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WORKING LANGUAGE

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Subject: State aid N424/2010 – Spain
Broadband deployment in Galicia

Dear Sir,

1. PROCEDURE AND DESCRIPTION OF THE MEASURE

- (1) On 1 October 2010, the Kingdom of Spain notified to the Commission the above-mentioned aid measure. The measure was notified under the Notice on simplified procedure, in particular point 5(b)(v) of the Notice.¹
- (2) The subject of the measure is granting of State aid to deploy basic broadband and NGA broadband in Galicia between 2010 and 2013. The objective of the measure is to offer broadband to 94 % of the population by 2013. The estimated budget is EUR 67.725 million. The aid intensity is maximum 40 % (except for the rural zone with special difficulties in the south of the Lugo county where the aid intensity amounts to maximum 70 %).
- (3) A description of the relevant features of this measure can be found in the summary of the notification, as published on the website of the Commission http://ec.europa.eu/competition/state_aid/register/ii/doc/Not_N424_2010_AL_ES.pdf and annexed to the present decision.

¹ OJ C136, 16.06.2009, p. 3-12.

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- (4) The aid cannot be cumulated with aid received from other local, regional, national or EU schemes to cover the same eligible costs.

2. ASSESSMENT OF THE MEASURE

2.1. Existence of aid

- (5) As shown by the features of the measure described in the summary of the notification, the current measure will be financed mainly by state resources (Xunta de Galicia funds) and will be co-financed by EAFRD and by ERDF, within the meaning of the EU structural funds rules². It will provide selective economic advantage to the electronic communication operators selected via the tender procedures and also for third party electronic communication operators that will be able to offer their services via wholesale access to the subsidized networks. There will be also an advantage for the business in the targeted areas.
- (6) The measure has the potential to distort competition. At the level of the network operators, support given to one operator may discourage other operators to deploy or expand their own networks in the targeted area on commercial terms. Public funding could also encourage local undertakings to subscribe to the services offered via the subsidized networks instead of more expensive market-based solutions. Insofar as the intervention is liable to affect providers of electronic communications services from other Member States and distorts competition between end users located in Spain and elsewhere in Europe, the measure has an effect on trade. The markets for electronic communication services are open to competition between operators and service providers, which generally engage in activities that are subject to trade between Member States.
- (7) The Commission therefore concludes that the notified aid measure constitutes State aid within the meaning of Article 107(1) TFEU as moreover confirmed by the notifying Member State during the notification.

2.2. Compatibility of the aid

- (8) The Commission's compatibility assessment of the notified measure in this case did not imply any serious difficulties.
- (9) The Commission has assessed the compatibility of the notified measure with the internal market in the light of the Broadband Guidelines³, which contain a detailed interpretation of Article 107(3)(c) TFEU in this area of State aid law. As regards the applicable substantive provisions, the Commission has

² Council Regulation (EC) No 1698/2005 of 20 September 2005 on support for rural development by the European Agricultural Fund for Rural Development (EAFRD), OJ L 277, 21.10.2005, p. 1–40, and Council Regulation (EC) No 1083/2006 of 11 July 2006 laying down general provisions on the European Regional Development Fund, the European Social Fund and the Cohesion Fund and repealing Regulation (EC) No 1260/1999, Official Journal L 210 , 31/07/2006 P. 0025 – 0078.

³ *Community Guidelines for the application of State aid rules in relation to rapid deployment of broadband networks*, OJ C 235, 30.9.2009, p.7.

essentially analysed the measures in the light of the criteria developed in paragraphs 31 to 51 of the Broadband Guidelines. In order to be compatible under Article 107(3)(c) TFEU, the aid must pursue an objective of common interest in a necessary and proportionate way.

