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Subject: **State aid SA.30317 – Portugal**
 High-speed broadband in Portugal

Sir,

I. SUMMARY

- (1) I am pleased to be able to inform you that the European Commission has assessed the measure "High-speed broadband in Portugal" (hereafter: "the measure") and decided not to raise objections as the State aid contained therein is compatible with Article 107(3)(c) TFEU.

II. PROCEDURE

- (2) Following pre-notification discussions, by letter dated 15 June 2010 pursuant to Article 108 (3) TFEU, the Portuguese authorities notified a measure to the Commission for supporting the deployment of Next Generation Broadband networks in the Portugal.
- (3) The Portuguese authorities provided answers to the Commission's requests for information of 12 July 2010 and 27 August 2010 by letters dated 9 August 2010, 24 September 2010, 1 October 2010, 11 October 2010, 26 October 2010 and 17 December 2010.

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III. CONTEXT

III.1. The National Broadband Strategy

- (4) On 30 July 2008, the Portuguese government published Resolution of the Council of Ministers No. 120/2008¹, the Digital Agenda for ensuring that Portugal promotes investment in next generation broadband networks. In the National Broadband Strategy, the Portuguese government *inter alia* undertook to assess what measures could be taken to encourage investment in new generation networks in geographical areas with low penetration, particularly of broadband services, and to modernise current network infrastructure. It also stated that in the context of the National Strategic Reference Framework, any investment in high-speed broadband infrastructure in areas where market forces do not find the operating conditions needed to offer these services – in particular, for population density reasons – this investment could receive support.
- (5) Next Generation Access (hereafter: "NGA") network deployment is considered a priority to tackle the economic crisis in Portugal. Commercial operators announced to reach 1.5 million users in 2009 with NGA networks and the government agreed to adopt legislative (such as ease of access rights) and regulatory measures (such as the mapping of existing ducts) to remove barriers to investment in infrastructure and to promote private and public investments in this sector. In addition, Portugal designed the current State aid measure to extend NGA coverage to areas where private operators have no commercial incentives to invest in the near future of three years.
- (6) According to the Portuguese authorities, the implementation of the NGA networks could generate an additional GDP growth of 1.8% annually and the measure could create 20.000 jobs in the country.

III.2. Rationale for public intervention

III.2.1. Existing networks are not sufficient to satisfy the continuously growing needs of citizens and business users in the area in question

- (7) Portugal's current broadband infrastructure in the targeted areas is based upon technology which physically limits the speed, flexibility and quality of connections and ultimately limits the potential for further economic growth.
- (8) According to the information provided by Portugal, the current infrastructure is not adequate and not able to satisfy the needs of the citizens. For example, provision of triple-play services is currently only possible in 44% of the exchanges of the existing network. As a consequence, the current infrastructure will not be able to sustain telemedicine, e-

¹ Available at: <http://www.anacom.pt/render.jsp?contentId=993788>.

Government, e-Learning and other advanced and interactive services. According to the Portuguese authorities, the lack of adequate broadband infrastructure in the remote and less densely populated areas of the country already hampers the economic and social development of those regions.

III.2.2. Commercial operators do not have sufficient commercial incentives to upgrade the existing networks

- (9) Currently the targeted areas have a basic broadband availability of around 99%. However, similarly to all other Member States, the NGA investment plans of the commercial operators is concentrated on urban and highly density populated areas, in particular in the regions of Lisbon and in the North.
- (10) The State aid measure targets scarcely populated, low income areas where none of the commercial operators – including the incumbent, Portugal Telecom – have plans to upgrade the existing basic broadband network to an NGA infrastructure.

IV. DESCRIPTION OF THE MEASURE

- (11) **Objective:** According to the Portuguese authorities, State intervention is needed to bridge the digital divide affecting rural areas. To this aim, five public tenders were launched for deployment of NGA networks in rural areas, which are not served by private operators, including the outermost regions of Azores and Madeira. The project will aim to maximise the available coverage of Next Generation Broadband across the municipalities, aiming for a minimum coverage of 50% of the population in each area by 2013.
- (12) **Legal basis:** The measure is based on (1) Resolution of the Council of Ministers No. 120/2008 of 30 July 2008², (2) Electronic Communications Act (Law No. 5 / 2004 of 10 February 2004, (3) Decree-Act No. 123/2009 of 21 May 2009, as amended by Decree-Act No. 258/2009 of 25 September 2009³, (4) Council Regulation (EC) No 1083/2006 – General regulation⁴, (5) Council Regulation (EC) No 1080/2006 - ERDF⁵ and (6) Council Regulation (EC) No 1698/2005 - EAFRD⁶.
- (13) **Detailed mapping and coverage analysis:** The Portuguese authorities conducted a detailed survey of the existing broadband infrastructures and services.⁷ In the targeted areas

² Available at: <http://www.anacom.pt/render.jsp?contentId=993788>.

