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Subject: **State aid N 407/2009 – Spain**
 Optical fibre Catalonia (Xarxa Oberta)

Sir,

I. SUMMARY

- (1) I am pleased to be able to inform you that the European Commission has assessed the measure "*Optical fibre Catalonia (Xarxa Oberta)*" (hereafter: "the measure") and decided not to raise objections because the measure is compatible with the internal market, pursuant to Article 107(3)(c) of the Treaty on the Functioning of the European Union (TFEU)¹.

II. PROCEDURE

- (2) Following pre-notification discussions, by letter dated 08/07/2009, pursuant to Article 108 (3) of the TFEU, the Spanish authorities notified to the Commission a measure for supporting the deployment of an optical fibre network covering 281 municipalities in Catalonia.

¹ 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.

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- (3) The Commission requested additional information on the measure by letters registered on 09/09/2009, 15/02/2010 and 7/05/2010. The Spanish authorities provided the requested information on the measure by letters registered on 08/10/2010, 15/12/2009, 25/02/2010, 10/03/2010, 12/05/2010 and 02/07/2010. Several meetings, conference calls and email exchanges took place over the course of the notification process. The Spanish authorities proposed a substantial modification of the project on 18 May 2010, formally submitted on 2 July 2010.
- (4) By letter dated 23/03/2010 the Spanish National Regulatory Authority (Comisión del Mercado de las Telecomunicaciones, hereafter "CMT"), submitted to the Commission market data regarding the availability in the areas targeted by the measure (i.e. in the Catalonia region) of access networks, ULL based broadband operators, backhaul and dark fibre infrastructure. The Commission transmitted the CMT report to the Spanish authorities and they provided their comments on the report by email of 8 April 2010.
- (5) On 22/12/2009 and on 05/05/2010 Telefónica, the Spanish incumbent telecommunication operator, submitted to the Commission its observations on the project. These were transmitted for comments to the Spanish authorities, whose reply was sent to the Commission on 13/05/2010.

III. CONTEXT

III.1. The Catalonia region

- (6) Catalonia is an autonomous region of Spain located in the North East of the country. It exercises its self-government, in accordance with the Spanish constitution, with the main institutional body being the *Generalitat de Catalunya*. The region has a population of over 7 million inhabitants and its territory is divided up into 946 municipalities grouped in 41 supra-municipal counties (called *comarca*). Besides the central regional government, all counties and municipalities have their own competences and services.
- (7) The Generalitat is well aware of the importance of information society services and considers that information and communication technologies (ICT) that shape the knowledge society are one of the forces that will enable the growth of modern economy and contribute to the economic and social development. For these reasons, the Generalitat set as one of the priority objectives in its 2007-2010 Government Plan the consolidation of a dynamic economy in a sustainable environment via the rollout of, *inter alia*, electronic communications networks.
- (8) To fulfil their objectives and foster the roll-out of high speed broadband networks, the regional authorities have undertaken a number of initiatives, such as coordination and rationalisation of civil engineering works², resolutions to promote the extension of electronic communication networks in Catalonia³ and setting as

² Public Works Act 3/2007 of 4 July 2007.

³ MEITel agreement of 10 June 2008.

their objective that all local authorities, businesses and citizens in Catalonia should have the possibility to obtain broadband access at competitive conditions.

III.2. The rationale for public intervention

- (9) According to the Spanish authorities, the development of broadband in Catalonia faces two key problems: (1) the first is the lack of infrastructure to deliver the services required by the public authorities and by citizens; and (2) the second is linked to the lack of adequate competition reflected in high prices or inadequate services.

Shortage of infrastructures from commercial operators to offer broadband services

- (10) As regards the first concern, similarly to other regions in the European Union, also in the case of Catalonia, advanced broadband services and the infrastructures required to support them are available for citizens and businesses in more densely populated areas, whereas broadband infrastructure is inadequate or outright lacking in other areas which are not commercially attractive for electronic communication operators. This leaves citizens and businesses in such areas without the possibility of adequate broadband access and services.
- (11) The Spanish authorities submitted that, based on the information published by the National Regulatory Authority in 2008⁴, only 0.7% of all accesses installed are made on optical fibre in Catalonia and most of these are in Barcelona⁵. The Spanish authorities stress that no commercial operator is planning to deploy NGA networks in the near future of 3 years – on the contrary, all of them have reduced significantly their investment budgets due to the economic and financial crisis started at the end of 2008⁶. According to the report of CMT, telecom investments fell for the second year in a row in 2009, by 17.3 percent, compared to a 10.6 percent drop in 2008⁷.