- (10) Since the objective of the measure is to extend (1) basic broadband and (2) NGA network coverage to areas where such networks currently do not exist and also not planned by other operators in the next three years, the measure at stake pursues well defined EU policy objectives as laid down in paragraphs 37 to 40 of the Broadband Guidelines. The objective of the measure is also in line with the Digital Agenda⁴ which calls Member States to use public financing in line with EU competition and State aid rules in order to meet the coverage and speed and take-up targets defined in Europe 2020⁵.
- (11) The Commission's analysis confirms that the measure is well designed to deliver those common interest objectives.
- (12) First, it is an appropriate instrument because in the targeted areas of Galicia, Spain, the provision of adequate broadband services remains unprofitable for commercial operators in the near future of three years - that has been proved by a detailed mapping and coverage analysis and verified by an open, transparent public consultation⁶. Hence the measure targets only "*white areas*" within the meaning of paragraphs 41 and 42 of the Broadband Guidelines and "*white NGA areas*" within the meaning of paragraph 68 of the Broadband Guidelines - and there are no valid alternatives to public funding to overcome those obstacles.
- (13) Second, since the measure only targets "*white areas*" and "*white NGA areas*", the broadband network investment concerned would not take place in the near future of three years without any State aid. The Commission considers that the aid should provide a direct and appropriate investment incentive for the selected operator due to the use of an open tender process to select the beneficiaries.
- (14) Third, the measure at stake is considered proportionate because, amongst other features, the following can be identified:
 - a) A detailed mapping and coverage analysis verified by an open, transparent public consultation has been conducted by the granting authorities in order to clearly indentify the targeted "*white areas*" and "*white NGA areas*". In particular, (1) the granting authorities have undertaken a detailed analysis of the existing infrastructures of the targeted areas; (2) the existing broadband services are deemed not adequate and the granting authorities verified that there are no other means to remedy the "market failure" than using state aid;

⁴ A Digital Agenda for Europe. COM/2010/0245 f/2.

⁵ The Europe 2020 Strategy has underlined the importance of broadband deployment to promote social inclusion and competitiveness in the EU. It restated the objective to bring basic broadband to all Europeans by 2013 and seeks to ensure that, by 2020, (i) all Europeans have access to much higher internet speeds of above 30 Mbps and (ii) 50% or more of European households subscribe to internet connections above 100 Mbps.

⁶ Published at:
http://imit.xunta.es/portal/telecomunicacion/oficina_tecnica_banda_larga/oficina_tecnica_banda_larga.html.

(3) the Spanish authorities confirmed that during the public consultation – which allowed all stakeholders to comment on the planned state aid measures for at least 1 months - no stakeholder raised concern on the plans of the granting authorities to roll out basic and NGA broadband infrastructure in the near future . All information related to the aid projects (including the mapping and the call for tenders) has been published on the dedicated broadband portal of Galicia:

http://imit.xunta.es/portal/telecomunicacion/oficina_tecnica_banda_larga/oficina_tecnica_banda_larga.html.

- b) Open tender process: the aid will be awarded on the basis of an open tender in accordance with the principles of the EU and national procurement rules. The call for tenders has been published on the dedicated webpage of Galicia: http://imit.xunta.es/portal/telecomunicacion/oficina_tecnica_banda_larga/oficina_tecnica_banda_larga.html.
- c) Selection of the most economically advantageous offer: within the context of an open tender, the granting authorities will select the most economically advantageous offers among those presented by the operators. In line with paragraph 51 c) of the Broadband Guidelines, for the purpose of determining the most economically advantageous offer, the awarding authority has specified in advance the relative weighting, which it grants to each of the qualitative criteria chosen (see footnote 55 of the Broadband Guidelines). In case of identical quality, the contract will be awarded to the tenderer with the lowest amount of aid requested⁷.
- d) The measure is technologically neutral: bidders are entitled to propose the provision of basic broadband and NGA networks using whatever technology they deem most suitable.
- e) The measure ensures the use of existing infrastructure to the extent possible: bidders are given the possibility to identify the most appropriate infrastructure and to contribute their infrastructure to the notified measure.⁸
- f) There will be a requirement to provide a wholesale access on the subsidized broadband network that will enable third party operators to compete with the selected service provider thereby strengthening choice and competition in the areas concerned by the measure. In line with the provisions of the Broadband Guidelines, the Spanish authorities will require that wholesale access will be in place for a period of ten years without prejudice to any further regulatory obligations of the selected operators.
- g) Benchmarking pricing exercise: In order to ensure effective wholesale access and to minimise potential distortion of competition, access wholesale prices should be based on the average published (regulated) wholesale prices that prevail in other comparable, more competitive areas of the country or the