³ Available at: <http://www.anacom.pt/render.jsp?contentId=953021>.

⁴ OJ L 210 of 31/07/2006.

⁵ OJ L210 of 31/07/2006.

⁶ OJ L272 of 21/10/2005.

⁷ The OVUM study, commissioned by ANACOM in 2007.

only one basic broadband infrastructure is present (belonging to the incumbent operator, Portugal Telecom). The Portuguese authorities argue that, contrary to the rest of the country, these are the areas where the level of competition and investment is very low: (1) there is no alternative infrastructure available (such as cable) that would enhance infrastructure-based competition, (2) no local loop unbundlers are present, (3) access to the incumbent operator's network is only used via bitstream access, which is considered as the lowest level in the ladder of investment⁸. According to the data submitted by the Portuguese authorities, in the targeted areas the median proportion of customers that are currently served by alternative operators (via bitstream access products) is a mere 1.63% of the population, while the rest of the end-users are served by the incumbent operator.

- (14) **Public consultation:** The Portuguese authorities verified and validated the result of their coverage analysis and the investments plans of private operators for the next three years through an open and transparent public consultation procedure. The Portuguese authorities published on a prominent webpage⁹ detailed information on the planned measure, including the mapping, the targeted areas and the details of the planned public intervention. This allowed all stakeholders to submit comments on the measure. The consultation with the existing operators confirmed that no private operator has plans to invest in the targeted municipalities in NGA networks within the next 3 years.
- (15) Several stakeholders submitted written opinions on the measure. In general, they argued that on the targeted areas no NGA networks would be deployed on commercial terms without public funds. In the same context, several municipalities provided information on their publicly-owned existing infrastructure (including non-telecoms ones) which could be re-used by the bidding operators for the network deployment. Moreover, several operators, including the incumbent Portugal Telecom, will offer access (mainly access to ducts) to the bidding operators.
- (16) One operator raised its concerns on the proposed public intervention arguing that subsidising NGA networks in some of the regions covered by the measure could distort competition since some of its network elements go through some of the targeted areas. The Portuguese authorities asked ANACOM to validate these statements. According to the submissions of the Portuguese authorities, the company raising concerns does not have any access network in the targeted area (hence it would not be able to provide retail services to the end-users in the targeted area), and being a cable company, it does not provide any wholesale access products for third parties. Furthermore, according to the Portuguese authorities, the company has also not submitted any credible or plausible investment plans for the near future of three years in the targeted areas. Thus the Portuguese authorities

⁸ Making the ladder of investment operational, November 2004, Martin Cave.

⁹ Available at: http://www.portugal.gov.pt/pt/GC18/ConsultaPublica/Pages/20101025_RNG_Rurais.aspx.

consider that the public intervention will not distort competition *vis-a-vis* this specific operator and the targeted areas shall constitute “white NGA areas” in line with paragraph 68 of the Broadband Guidelines.

- (17) The national regulatory authority ("NRA"), ANACOM was regularly consulted throughout the process of designing the measure and selecting investors and was informed of the key decisions and milestones. The NRA has also provided its written opinion on the project¹⁰. ANACOM will ensure that access by service providers to active NGA products on a fair and non discriminatory basis is ubiquitous. Moreover, to ensure that competition can also develop at the infrastructure level, ANACOM will ensure that access is provided also to passive products, should reasonable demand arise. ANACOM will also be entrusted with the responsibility to supervise the migration of existing operators to the new fibre-based infrastructure.
- (18) **Target areas:** As a result of the mapping and consultation with the stakeholders, finally the targeted areas of the measure will include 139 municipalities¹¹. The utmost objective of the Portugal authorities was to reach at least 50% NGA coverage on the targeted areas.
- (19) **Tender process:** The aid is allocated on the basis of public tenders. The targeted municipalities were divided to five areas, and for each of those areas, a separate tender

¹⁰ *"Conformidade dos instrumentos dos concursos públicos para instalação, gestão, exploração e manutenção de redes de comunicações electrónicas de alta velocidade com as orientações comunitárias relativas à aplicação das regras em matéria de auxílios estatais à implantação rápida de redes de banda larga"* of 21/01/2010 and *"Parecer do ICP-ANACOM sobre as condições de acesso por grosso à rede previstas no âmbito dos concursos públicos para a instalação, gestão, exploração e manutenção de redes de comunicações electrónicas de alta velocidade nas zonas Norte, Centro e Alentejo e Algarve"* of 07/01/2010.

