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Subject: **State aid SA. 33099 (2012/N) – Spain**
 High speed broadband in Rioja

Dear Sir,

1. PROCEDURE AND DESCRIPTION OF THE MEASURE

- (1) On 1 August 2012, 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) 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/cases/245388/245388_1346459_23_1.pdf and annexed to the present decision.

¹ OJ C136, 16.06.2009, p. 3-12.

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2. ASSESSMENT OF THE MEASURE

2.1. Existence of aid within the meaning of Article 107(1) of the TFEU²

- (3) As shown by the features of the measure described in the summary of the notification, the current measure will be financed by state resources. 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.
- (4) 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.
- (5) The Commission therefore concludes that the notified aid measure constitutes State aid within the meaning of Article 107(1) of the TFEU as moreover confirmed by the notifying Member State during the notification.

2.2. Compatibility of the aid

- (6) The Commission's compatibility assessment of the notified measure in this case did not imply any serious difficulties. 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) of the TFEU in this area of State aid law. As regards the applicable substantive provisions, the Commission has essentially analysed the measures in the light of the criteria developed in paragraphs, 51 and 71 to 79 of the Broadband Guidelines. In order to be compatible under Article 107(3)(c) of the TFEU, the aid must pursue an objective of common interest in a necessary and proportionate way.

² With effect from 1 December 2009, Articles 87 and 88 of the EC Treaty have become Articles 107 and 108, respectively, of the TFEU. The two sets of provisions are, in substance, identical. For the purposes of this Decision, references to Articles 107 and 108 of the TFEU should be understood as references to Articles 87 and 88, respectively, of the EC Treaty where appropriate.

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.

- (7) Since the objective of the measure is to extend the NGA network coverage to areas where such network currently does not exist and also is not planned by other operators in the near future of three years, the measure at stake pursues well defined EU policy objectives as laid down in paragraphs 37 to 40 and also 57 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.
- (8) The Commission's analysis confirms that the measure is well designed to deliver those common interest objectives.
- (9) First, it is an appropriate instrument because in the targeted areas of Rioja, Spain, the provision of adequate advanced 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 "*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.
- (10) Second, since the measure targets "*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 beneficiary.
- (11) 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 identify the targeted "*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 deemed not adequate⁷ and the granting authorities verified that there are no other means to remedy the "market failure" than using state aid; (3) the Spanish authorities confirmed that during the public consultation – which allowed all stakeholders to comment on the planned state aid measures for at

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 Boletín Oficial de La Rioja, 4 August 2010, http://www2.larioja.org/pls/dad_user/G04.texto_integro?p_cdi_accn=2539-295253

⁷ The speed available in the target areas reaches in most of them only 1Mbps, which is not sufficient for the advanced electronic services such as triple play, interactive audiovisual services etc.

least 1 months –no stakeholder raised concern on the plans of the granting authorities.. All information related to the aid projects has been published on the webpage:

http://www.conocimientoytecnologia.org/consulta_publica/index.htm.

- 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 will be published after the Commission's approval of the scheme in the Official Bulletin of La Rioja.
- 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 requested⁸.
- d) The measure is technologically neutral: bidders are entitled to propose the provision of 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.
- 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 Union or, in the absence of such published prices, on prices already set or

⁸ The award criteria and their weighting are specified in Article 14 of the draft Order - Orden de la Consejería de Administración Pública y Hacienda, por la que se regula la concesión en régimen de concurrencia competitiva de ayudas para la dotación de redes troncales que permitan servicios avanzados en diversos municipios de la Comunidad Autónoma de La Rioja.

approved by the Spanish national regulatory authority ("NRA"⁹) 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.

- 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 ten 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. 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.
- (12) 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 Spanish authorities proved 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.
- (13) Concerning the conditions laid down in paragraph 79 of the Broadband Guidelines, as long as the measure supports NGA networks, the Spanish authorities proved 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

⁹ The prices are regulated by the NRA- Comisión del Mercado de las Telecomunicaciones ("CMT").

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.
- (14) 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 NGA broadband network) in sparsely populated areas. Moreover, the features of the measure and the safeguards applied by the Spanish authorities described above ensure that it does not distort competition or adversely affect trading conditions to an extent contrary to the common interest.

2.3. Conclusion

- (15) The Commission did not receive any substantiated comments of third parties upon publication of a summary of the notification on its website¹⁰.
- (16) 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

- (17) 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) of the TFEU and has accordingly decided not to raise objections to the notified measure.
- (18) 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.
- (19) 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.

¹⁰

http://ec.europa.eu/competition/elojade/isef/dsp_simple_notif.cfm

Yours faithfully,
For the Commission

Algirdas ŠEMETA
Member 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.