⁷ The award criteria can be found in the tender documents of the procurement procedures published at: <http://imit.xunta.es/portal/sectorempresarialdasociedadedainformacion/axudas/>.

⁸ Third party operators can rely, via regulation on the incumbent operator's infrastructure to make their bid. According to the Spanish authorities, all operators will be under the same conditions because none of them own a transport network to the populations in the scope of this measure and all have the right to use the infrastructure of existing copper pairs regulated by the NRA, Comisión del Mercado de las Telecomunicaciones ("CMT"), establishing obligations for third parties access to the copper network according to the reference offer: OBA.

Union or, in the absence of such published prices, on prices already set or approved by the Spanish national regulatory authority ("NRA") for the markets and services concerned. Wholesale prices on the subsidized network will be monitored by the NRA with the objective to keep these at a reasonable and non-discriminatory level. The criteria for the wholesale pricing will be stipulated in the tender documents.

- h) Monitoring and claw-back mechanism to avoid over-compensation: The project will be examined on a regular basis by the granting authority for a period of seven years and the monitoring mechanisms implemented will ensure that if the beneficiary fails to comply with the rules, the granting authorities will be in the position to recover the aid granted. Regarding the requirement of a claw-back mechanism contained in paragraph 51 h) of the Broadband Guidelines, the Commission notes that the [claw-back mechanisms implemented will ensure that any extra profit generated will be clawed back A claw-back mechanism will also be part of the contracts: the bidders must commit themselves to pay back part of the payment if the demand for broadband in the target area grows beyond anticipated levels and this leads to that the support granted is deemed to be unreasonably high. The claw back mechanism will be maintained for 5 years after the network is operational. Profits will be calculated cumulatively and checked after the five year period has expired. If the cumulative profitability in these 5 years was higher than the average profitability of the industry, the Decision Making Authority will reclaim the part of the extra profit that corresponds to the aid intensity of the measure. Thereby the Spanish authorities ensure that the recipients of the aid will not benefit from overcompensation and will minimise *ex post* and retroactively the amount of aid deemed initially to have been necessary.

- (15) To the extent the measure aims to support the deployment of an NGA network in "white NGA areas" where one basic broadband network already exists (traditional "grey area"), the Commission considers on the basis of the evidence it has received from the Spanish authorities that the following conditions have been met as laid down in paragraph 73 of the Broadband Guidelines:

- i) The broadband services provided over the existing networks are not sufficient to satisfy the continuously growing needs of citizens and business users in the area in question and commercial operators do not have sufficient commercial incentives to upgrade the existing networks;
- j) There are no less distortive means (including *ex ante* regulation) to reach the stated goals.

- (16) Concerning the conditions laid down in paragraph 79 of the Broadband Guidelines, as long as the measure supports NGA networks, the Commission considers on the basis of the evidence it has received from the Spanish authorities that the following conditions are met:

- k) The effective wholesale access obligations imposed on the chosen operator include access to both passive and active infrastructure for at least ten years without prejudice to any similar regulatory obligations that may be imposed

by the NRA. The access obligations imposed also include the right to use ducts or street cabinets in order to allow third parties to have access to passive and not only active infrastructure. This is without prejudice to any similar regulatory obligations that may be imposed by the NRA in the specific market concerned in order to foster effective competition or measures adopted after the expiry of that period.