¹¹ Aguiar da Beira, Alandroal, Alcoutim, Alfândega da Fé, Alijó, Aljezur, Aljustrel, Almeida, Almodôvar, Alter do Chão, Alvaiázere, Alvito, Ancião, Arcos de Valdevez, Armamar, Arouca, Arraiolos, Arronches, Avis, Baião, Barrancos, Boticas, Cabeceiras de Basto, Calheta (R.A.M.), Calheta de S. Jorge, Carrazeda de Ansiães, Carregal do Sal, Castanheira de Pêra, Castelo de Paiva, Castelo de Vide, Castro Daire, Castro Marim, Celorico de Basto, Chamusca, Cinfães, Constância, Coruche, Corvo, Crato, Ferreira do Zêzere, Figueira de Castelo Rodrigo, Figueiró dos Vinhos, Fornos de Algodres, Freixo de Espada à Cinta, Fronteira, Gavião, Góis, Golegã, Idanha-a-Nova, Lajes , das Flores, Lajes do Pico, Mação, Macedo de Cavaleiros, Madalena, Manteigas, Marvão, Meda, Melgaço, Mértola, Mesão Frio, Miranda do Corvo, Miranda do Douro, Mogadouro, Moimenta da Beira, Monção, Monchique, Mondim de Basto, Montalegre, Mora, Mortágua, Moura, Mourão, Murça, Nisa, Nordeste, Oleiros, Ourique, Pampilhosa da Serra, Paredes de Coura, Pedrógão Grande, Penacova, Penalva do Castelo, Penamacor, Penedono, Penela, Pinhel, Ponte da Barca, Ponte de Sor, Porto Moniz, Porto Santo, Póvoa de Lanhoso, Povoação, Proença-a-Nova, Redondo, Reguengos de Monsaraz, Resende, Ribeira de Pena, Sabrosa, Sabugal, Salvaterra de Magos, Santa Comba Dão, Santa Cruz da Graciosa, Santa Cruz das Flores, Santa Marta de Penaguião, Santana, São João da Pesqueira, São Pedro do Sul, São Roque do Pico, São Vicente, Sardoal, Sátão, Sernancelhe, Serpa, Sertão, Sever do Vouga, Sousel, Tábua, Tabuaço, Tarouca, Terras de Bouro, Torre de Moncorvo, Trancoso, Valpaços, Velas, Viana do Alentejo, Vieira do Minho, Vila de Rei, Vila do Bispo, Vila do Porto, Vila Flor, Vila Nova da Barquinha, Vila Nova de Cerveira, Vila Nova de Foz Côa, Vila Nova de Paiva, Vila Nova de Poiares, Vila Viçosa, Vimioso, Vinhais, Vouzela.

procedure was conducted for the installation, management, operation and maintenance of electronic communications networks of high speed. The Portuguese authorities followed the procurement procedures to select a preferred bidder in compliance with Directive 2004/18/EC¹².