Lack of adequate competition reflected in high prices or inadequate services.

- (12) As regards the second concern, according to the Spanish authorities, there is a lack of competition as regards of wholesale and retail bandwidth services in many areas of Catalonia. They assert that the broadband share in Catalonia held by the

⁴ Source: CMT – “2008 Report on the penetration of telecommunications services and infrastructure by province and autonomous community” (link to Spanish document) http://www.cmt.es/cmt_ptl_ext/SelectOption.do?nav=publi_estudios&detalles=0900271980083c1f&pagina=1.

⁵ According to the Spanish authorities, limited NGA investments are currently taking place in Spain: a few VDSL2 and FTTH pilot projects of Telefónica in Madrid and Barcelona.

⁶ For instance, according to publicly available information, Telefónica slowed down its plan to deploy fibre optics networks in 12 major cities of Spain (including Barcelona from Catalonia) within the framework of "Futura network" project; ONO has started experimenting in Valladolid with cable network providing 100 Mbps but in 2009 significantly cut back its investment budget, Vodafone communicates that in most cases it did not find commercially viable to deploy fibre networks on its own, etc.

⁷ CMT: Informe Annual 2009.

incumbent operator (Telefónica) is 62.2%, without taking into account the indirect share attributable to it due to line rental to other operators⁸.

- (13) As regards pricing, the Spanish authorities assert that in Spain, the price of the best medium-speed broadband offering (from 2 to 10 Mbps, a range that covers 72.4% of market lines) is 44.3% higher than the average price of the best offerings in the European Union, taking into account the figures of all the reference operators⁹. For example, according to the Spanish authorities, in up to 898 of all municipalities of Catalonia, having less than 40.000 inhabitants or not located in Barcelona's Metropolitan area, the prices that end-users such as the Generalitat have to pay for advanced broadband connectivity are very high or that high-capacity services – i.e. next generation services of at least 100 Mbit/s – are not available at all. Moreover, even in the 48 remaining municipalities (with more than 40.000 inhabitants or located in Barcelona's metropolitan area) services of up to 1 Gbit/s are provided only on request, their viability is not guaranteed and the prices charged are very high and fluctuating.

Existing networks are not sufficient to satisfy the continuously growing needs of public administration, citizens and business users in the area in question

- (14) According to the analysis presented by the Spanish authorities, the inadequacy of existing broadband connections will prove to be a serious bottleneck for providing citizens and companies in the region with many new advanced services and can seriously hamper their activity.
- (15) Thanks to progress and technological development, the Spanish authorities argue that advances in the health care field, will soon make it possible for the public authorities to introduce services such as shared clinical histories (which include heavy high-definition images), remote medical imaging (for exchange of radiological diagnostic examinations), telemedicine and remote assistance. E-learning is also expected to grow very fast, thanks to services such as virtual training, remote laboratories, digital remote libraries and virtual meeting points. Additionally, substantial improvements in the justice, security and e-Government fields¹⁰ will be generated by services such as remote interrogations, centralised data services (including multimedia) and remote surveillance.

The rationale for rolling out a new network

- (16) As a consequence of the above described situation, the Regional government of Catalonia has pointed out that for the public administration to live up to the growing

⁸ Report published by the National Regulatory Authority entitled “Penetration of Final Services and Telecommunications Infrastructure. Parameters selected by Autonomous Community and Province, dated 29 July 2009.

⁹ For reference, see footnote 4.