- l) The NRA was consulted in setting the conditions for wholesale network access and will actually be monitoring the compliance of the selected operator with the wholesale access obligations. Furthermore, the Granting Authority together with the NRA will approve the access conditions under the applicable Union rules upon demand of third party operators.
 - m) The NGA network architecture that will benefit from State aid will support effective and full unbundling and satisfy all different types of network access that operators may seek, including but not limited to access to ducts, fibre and bitstream.
- (17) On balance, the Commission concludes that the overall effect of the measure is deemed to be positive. The measure is in line with the objectives of Article 107(3)(c) TFEU as it facilitates the development of certain economic activities (namely basic broadband and NGA networks) in remote and rural areas. The intervention is designed in a way that does not distort competition or adversely affect trading conditions to an extent contrary to the common interest.

2.3. Conclusion

- (18) The Commission did not receive any substantiated comments of third parties upon publication of a summary of the notification on its website.
- (19) On the basis of the foregoing assessment, the Commission's analysis confirms that the compatibility criteria set out in the Broadband Guidelines are met, hence the aid involved in the notified measure is compatible with Article 107(3)(c) TFEU.

3. DECISION

- (20) In the view of the above, the Commission finds that the aid granted on the basis of the measure in question is compatible with the internal market in accordance with Article 107(3) (c) TFEU and has accordingly decided not to raise objections to the notified measure.
- (21) The Commission reminds the Kingdom of Spain to submit annual reports on the application of the aid measure and to inform the Commission pursuant to Article 108(3) TFEU on all plans to approve a new or to modify this aid measure. In view of the duration of the scheme, the Commission would like to draw the Spanish authorities' attention to future revisions of the Broadband Guidelines, which might make appropriate measures to the scheme necessary.
- (22) The Member State has indicated in the context of the notification process that the summary nature of this decision implies that it does not contain any confidential information.

Yours faithfully,
For the Commission

Joaquín ALMUNIA
Vice-President of the Commission

Annex: Summary of the notification based on the information provided by the Member State according to the standard form provided in Annex to the Notice on simplified procedure.

Summary of notifications

On 01/10/2010, the Commission received a notification of an aid measure pursuant to Article 108 of the Treaty on the Functioning of the European Union. On preliminary examination, the Commission finds that the notified measure could fall within the scope of the Commission Notice on a simplified procedure for treatment of certain types of State aid (JO C136, 16.06.2009, p. 3-12).

The Commission invites interested third parties to submit their possible observations on the proposed measure to the Commission. The main features of the aid measure are the following:

Reference number of the Member State	N 424/2010
Member State reference	Spain
Region	GALICIA
Granting authority	Article Secretaría General de Modernización e Innovación Tecnológica y Agencia Gallega de Desarrollo Rural, Edificio Administrativo San Caetano S/n 15781 Santiago de Compostela (A Coruña) España Rúa dos Camiños da Vida, s/n (Edif. Witland-Salgueiriños) CP: 15705, Santiago de Compostela (A Coruña) España.
Title of the aid measure	Ayudas para el despliegue de infraestructuras de banda ancha en el marco del Plan Director de Banda Ancha de Galicia 2010–2013
National legal basis	Acuerdo del Consello de la Xunta de Galicia de 18 de febrero de 2010 por el que se aprueba el Plan Director de Banda Ancha de Galicia 2010 –
Legal basis of the EU proposed for assessment	Community Guidelines for the application of State aid rules in rel. to rapid deployment of broadband networks
Type of measure	Aid scheme
Amendment of an existing aid measure	
duration	until 31/12/2013
Economic sector(s) concerned	Telecommunications
Type of beneficiary	All firms
Budget	Overall aid amount : 67.73 mil.
Aid instrument (grant, interest rate subsidy,	Direct grant

Observations raising competition issues relating to the notified measure must reach the Commission no later than 10 working days following the date of this publication and include a non confidential version of these observations to be provided to the Member State concerned and/or other interested parties. Observations can be sent to the Commission by fax, by post or email under reference number N 424/2010 to the following address:

European Commission Directorate-
General for Competition State Aid
Registry B-1049 Brussels

Fax (32-2) 296 12 42

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