- (20) **The award criterion** is the most economically advantageous tender in compliance with Article 29 (1) of the referred Directive. The contracts will be awarded for a period of twenty years. The awarding authority set in advance the award components and the weight for each component, namely: the amount of public funding required and the amount of private investment (60%), the technical quality of the bid (15%), the quality of economic and financial plan (15%) and the quality of wholesale access to networks (10%).
- (21) **Budget and funding instruments:** A level of gap funding of EUR 106.2 million was identified that will be provided by public funds. Out of the total aid amounts of EUR 106.2 million EUR, EUR 103.2 million will be provided from EU funds and EUR 3 million from the national budget. The funding includes allocation of EUR 26.55 million per year from 2010 to 2013. The aid takes the form of a direct grant.
- (22) The measure is covered by the measure 3.6. "*Deployment of Broadband Networks of New Generation in Rural Areas*" integrated into the Regional Development Program (PRODER/EAFRD). The project will also be co-financed by ERDF Axis 1 "*Competitiveness, Innovation and Knowledge*" of the Digital Economy and Knowledge Society Operational Programmes. The Portuguese authorities will ensure that the parts of the projects co-financed by the above-mentioned funds do not overlap.
- (23) **Aid intensity:** The public funding of EUR 106.2 million will be matched with additional EUR 45.4 million from the selected bidders until the end of 2013 which would lead to an aid intensity of approximately 70%. The total investment during the 20 years of the contract is expected to reach EUR 182.6 million.
- (24) **Objective to minimize public funding:** During the procurement procedure, the granting authorities encouraged participants to examine the opportunities of using all existing infrastructures and reduce costs that would score more highly under the evaluation criteria due to the lower aid amounts needed. Bidders will use the infrastructures available in the field, from utilities such as water, gas, electricity and other municipality's infrastructures as well as construction of new ducts and poles. Furthermore, the Portugal authorities took proactive steps to promote the opportunity to use the existing infrastructure of the

¹² Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts. OJ L 134, 30.4.2004, p. 114–240.

incumbent, which is made available under the applicable regulatory framework for electronic communications.

- (25) **Beneficiaries:** The direct beneficiaries of the aid will be electronic communications operators offering broadband services. Indirect beneficiaries will be electronic communication operators using the new network for offering retail services to end users. Beneficiaries include also residential and business users in the areas concerned who will benefit from better broadband services.
- (26) **Duration of the measure:** The lifetime of the project is 20 years, during which the successful tenderers will operate the network. The investment co-financed via the notified State aid must be made by 31 December 2013, at which stage the whole network will be fully operational.
- (27) **Technology:** The Portugal authorities did not specify the technology in the invitation to tender, it was left to the operators to propose the technological solutions they favour to reach the objectives established by the Portuguese authorities. In line with those objectives, as explained above, the subsidised networks shall be able to provide minimum download speeds of 40 Mbps and include a wholesale access offer.
- (28) **Wholesale access:** The subsidised infrastructures will be opened for third party operators, including both passive and active infrastructure elements. The wholesale offer shall include advanced bitstream offer, access to the cabinets, ducts,¹³ poles and other associated infrastructure. Furthermore the network topology chosen by the selected operators for a fibre infrastructure has to allow third party operators to access the fibre optic network both with point-multipoint and point-to-point technologies. Third party operators will have wholesale access to the subsidised broadband networks in a non-discriminatory way during the entire duration of the contract, i.e. for minimum 20 years.
- (29) ANACOM will be entrusted, through an appropriate legal instrument issued by the Government, with the responsibility to supervise the implementation of the NGA access products and, in particular, the competence to determine their review in accordance with the regulatory and technological developments.
- (30) **Benchmarking:** A price benchmarking mechanism is incorporated in the contract with the preferred bidder. The price for wholesale access will be based on average prices for comparable services in more competitive areas of Portugal and the EU. The NRA and the granting authorities will monitor and approve the pricing of broadband services.

¹³ This comprises newly built ducts and ducts already under the control of the selected operator in the target areas.

- (31) **Monitoring and clawback mechanism:** The measure will comply with the approved EU regulatory and monitoring processes. The selected bidders will be required to maintain separate accounts for the subsidised activity to avoid cross-subsidisation of other commercial activities and to facilitate the monitoring of profit levels. The Portuguese authorities will be in a position to recover some, or all, of the grant if the preferred bidder is in breach of the contracts in question. A claw-back mechanism will be part of the contracts: in case extra profit is realized by the selected operators, they will have to pay back part of the State aid to the Portugal. The level of profit will be examined every five years, and if the profit generated on the subsidised network is higher than the industry average, the extra profit has to be paid back to the granting authority in proportion to the aid intensity.
- (32) **State of play of the tender process:** Five organizations submitted a total of twelve bids for the five tenders. Of the five public tenders, three of them ((1) Center¹⁴, (2) Madeira¹⁵ and (3) Azores¹⁶) were awarded to Viatel - Communications Technology SA, with the remaining two ((4) North¹⁷, and (5) Alentejo and Algarve¹⁸) have been awarded to DS Telecom SA. The contract notices (ref. OJ 2010/S 44-64178, OJ 2010/S 44-64191, OJ 2010/S 44-64205, OJ 2010/S 145-222968 and OJ 2010/S 145-222969) were published on 4 March 2010 and 29 July 2010. The initial investment (to be made until 2013) for the particular regions and the amount of aid required in the bid concerned, which represents approximately 70% (66% in case of Azores and Madeira) of such initial investment, were as follows:

Region	Initial investment (EUR million)	Aid requested (EUR million)
Centre Region	43.7	30.9
North Region	49.9	34.9
Alentejo and Algarve	34.1	23.9
Madeira	5.5	3.6
Azores	19.4	12.9

¹⁴ Awarded on 5 February 2010.