¹⁰ In fact, provision of e-Government services constitutes an obligation for the regional government, pursuant to Law 11/07 of 22 June 2007 on access by citizens to public services (BOE 150 of 23/06/2007).

expectations of its citizens as regards the provision of advanced e-government, education and health care services, all its departments, including those situated in the most remote areas, need a conspicuous increase of the current broadband capacity, speed and connectivity services. The Spanish authorities argue that the current situation cannot be remedied by alternative instruments (such as demand side measures, regulations, etc.): the market problem in Catalonia is not a problem of regulation of next generation internet services, it is instead a problem of lack of infrastructure. Hence they argue that there are no less distortive means (including ex ante regulation) to reach the goal of providing very high speed, reliable and affordable connectivity services in the region.

- (17) On the basis of the internal evaluation of the availability of infrastructure and existing commercial offer of connectivity services, the Spanish authorities stated that their public interest goals are best achieved through the rollout of a new public broadband infrastructure connecting all the public administration sites.
- (18) Furthermore, in order to alleviate the other disadvantages of the existing situation, i.e. to meet current and future private demand for very high capacity broadband and to foster competitive provision of broadband services, the Generalitat plans to make it possible to private operators to obtain access to the public infrastructure it intends to build for its own internal use. By selling the spare capacity of the network to such operators, it would generate additional revenue covering part of the overall investment cost.
- (19) The Spanish authorities argue that the measure is fully in line with the objectives of the EU as highlighted recently in the EU2020 strategy and the Digital Agenda¹¹. The Spanish authorities argue that according to public information, the EU needs an investment in excess of €200-300 billion to deploy NGA networks capable of allowing the economies of Member States to compete with Asia or the U.S. In this connection, there is a risk that countries such as Spain with major deficits will be unable to invest to the necessary extent and that the existing digital divide will widen as a result. The Spanish authorities stress that this is precisely the backdrop to the Xarxa Oberta project and therefore the project is considered necessary to ensure competitive Internet access to the citizens of Catalonia.

IV. DESCRIPTION OF THE MEASURE

- (20) **Objective:** The goal of the Spanish authorities is to provide government departments and agencies, public administration bodies, end users, residential customers and business users with the ability to access the electronic communication operator and technological platform of their choice and to have access to the services provided on NGA networks.
- (21) **Legal basis:** The measure is based on the Agreement of the Government of the Generalitat of Catalonia adopted on 29.07.2008¹². The adoption of the said

¹¹ EUROPE 2020 - A strategy for smart, sustainable and inclusive growth, COM(2010) 2020.

¹² Available at: http://www10.gencat.cat/gencat/binaris/20070314_pdg_snt_cs_tcm33-54599.pdf.

agreement forms part of the Governmental Plan 2007-2010¹³, which provides a basis for the promotion of a strong and dynamic economy within a sustainable region pursuant to Decree 205/2007 of 18 September. The Secretariat of Telecommunications and Information Society is entrusted with elaboration of a plan of the notified measure.

- (22) ***Design of the project:*** To achieve the final goal mentioned above, the measure notified by the Spanish authorities aims at fulfilling two different objectives. The first one is the self-provision of advanced telecommunications services (hereafter, "*self-provision sub-project*") to 4.285 public administration sites, including healthcare and education establishments, security and government bodies, libraries, etc., located in 281 municipalities of Catalonia¹⁴. The second objective pursued is the provision of wholesale connectivity services on the private market in those areas of the region where such services are non existent or inadequate (hereafter "*wholesale sub-project*").

The self-provision sub-project

- (23) The Generalitat is currently procuring on the private market connectivity services for all the public administration sites of the region, including government departments and agencies, health care institutions, education bodies, etc. The Generalitat has conducted an internal estimate of the growth in the connectivity needs of the public administration. On the basis of the knowledge of the relevant parameters¹⁵ per each public administration site, the regional government has estimated the growth in the individual bandwidth requirements per site and then has summed them up to obtain an estimate of the future needs of all public administration sites under the responsibility of the Generalitat.
- (24) On the basis of the internal process of evaluation, the Generalitat concluded that (i) the existing infrastructures and services offered by commercial operators do not ensure that NGA-type of services will be available in the near future to satisfy the growing connectivity needs of the public administration; and (ii) the estimated prices for such advanced services (if they were available) would be so high¹⁶ as to make it economically feasible for the regional government to build its own NGA network for internal use, instead of purchasing connectivity services on the private market. Furthermore, (iii) not many operators can provide end-user services to the Generalitat as they do not have an infrastructure available.
- (25) On the basis of the above analysis the regional government of Catalonia deliberated to fund the rollout of its own NGA network for internal use by the public administration. The Spanish authorities explained that this type of network will not

