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**Subject: State aid N 73/2008 – Spain / Public support to broadband, digital TV, mobile and infrastructures in rural areas**

#### **PROCEDURE**

1. By letter dated 6 February 2008, registered the same day, the Spanish Authorities notified, pursuant to Article 88(3) of the EC Treaty, their plan to establish an aid scheme aimed at supporting the provision of certain electronic communication services in rural areas of Spain ("the measure" hereafter). By letter dated 3 April 2008, the Commission requested additional information necessary to assess the measure, which the Spanish Authorities provided by letter dated 28 April 2008, registered the same day. Further information was also supplied on 5 June 2008.
2. The notified measure concerns the support to electronic communications contained in the sub-programme "Avanza Infraestructuras" within the Strategic Plan on Telecommunications and Information Society for 2008-2011. According to the Spanish Authorities, other sub-programmes (e.g. R+D, SMEs, digital public services) within the same Plan are subject to other notifications to the Commission in accordance with Article 88(3) of the EC Treaty, fall under block-exemption regulations or do not contain State aid. These other sub-programmes are not included in the present notification.

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## **DESCRIPTION OF THE AID MEASURE**

### **2.1 Objective**

3. The measure has the main objective of reducing the digital divide between urban and rural areas of Spain by supporting three categories of actions: i) the provision of broadband, mobile telephony and digital TV services, ii) the improvement of the connection of small municipalities to big capacity trunk networks and iii) the launching of pilot projects for advanced telecommunication services.
4. The measure modifies and expands on the previous aid approved by the Commission on 6 April 2006 in case n° N 583-2004 ES- "Broadband in rural and ultra-remote areas". The previous scheme runs between 2005 and 2008. However, the Spanish authorities state that the previous scheme will not be applied in 2008. As a result, there is no overlap between the notified measure and the previous scheme.
5. Like in the previous scheme, the target areas of the measure are rural and isolated areas with low density of population where the services under consideration are not on offer and where there are no prospects of offerings in the near future in the whole territory of Spain. However, in contrast with the previous scheme, the measure now includes also mobile telephony, digital TV, trunk segments of networks and pilot projects of advanced telecommunication services with a view to proposing similar services under similar conditions as those on offer in urban areas. The former two services may be indeed subject to bundled offers with broadband access in those areas.

### **2.2 Legal basis**

6. The legal basis of the measure, which was notified to the Commission as a draft, is the "*Orden ITC/464/2008 de 20 de febrero por la que se regulan las bases, el régimen de ayudas y la gestión de la Acción Estratégica de Telecomunicaciones y Sociedad de la Información-dentro del Plan Nacional de Investigación Científica, desarrollo e Innovación Tecnológica 2008-2011*". The notified measure concerns the support to electronic communications contained in the sub-programme "Avanza Infraestructuras", referred to in section 6, point 6, measures a), b) and c) of the order.
7. The legal basis of the measure contains a provision ("*Disposición adicional cuarta*") which makes the payment for applications under the measure in 2008 conditional upon the Commission having authorised the measure.

### **2.3 Budget and aid instruments**

8. The total funds allocated to the measure between 2008 and 2011 consist of grants up to EUR 60 million and soft loans up to EUR 120 million. Soft loans consist of zero-interest loans to be reimbursed over a maximum 15 year period depending on the nature of the project. The discount rate applied for the calculation of the aid equivalent for soft loans will be the relevant reference rate established by the Commission. The support may be co-financed with Community Structural Funds, in which case the relevant provisions of Council Regulation

(EC) N° 1083/2006 apply. Both types of financial instruments may concur in supporting a project, provided the aid intensity limits referred to below are not exceeded.

## **2.4 Duration**

9. Applications under the measure will be possible between 2008 and 2011, for projects being completed within three years from approval at the latest. The Commission notes, however, that support through soft loans may last for a maximum period of 15 years provided for reimbursement.

## **2.5 Beneficiaries**

10. The possible direct beneficiaries of the measure as concerns the provision of broadband, mobile telephony and digital TV services and the improvement of the connection of small municipalities to big capacity networks are duly constituted enterprises which carry out an economic activity, including, where applicable, SMEs as defined in accordance with Commission Regulation (EC) N° 70/2001 of 12 January 2001 on the application of Articles 87 and 88 of the EC Treaty to State aid to small and medium-sized enterprises. Possible beneficiaries of support to pilot projects for advanced telecommunication services may also include non-profit organisations and local public entities, in addition to enterprises.