¹⁵ Awarded on 7 June 2010.

¹⁶ Awarded on 7 June 2010.

¹⁷ Awarded on 5 February 2010.

¹⁸ Awarded on 5 February 2010.

V. ASSESSMENT OF THE MEASURE: PRESENCE OF AID

- (33) According to Article 107 (1) TFEU, “*any aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods shall, in so far as it affects trade between Member States, be incompatible with the internal market*”. It follows that in order for a measure to qualify as state aid, the following cumulative conditions have to be met: 1) the measure has to be granted out of State resources, 2) it has to confer an economic advantage to undertakings, 3) the advantage has to be selective and distort or threaten to distort competition, 4) the measure has to affect intra-EU trade.

State resources

- (34) The measure is financed partly by EU funds, which qualify as state resources once they come under the control of a Member State¹⁹ and partly by funds from the national budget. Hence state resources are involved.

Economic advantage

- (35) *Selected operators*: Through the tender process, the selected operators will receive financial support which will enable them to enter the market and provide very high speed broadband services on conditions not otherwise available on the market. Although a competitive tender procedure tends to reduce the amount of financial support required, the aid will also allow the operator to offer end-to-end services *prima facie* at lower prices than if it had had to bear all costs themselves and thus attract more customers than under normal market conditions. In view of the above, an economic advantage will be granted to the selected operator.
- (36) *Third party providers*: Third party electronic communication providers will be able to offer their services by using the active and passive wholesale access of the subsidized network on open, non-discriminatory terms. They will therefore also indirectly benefit from the State resources, as they will be customers of the selected electronic communication operator.
- (37) *End users*: The measure aims at improving the provision of existing broadband services to business users and residential users. Whereas residential users are not subject to state aid rules, businesses in the targeted areas will therefore ultimately benefit from the improved broadband services and coverage in comparison with what would be provided on a purely commercial basis.

¹⁹ See for instance Commission decision in case N 157/2006 South Yorkshire Digital Region Broadband Project, - United Kingdom. JOCE C/80/2007.

Distortion of competition

- (38) The intervention of the State alters the existing market conditions by allowing the provision of improved broadband services by the selected electronic communication operator and, potentially, third party providers. Furthermore, the measure will alter the conditions of competition between end users who are likely to subscribe to the very high speed broadband services in the targeted areas and end users elsewhere in Portugal and the EU. Therefore, the fact that an improved broadband service becomes available has the effect of distorting competition.

Effect on trade

- (39) Insofar as the intervention is liable to affect providers of electronic communications services 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 generally engage in activities that are subject to trade between Member States. Moreover, the measure has the potential to distort competition between end users located in the municipalities and elsewhere in the EU.

Conclusion

- (40) 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. Having established that the project involves aid within the meaning of Article 107(1) TFEU to the selected service provider, third party providers and businesses, it is necessary to consider whether the measure can be found to be compatible with the internal market.

VI. ASSESSMENT OF THE MEASURE: COMPATIBILITY

- (41) The Commission has assessed the compatibility of the scheme according to Article 107(3)(c) TFEU and in the light of the *Community Guidelines for the application of State aid rules in relation to rapid deployment of broadband networks*²⁰. The Broadband Guidelines contain a detailed interpretation of Article 107(3)(c) TFEU in this area of State aid law.

VI.1. The balancing test and its application to aid for the broadband network deployment

- (42) As described in paragraphs 34 and 35 of the Broadband Guidelines, in order to assess whether a measure is compatible under Article 107(3)(c) TFEU, the Commission balances

²⁰ OJ C 235 of 30.9.2009, p. 7.

positive and negative effects of the aid according to the criteria set out in the Guidelines. In applying the balancing test, the Commission will 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?
 - (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?

