indirect advantages.
- (119) Since selected NPs will be allowed to become active also as service providers at retail level, offering services directly to end customers,³⁰ the government of the Federal State of Styria will ensure that *the Beneficiary*, as owner and lessor of the passive infrastructure, will provide for safeguards in the leasing contracts with NPs for preventing any anti-competitive behaviour of NPs towards other service providers when also active at retail level. Such contract clauses will have to be reflected already in the tender documents, and the award criteria in particular, of the procurement procedures for the lease of the subsidised passive infrastructure.

³⁰ See above in section 3.4.

4.2.5.9. Monitoring and claw-back mechanism

- (120) Granting authorities shall closely monitor the implementation of the broadband project during the entire duration of the project.
- (121) The government of the Federal State of Styria will carry out an ongoing monitoring of the measure as described above in section 3.15.
- (122) A claw-back mechanism is not necessary in case of publicly-owned, wholesale only infrastructures managed by an in-house company with the sole purpose of granting fair and non-discriminatory access to all operators, in line with the Broadband Guidelines.³¹ Therefore, the Federal State of Styria does not need to implement a claw-back mechanism in relation to *the Beneficiary* whose activities as a state-owned in-house company are limited to building, maintaining and repairing the passive infrastructure and leasing it to selected NPs chosen in competitive selection procedures in accordance with the applicable rules on public procurement.
- (123) However, the government of the Federal State of Styria will implement a claw-back mechanism with regard to the selected NPs who operate the subsidised networks at wholesale level and may also become active at retail level. For the details of this claw-back mechanism it is referred to section 3.15. above.
- (124) It will therefore be guaranteed that NPs cannot generate unreasonably excessive profit by making use of the publicly funded infrastructure.

4.2.5.10. Transparency and reporting

- (125) The government of the Federal State of Styria must ensure, for the entire duration of the measure, that all transparency requirements are met at each phase of the measure. In particular, the government of the Federal State of Styria shall publish on a central website³² at least the following information: The full text of the award decision and its implementing provisions, the names of the aid beneficiaries, aid amounts, aid intensities and the technology used. Such information shall be published after the granting decision has been taken, must be kept for at least ten years and shall be available for the general public without restrictions. *The Beneficiary* as well as the selected NPs are obliged to provide entitled third parties with comprehensive and non-discriminatory access to information on the infrastructure (including ducts, poles, street cabinets, fibre, etc.) built within the scope of the measure, which will facilitate other operators' access to the infrastructure.
- (126) Furthermore, for the duration of the measure, the government of the Federal State of Styria shall consolidate key information on the individual projects and report to the Commission about the application and the progress of the measure every two years.³³

³¹ See paragraph 78(i) and footnote 113 of the Broadband Guidelines.

³² E.g. on the Federal State website at <http://www.verwaltung.steiermark.at/breitband>.

³³ 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 wholesale access products, the

- (127) The reporting obligations of *the Beneficiary*, of the selected NPs as well as of service providers explained in section 3.15. above should provide the government of the Federal State of Styria with detailed insight into the development, the operations and the use of the broadband network and thus provide information concerning the fulfilment of all obligations by *the Beneficiary* and the NPs. This ensures that e.g. wholesale access is guaranteed and the profits that are subject to the claw-back mechanism can be determined.

4.2.6. *Limited negative effects*

- (128) It follows from the above assessment regarding market failure that the aid measure does not crowd out any private investment. In particular, the aid is confined to white NGA areas in Styria, i.e. areas where no operator is willing to invest in NGA infrastructure without State aid in the next three years.
- (129) Therefore, the Commission concludes that negative effects of the aid measure, if any, are limited.

4.2.7. *The overall balancing exercise*

- (130) A carefully designed State aid measure should ensure that the overall balance of the effects of the measure is positive. A subsidised network should also be able to ensure a 'step change' that can be demonstrated if as the result of the public intervention the beneficiary makes significant new investments in the broadband network and the subsidised infrastructure brings significant new capabilities to the market in terms of broadband service availability and capacity, speeds and competition.
- (131) As mentioned above in section 3.1., one of the objectives of the measure is to bridge the "digital divide" and provide access to NGA services where they are currently unavailable by making possible a significant new investment in areas where private operators are not planning equivalent investments in the near future.
- (132) As a result of the aid measure, *the Beneficiary* will build passive infrastructure supporting ultrafast broadband networks providing symmetrical access speeds of at least 100 Mbps that can be upgraded to provide download speeds of 1 Gbps in selected white NGA areas in Styria. As has been confirmed by the outcome of the public consultation, such investment would not be made without the aid. The deployment of the passive infrastructure therefore constitutes the necessary first step to enable the achievement of the EU's goals as expressed in the Digital Agenda for Europe and the Commission's Communication "Connectivity for a Competitive Digital Single Market – Towards a European Gigabit Society" in the target areas in Styria.³⁴ The rollout of the infrastructure will enable the delivery of broadband connectivity bringing additional capacity and speed on the market in the measure's target areas and might eventually lead to lower prices and better choice for consumers, with services offering higher quality and innovation. Consumers in the measure's target areas will have better access to online

number of access seekers and service providers on the network, the number of houses passed, take-up rates.

³⁴ See above in section 4.2.1.

resources, which, in combination with higher quality of the services, is likely to stimulate demand in the target areas. This constitutes an important step on the way to bridging the "digital divide" in Styria and to completion of the Digital Single Market in the EU as a whole.

- (133) As regards the required 'step change', the aid measure does not provide aid for purely marginal investments related merely to the upgrade of the active components of the network but for significant new investments in the broadband network by rolling out new passive infrastructure. As described above, this subsidised infrastructure will enable symmetrical access speeds of at least 100 Mbps, upgradeable to download speeds of 1 Gbps, in white NGA areas. It will thus deliver an upgrade from basic to NGA broadband networks. At the same time, recourse to the ZIS database run by RTR GmbH³⁵ will likely reduce the overall cost of development of the new passive infrastructure by allowing an efficient re-use of the infrastructure already deployed for the existing basic broadband networks.
- (134) Furthermore, the design of the aid measure ensures open access to the subsidised network on equal and non-discriminatory terms in favour of all access seekers, thus favouring competition among service providers at retail level. The provision of passive infrastructure for NGA networks has a pro-competitive impact, as it allows network operators and service providers to use the subsidized infrastructure and compete on services to the end users. The measure is thus expected to create a level playing field for competition benefitting end-users. The increase in network capacity is expected to stimulate market entry by service providers and the provision of a larger variety of services.
- (135) The Commission therefore concludes that the subsidised network is pro-competitive and that the subsidised infrastructure brings significant new capabilities to the market in terms of broadband service availability and capacity, speeds and competition. An adequate 'step change' is ensured.
- (136) Finally, the government of the Federal State of Styria has designed the measure under examination in such a way as to minimise the State aid involved and the potential distortions of competition arising from the measure.³⁶
- (137) In view of the characteristics of the project and of the safeguards applied, the Commission considers, based on the information available, that the aid measure's overall impact on competition will be positive.

5. CONCLUSION

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

If this letter contains confidential information which should not be disclosed to third parties, please inform the Commission within fifteen working days of the date of receipt. If the Commission does not receive a reasoned request by that deadline, you will be

³⁵ See above in section 3.12.

³⁶ Please see above in section 4.2.5.

deemed to agree to the disclosure to third parties and to the publication of the full text of the letter in English 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
Member of the Commission

CERTIFIED COPY
For the Secretary-General,

Jordi AYET PUIGARNAU
Director of the Registry
EUROPEAN COMMISSION