## **2.6 Eligible projects and selection criteria**

11. The procedure for awarding the financial support in all cases will be that of open competition and must follow the principles of publicity, transparency, equal treatment and non-discrimination.

### *Electronic communication services*

12. The eligible projects in rural and isolated areas must support the provision of broadband, mobile telephony and digital TV for end-users in areas where such services are not provided and where there are no plans of coverage in the near future. To that effect, lists of non-serviced priority areas will be drawn up and made available to all interested parties. Applicants may also propose other areas where they can demonstrate that there is no coverage for the above services.
13. The measure does not prescribe any particular technological solution. Broadband projects must meet minimum service specifications, i.e. download/upload speed 256K/128K, access availability >99%, quality of service similar as predominant access offer in Spain, maximum tariff limits of EUR 39 as activation fee and same amount as monthly tariff during the first 24 months of contract and Service Level Agreements defining quality of services for end-users. Mobile telephony projects must also include such Service Level Agreements. In addition, applicants must also indicate the terms and conditions under which they offer open and non-discriminatory access to the subsidised infrastructure for other operators.
14. The evaluation criteria and respective weightings include the following:
  - Quality of project definition and service provision (15%);

- Technical, economic and financial quality and viability (15%);
- Business plan and dissemination of results (15%);
- Degree of innovation (10%);
- Terms and conditions for open access to other operators (15%);
- Socio-economic benefits (15%);
- Territorial and demographic impacts (15%).

*Connection to big capacity trunk networks*

15. The eligible projects must support the connection of rural municipalities to the main data transmission networks with trunk networks of sufficient capacity to ensure the provision of advanced telecommunication services to rural and isolated areas where there are no plans of coverage in the near future. To that effect, lists of non-serviced priority areas will be drawn up and made available to all interested parties. Applicants may also propose other areas where they can demonstrate that there is no coverage for the above services.
16. The measure does not prescribe any particular technological solution. In addition, applicants must also indicate the terms and conditions under which they offer open and non-discriminatory access to the subsidised infrastructure for other operators.
17. The evaluation criteria and respective weightings are the same as for the electronic communication services referred to above.

*Pilot projects for advanced telecommunication services*

18. The eligible projects have the objective of testing in rural areas (normally "*municipio*" or smaller part of it) certain advanced technologies present in urban areas (e.g. fiber-to-home, contents for high definition digital TV) which are not foreseen to be extended in the short term and medium term to such areas. The projects must run for two years or less, which is the time deemed sufficient to test the acceptance by rural population in the rural environments concerned. . Particular emphasis is thus put in the public dissemination of results of the pilot projects, allowing gathering information made publicly available (e.g. publicly available reports and conferences) as to use and acceptance by rural population, accessibility by elderly people, issues technical maintenance etc.
19. The evaluation criteria and respective weightings include the following:
  - Quality of project definition and service provision (15%);
  - Technical, economic and financial quality and viability (20%);
  - Business plan and dissemination of results (20%);

- Degree of innovation (15%);
- Socio-economic benefits (15%);
- Territorial and demographic impacts (15%).

## **2.7 Aid intensity and cumulation**

20. The eligible costs must be duly justified and exclusively derived from or dedicated to the project. They include subcontracting, material, promotion dissemination and other general costs, including infrastructure and civil construction works. Those costs must be duly documented with strict requirements of accounting separation set out in the order, including appropriate audit reports certifying the eligibility of the costs items. The maximum aid intensity will be 50% of the eligible costs, subject to the coverage of those costs being strictly necessary to ensure the viability of the project, on the basis of a business plan
21. The maximum aid intensity under the previous scheme approved by the Commission in case N 583-2004 ES was 30%. According to the Spanish authorities, the fact that the current measure targets geographic areas where the previous 30% aid intensity ceiling was insufficient to attract investment into economically viable projects of broadband supply between 2005 and 2007 justifies the increase to 50%.
22. Beneficiaries must communicate the amount of other aid granted during the ongoing fiscal year and the two previous years, including *de minimis* aid. Having regard to the amount of such aid and the business plan provided, the aid intensity will be adjusted and will not exceed the ceiling provided for in the measure.
23. Enterprises subject to a pending recovery order following a Commission decision declaring aid as illegal and incompatible with the common market shall not be beneficiaries of the measure.

## **2.8 Granting authority**

24. The applications will be launched and decided by the Secretary of State for Telecommunications and Information Society and managed by the Directorate General for the Development of the Information Society.

## **3 ASSESSMENT OF THE AID MEASURE**

25. The Spanish authorities have complied with the procedural requirements of Article 88(3) of the EC Treaty by notifying the measure before it is implemented and making the payment of any aid in 2008 conditional upon approval by the Commission.