VI.2. Objective of the measure

The aid is in line with the EU policy

- (43) The current measure targets areas where no NGA broadband coverage is currently available and where there are no plans by private investors to roll out such infrastructures in the near future of three years. Hence the objective of the measure is in line with the Digital Agenda²¹ which calls Member States to use public financing in line with EU competition and State aid rules in order to meet the coverage, speed and take-up targets defined in Europe 2020 Strategy²². Therefore the measure at stake pursues well defined EU policy objectives also in line with Section 3.1 of the Broadband Guidelines.

Aid is the appropriate instrument

- (44) Important measures have been undertaken by Portugal recently as regards facilitative measures for NGA deployment, including in-building infrastructure, access obligations to public utilities' infrastructures, reinforced rights of way and promotion of public and private investments.²³ Other alternative instruments, such as demand side measures could provide grants or tax incentives to end users. However, in the situation currently under assessment, for the specific targeted areas, the efforts from alternative instruments (including *ex ante*

²¹ A Digital Agenda for Europe. COM/2010/0245 f/2.

²² 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.

²³ For more details, see:

http://ec.europa.eu/information_society/policy/ecomm/doc/implementation_enforcement/annualreports/15threport/pt.pdf.

regulation) do not solve the problems related to the lack of supply (non-existence of infrastructure) of basic or high speed broadband in the targeted areas and would fail to deliver the wider economic benefits of a widespread next generation broadband network. In line with paragraphs 47 and 48 of the Broadband Guidelines, in order to ensure the supply of high-speed broadband services, the Portuguese authorities see no alternative but to grant public aid to the construction of NGA broadband networks in the targeted areas of the country.

- (45) The Commission can agree that without further public intervention, avoiding the emergence of a new "*digital divide*" between rural and urban areas seems not possible, which could lead to the economic and social exclusion of the local citizens and undertakings. Hence in the current situation, State aid is an appropriate instrument to achieve the set objectives.

The aid provides the right incentives to operators

- (46) Regarding the incentive effect of the measure, the Broadband Guidelines set out in paragraph 50 that it needs to be examined whether the broadband network investment concerned would not have been undertaken within the same timeframe without any State aid. The market analysis and the public consultation described in paragraphs (12) to (17) will guarantee that in the targeted areas no high speed or very high speed broadband network investment would take place without public funding in the near future of three years, hence the aid produces a change in the investment decisions of the operators. Moreover, as explained in paragraph (19), the recipients of the aid were selected by public tender. Therefore, the aid should provide a direct and appropriate investment incentive for the selected operators.

VI.3. Design of the measure and the need to limit distortions of competition

- (47) In order to minimise the State aid involved and the potential distortions of competition, the notified measure has to meet a number of necessary conditions.
- (a) *Market research and consultation:* As set out in detail in paragraphs (13) to (17) the Portuguese authorities undertook a detailed analysis of the existing broadband infrastructure in order to clearly identify the areas where state intervention is necessary. The consultation with existing operators in an open, transparent way ensures that public funds are used only in areas where private investments do not exist and they are not planned in the near future. By conducting in parallel an analysis of the competitive conditions and structure prevailing in the given areas and consulting with all stakeholders affected by the relevant measure, the Portuguese authorities ensure to minimise distortions of competition with regard to existing providers who had plans to invest in the near future in the area and also to those who are currently using the existing infrastructure. The Commission concludes that the detailed market research and "mapping" together with the wide public consultation conducted by the Portuguese

authorities will limit any potential distortion of competition *vis-à-vis* existing operators and reduce the amount of State aid required for the measure.