### **3.1 State aid in the sense of Article 87(1) of the EC Treaty**

26. According to Article 87(1) of the EC Treaty, "*any aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favoring certain undertakings or the production of certain goods shall, in so far as it affects trade between Member States, be incompatible with the common market.*".
27. In order to be classified as a state aid, a national support measure must therefore fulfil the following cumulative conditions: 1) the measure must be granted through State resources; 2) it has to confer an economic advantage to undertakings; 3) this advantage must be selective and distort or threaten to distort competition; and 4) the measure must affect intra-Community trade.

#### ***Presence of State resources***

28. The measure is partly funded by structural funds monies and partly by resources of the Spanish central government. These funds are all to be considered as State resources.

#### ***Economic advantage to an undertaking***

29. Selected operator: The open competition procedure and the principle that support shall be limited to ensure the financial viability of the project are both liable to reduce the amount of public support to the projects subsidised by the notified measure. However, even if the selected service provider of the three categories of actions referred to above at point 3 would not receive an excessive return on its overall investment, which may normally be no less than 50% of the eligible investment costs, it receives financial support which allows establishing its business or, as to pilot projects, testing acceptance in the targeted rural areas on conditions not otherwise available on the market, e.g. as to private funding. In addition, the subsidy will allow the service provider to offer the services at lower prices than if it had had to bear all the costs itself and, as a consequence, such a service provider will be able to attract more customers than under normal conditions.
30. As a result of the State contribution, the selected providers are likely to build or upgrade new or additional infrastructure and equipment necessary to offer broadband, mobile telephony, digital TV, connection to main networks through trunk segments and pilot projects for advanced telecommunications services which are only present today in urban areas. The providers will be in a position to exploit this infrastructure and equipment as well as customer relationships acquired with State funds even after the lifetime of the project. Hence, it may benefit from continuing residual advantages from the project.
31. Resellers: In addition, third party service providers could also be expected to benefit from the State resources, given the wholesale access requirement. They may apply to be customers of the wholesale access service provided by the selected operator at more favorable conditions than if the latter had to apply tariffs ensuring the financial viability of the project in the absence of State contribution. In the areas covered by the measure, there is currently no infrastructure and therefore no wholesale offer at all, preventing entry of third parties such as resellers without own infrastructures.

#### ***Selectivity and distortion of competition***

32. The notified measure supports the supply of certain electronic communication services including wholesale access and retail services, which include trunk segments of communication networks, broadband, digital TV, mobile telephony and testing of advanced telecommunication services at affordable tariff conditions. The intervention of the State alters the existing market conditions by allowing the provision of such services by the selected operators and, potentially, third party providers. A number of SMEs or residential customers may be subscribing to the services provided by the selected suppliers instead of more expensive market-based solutions, for instance satellite or leased line offerings. Therefore, the fact that a new service becomes available at a much lower price than existing albeit expensive solutions has the effect of distorting competition.
33. In addition, while the national or regional authorities involved decided to intervene precisely in view of the lack of private initiatives to provide the services at hand under affordable tariff conditions in the concerned areas, it cannot be excluded that market initiatives could become viable in some areas in the medium to long term. By securing this project, the chosen service providers will be capable of establishing their business, getting knowledge of local markets concerned and developing their customer base, enjoying a first mover advantage over prospective competitors.

#### ***Effect on intra-Community trade***

34. Insofar as the intervention is liable to affect providers of electronic communications services and service providers from other Member States, the measure has an effect on trade. The markets for electronic communications services are open to competition between operators and service providers, which engage in activities that are subject to trade between Member States (e.g. content, equipment), the patterns of which may be affected by increased demand for such services in Spain. Some of the undertakings which will be beneficiaries of the measure may also be active in other Member States. There may also be an effect on competition between the businesses using the services enabled by the measure and their competitors in other Member States, although the importance of that effect will probably be low.

#### ***Conclusion on presence of aid***

35. In the light of the foregoing, the Commission considers that the notified measure may constitute state aid in the meaning of Article 87(1) of the EC Treaty and it is therefore necessary to assess its compatibility under the provisions of Article 87(3) of the EC Treaty.

### **3.2 Compatibility under article 87(3)(c) of the EC Treaty**

36. At present, there are no frameworks or guidelines which can be applied to assess state aid measures in the area of electronic communications services in rural areas of the whole territory of Spain such as the one under review. Hence, the Commission considers that it is appropriate to examine the measure directly under Article 87(3)(c) of the EC Treaty concerning “*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*”.

- (1) In order to be compatible under article 87(3)(c), an aid must pursue an objective of common interest in a necessary and proportionate way. In this regard, the Commission considers it appropriate to assess the following questions:
- (1) 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)?
  - (2) Is the aid well designed to deliver the objective of common interest? In particular:
    - (a) Is the aid measure an appropriate instrument, i.e. are there other, better-placed instruments?
    - (b) Is there an incentive effect, i.e. does the aid change the behaviour of firms?
    - (c) Is the aid measure proportional, i.e. could the same change in behaviour be obtained with less aid?
  - (3) Are the distortions of competition and the effect on trade limited, so that the overall balance is positive?

***Common interest***

37. Electronic communication services enhance the interpenetration between Member States and people which the treaty aims to bring about. As outlined in its Communication “i2010 – A European Information Society for growth and employment”<sup>1</sup> and the eEurope Action Plan 2005<sup>2</sup>, the Commission actively supports the widespread availability of such services. There is evidence of regional development benefits resulting from greater deployment, including job creation and retention as well as improved health and education services<sup>3</sup>. In order to achieve better coverage, the Commission encourages Member States to put comprehensive national strategies in place<sup>4</sup>. By improving access for citizens and businesses in remote and sparsely populated areas where these services are not yet available, the measure helps achieving greater cohesion between urban and rural areas and is therefore in line with the common interest.
38. The Commission notes that the measure is limited to areas where the market has failed to deliver the services under consideration at accessible tariffs and where there are no prospects of offerings in the near future. Lack of coverage is due, among others, to some of the typical

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<sup>1</sup> COM(2005)229 final, 1 June 2005.

<sup>2</sup> COM(2002)263 final, “eEurope 2005: An information society for all”.

<sup>3</sup> For an overview, see: Lehr, Osorio, Gillet and Sirbu (2005): “Measuring Broadband’s Economic Impact”, and Orazem, Peter, University of Kansas Business School (2005), “The Impact of High-Speed Internet Access on Local Economic Growth”.

<sup>4</sup> Commission Communication COM(2004) 369 of 12.05.2004, “Connecting Europe at High Speed – National Broadband Strategies”.



economic problems associated with networks industries. Due to economics of density, electronic communication networks are generally more profitable to roll-out where potential demand is higher and concentrated, in readily accessible areas which are more densely populated. Because of high fixed costs, unit costs escalate dramatically as population densities drop. Remoteness and relief also require bridging longer distances in upstream trunk segments of the network, in the backhaul and in the last mile. In other cases it has been estimated that approximately 65-70% of the costs associated with the deployment of broadband in the access network is related to civil infrastructure<sup>5</sup>. In addition, although equipment costs fall as volumes increase, they remain a significant cost and major barrier to roll-out. In rural and sparsely populated areas of Spain where demand is low and coverage of cost is uncertain or delayed, private operators have so far found it difficult to fund the relevant infrastructure, which has a long life and amortisation period.

### ***Well-designed aid***

#### ***(a) Aid is the appropriate instrument***

39. The measure at hand forms an important part of the Strategic Plan on Telecommunications and Information Society in Spain. Other complementary instruments are also available and used to enhance the penetration of electronic communication services, such as e-Government measures and sector-specific regulation, including tariff and, where necessary, access regulation. The Commission notes that the services under consideration are not subject to universal service obligations. As concerns mobile telephony, the Spanish authorities declare that the licenses granted for the roll-out of the network do not include any legal obligation to provide services in the areas concerned by the measure.
40. The time elapsed since the first GSM licenses were granted in the mid-1990s and the persistent lack of coverage for broadband services indicates that the measure is addressing a genuine failure of the market to provide the services under consideration. Similar considerations apply to the construction of trunk segments connecting to main networks the rural areas concerned, downstream of which, the lack of sufficient demand explains that the necessary connections to increase data transmission capacity was not carried out in market terms. In addition, the development of such segments is necessary to avoid bottlenecks and providing high speed reliable service to subscribers downstream. The same is true with regard to pilot projects which are intended to test at a reduced scale the acceptance and specific implementation difficulties of advanced services in rural environments, with dissemination of results allowing reducing the risk and addressing possible issues of inadequacy of the tested services which are mainly conceived for urban areas.
41. The measure is therefore socially and economically justified in view of the fact that the supply of such services under pure market conditions may disregard the positive contribution of electronic communication services in attenuating the effects of remoteness and isolation of the rural areas at hand, compared with urban areas where the same services are supplied at market conditions.