- (b) *Open tender process*: The Portuguese authorities selected the preferred bidders for the construction and the management of the network in open, non-discriminatory and competitive tender procedures in full compliance with national and EU public procurement principles. These procedures have the effect of maximising the effect of the aid provided while minimizing any potential advantage granted for the selected operator.
- (c) *Most economically advantageous offer*: Within the context of an open tender, the Portuguese authorities selected the most economically advantageous offers among those presented by the operators. Under the terms of the open tender, the bidder with the lowest amount of aid requested received more priority points within the overall assessment of the bid. Furthermore, in line with footnote 55 of the Broadband Guidelines, for the purposes of determining the most economically advantageous offer, the awarding authority specified in advance the relative weighting which it gave to each of the (qualitative) criteria chosen as described in paragraph (20).
- (d) *Technological neutrality*: The measure does not favour *ex ante* any technology or network platform leaving it to commercial operators to come up with the most appropriate technological solutions to provide very high speed broadband services to end users. Bidders were entitled to propose the provision of the required broadband services using or combining whatever technology they deemed most suitable.
- (e) *Use of existing infrastructures*: To avoid unnecessary and wasteful duplication of resources, the Portuguese authorities encouraged the use of existing infrastructure and facilitated their inventory as described above. Bidders were given the possibility to contribute their infrastructure to the notified project, which possibility included the use of the products from Portugal Telecom that were available under the Portugal's regulatory framework. The use of existing infrastructure could allow bidders to reduce their investment costs and it did not favour the incumbent.
- (f) *Wholesale access*: The selected operators will have to offer wholesale services and access to the subsidised network to other operators for the whole duration of the contract, i.e. 20 years. The selected operator will have to offer other operators access to a network element or to the capacity of the network in an open, transparent and non-discriminatory manner. The wholesale access enables third party operators to compete with the selected bidder (when the latter is also present at the retail level), thereby strengthening choice and competition in the areas concerned by the measure while at the same time avoiding the creation of regional service monopolies.

- (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 and the EU. Wholesale prices on the subsidised network will be monitored and approved 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 and the monitoring mechanisms implemented will ensure that any extra profit generated through the operation of the networks will be clawed back. Thereby the Portuguese authorities ensure that the recipient 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.
- (48) To the extent the measure aims to support the deployment of an NGA network in "white NGA areas", where one basic broadband network may already exist (traditional "grey area") further conditions shall be met as laid down in paragraph 73 of the Broadband Guidelines. In this respect, the Portuguese authorities proved that:
- (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 as described in detail in section III.2.1.
 - (j) There are no less distortive means (including *ex ante* regulation) to reach the stated goals as described in paragraph (44).
- (49) Concerning the conditions laid down in paragraph 79 of the Broadband Guidelines, the Portuguese authorities proved that the following conditions are met:
- (k) The access obligations imposed on the chosen operator include access to both passive and active infrastructure for at least 7 years without prejudice to any similar regulatory obligations that may be imposed by the NRA. The access obligation imposed also includes 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) As detailed in paragraphs (17) and (29), in setting the conditions for wholesale network access, the Portuguese authorities consulted the NRA. The NRA will continue to regulate *ex ante* and to monitor very closely the competitive conditions of the overall broadband market and, where appropriate, will impose the necessary remedies provided

by the applicable regulatory framework. Furthermore, the NRA – under the relevant regulatory obligations - will set the access conditions under applicable national and EU rules.

- (m) As detailed in paragraphs (27) to (30), 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 active and passive access products on an open wholesale basis. In addition, the deployed NGA network will support both "point-to-point" and "point-to-multipoint" topologies as described in paragraph (28).

VI.4. The distortions of competition and the effect on trade are limited, so that the overall impact of the measure is positive

- (50) The Commission concludes that the notified measure will offset a geographical and commercial handicap and is objectively justified to address the lack of availability of very high speed broadband services due to the commercial unattractiveness of upgrading existing broadband services.
- (51) In view of the characteristics of the project and of the safeguards applied by the Portuguese authorities, the overall impact on competition is deemed to be positive.
- (52) 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 (high speed broadband services) in certain 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.

VI.5. Conclusion

- (53) The Commission concludes 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 in conjunction with the Broadband Guidelines. In view of the duration of the scheme, the Commission would like to draw the Portuguese authorities' attention to future revisions of the Broadband Guidelines, which might make appropriate measures to the scheme necessary.

VII. DECISION

- (54) On the basis of the foregoing assessment, the Commission has accordingly decided that the aid measure "*High-speed broadband in Portugal*" is compatible with Article 107(3)(c) TFEU.
- (55) The Portuguese authorities are reminded that, pursuant to Article 108(3) TFEU, they are obliged to inform the Commission of any plan to extend or amend the measure.
- (56) 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/state_aids_texts_en.htm.

- (57) Your request should be sent by encrypted e-mail to stateaidgreffe@ec.europa.eu or, alternatively, by registered letter or fax to:

European Commission
Directorate-General for Competition
State Aid Greffe
Rue Joseph II. 70. 03/225
B-1049 Brussels
Fax No: +32 2 2961242

Yours faithfully,

For the Commission

Joaquín ALMUNIA
Vice-President of the Commission