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<sup>5</sup> Broadband Stakeholders Group “Broadband in Rural Areas”, 2003.

***(b) The aid provides the right incentives to operators***

42. The direct beneficiary of the aid will be selected by an open procedure in which applicants will submit a business plan necessary to ensure the viability of the project given the anticipated revenues, capped as appropriate for broadband services, as well as capital and operating costs. Prospective operators are therefore encouraged to operate efficiently by minimising estimated losses with little room to inflate planned tariffs, whilst being attracted by investment returns in line with their other purely market-based operations. The open procedure for selection will also contribute to minimising the amount of aid involved.
43. In that respect, the Commission notes that the maximum aid intensity of 30% of the eligible costs under the previous scheme approved by the Commission in case N 583-2004 ES for the period 2005-2008 proved insufficient to attract investment to areas which were potentially targeted by that scheme and which may now benefit from the notified measure with a greater aid intensity of 50%. Therefore, the aid should provide a direct and appropriate investment incentive for the selected operator.

***(c) Proportionality***

44. The Spanish authorities have designed the measure in such a way as to diminish the possible amount of State aid involved and potential distortions of competition arising from the measure. In this respect, the Commission notes, inter alia, the following positive elements in the design of the measure:
- *Open competition*: The operators will be selected through an open procedure
  - *Wholesale access*: The selected operators will have to provide access to the subsidised networks to other operators on equal and non-discriminatory terms that should enable the latter to replicate their formers' offers. This requirement also applies to trunk segments of the network so that, where trunk segments and networks downstream are build up, third party operators have the choice of the point of access to the subsidized infrastructure. The regulatory framework related to electronic communications networks and services will apply.
  - *Dissemination of results of pilot projects*: The public dissemination of results should provide common knowledge for stakeholders to address possible difficulties in the acceptance and implementation of advanced telecommunication services in rural areas at a wider scale in the future.
  - *Technological neutrality*: The project is technologically neutral, i.e. it does not favor a priori any given technology but limits itself to specifying minimum service standards.
  - *Effects on existing infrastructure providers and operators*: The measure concerns areas where the services under consideration are not on offer, that is, the so-called "*white areas*". The freedom for the operators to choose the most efficient way of procuring the necessary infrastructure, either by building, buying or leasing it from third parties minimises duplication, which may be liable to enhance economic efficiency. Existing operators have the possibility to

contribute and upgrade their infrastructure to the project, which limits its economic impact for operators that may already have infrastructure in place.

- *Tariff supervision:* The calls for applications will specify criteria which will secure that the tariffs applied in the relevant areas covered by the measure will be in line with those applied in other areas of Spain where the same services are supplied without aid.
- *Safeguards against reinforcing dominant positions:* Prospective operators can select the areas where they propose to apply. As a result, smaller companies active at the regional or local level can concur as potential beneficiaries. Moreover, the Spanish Authorities declare that the Committee in charge of evaluating the applications will especially watch over ensuring that dominant positions on the market will not be consolidated.

### ***Conclusion on compatibility***

45. The Commission concludes that the notified measure will offset a genuine geographical and economic handicap of the targeted areas and is objectively justified to address the lack of availability therein of the services under consideration on a purely market-driven basis. In view of the characteristics of the measure and of the safeguards applied by the Spanish authorities, the overall impact on competition is deemed to be positive. On the effect on trade, the Commission does not identify any negative spill-over for other Member States. On balance, the Commission concludes that the overall effect of the measure is positive.
46. Finally, the Commission notes that enterprises subject to an outstanding recovery order following a Commission decision declaring aid as illegal and incompatible with the common market shall not be beneficiaries of the measure. Moreover, in any event, the Spanish Authorities undertake to suspend the payment of aid under the measure to any company which would have received aid declared incompatible by a Commission decision until such company has reimbursed or put in a blocked account the total amount of illegal aid with the corresponding recovery interest. As a result, the problem of the potential cumulative effect of the unrecovered incompatible aid with the notified aid, in application of the Deggendorf jurisprudence,<sup>6</sup> does not arise.

## **4 DECISION**

47. On the basis of the foregoing assessment, the Commission decided that the measure is compatible with the common market pursuant to Articles 87(3)(c) of the EC Treaty.

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/index.htm](http://ec.europa.eu/community_law/state_aids/index.htm). Your request should be sent by registered letter or fax to:

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<sup>6</sup> Case C-355/95P, *Textilwerke Deggendorf GmbH (TWD) v. Commission* [1997] ECR I-2549, paragraphs 25-27.

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Yours faithfully,

For the Commission

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