¹³ Available at: <http://www.gencat.cat/pladegovern/cat/index.htm>

¹⁴ In a subsequent phase, which is not part of the present notification, the Generalitat plans to extend the network to all public administration sites (5.843) of all the 946 municipalities of Catalonia.

¹⁵ Capacity required by use of certain applications, evolution in the bandwidth needs of new applications, number of users, concurrent use of applications, etc.

¹⁶ In their submissions, the Spanish authorities assess that the costs for the Generalitat would be as high as [...] EUR per month in comparison with the current level of [...] EUR per month.

be used for commercial purposes, but will aim at the provision of services to bodies all forming part of the public administration and exercising public functions in the territory of Catalonia. Hence, in their view, such State intervention does not involve the granting of an economic advantage to undertakings and consequently falls outside State aid rules.

- (26) The Spanish authorities argue that the public entities mentioned above perform non-economic activities, therefore there cannot be any State aid in their regard, in line with the precedents of the Prague¹⁷ and the Welsh Public Sector¹⁸ cases and to paragraph (13) of the Broadband Guidelines. In their view, the reduction of costs for the broadband services borne by the Generalitat cannot be regarded as an advantage to an economic activity nor does it entail the use of public resources.
- (27) In any event, even if some of the public entities could conceivably be considered as performing an economic activity (such as health care providers) – thus potentially, recipients of an "advantage" – the Spanish authorities put forward that such entities are operating in the context of services of general economic interest¹⁹. The Spanish authorities have given assurance that they would only grant this aid to public entities performing an economic activity in the framework of Commission Decision 2005/842/EC on the application of Article 86(2) of the EC Treaty to State aid in the form of compensation for the operation of services of general economic interest (SGEI)²⁰, and in compliance with all the conditions set by this Decision. Hence this part of the aid measure is not covered by the present decision.

The wholesale sub-project

- (28) The above mentioned insufficiency of existing infrastructures and planned ones to provide adequate NGA services to end users in Catalonia does not affect only the public administration but also citizens and businesses located in the region. For this reason, the regional government wishes to make available at wholesale level to private operators the excess capacity of the Xarxa Oberta.
- (29) By giving wholesale access to spare capacity of the backhaul part of the Xarxa Oberta²¹ to electronic operators wishing to connect to it, the Generalitat aims to encourage private investment in NGA networks (i.e. last mile infrastructures²²) by electronic communication operators so as to accelerate the supply of NGA services to end users. This initiative will ensure that all potential end-users will be able to

¹⁷ Commission decision in case NN24/2007, Prague Municipal Wireless Network, OJ C/141/2007.

¹⁸ Commission decision in case N46/2007 Welsh public network scheme, OJ C/157/2007.

¹⁹ Such as health care, education etc.

²⁰ Commission Decision 2005/842/EC on the application of Article 86(2) of the EC Treaty to State aid in the form of public service compensation granted to certain undertakings entrusted with the operation of services of general economic interest, OJ L 312/67. Moreover, this Decision specifically exempts from State aid notification the funding of hospitals.

²¹ The services targeted by the "wholesale project" are the terminal leased lines, trunk/backhaul leased lines and dark fibre.

²² Access network connecting the end users with the backhaul network thus delivering connectivity from a communications provider to a customer.

choose the operator of electronic communications and/or technology platform for broadband access they deem most appropriate to their needs by providing an NGA network that is able to support high-bandwidth, high reliability and affordable connectivity services. Additionally, as a secondary objective, the regional government aims also to reduce the digital divide in those areas in which not even basic broadband services are currently provided.

- (30) The Spanish authorities assert that a market failure is present in Catalonia as regards the provision of NGA services and, in some areas, also of basic broadband services and therefore, they consider State intervention necessary to correct it. Therefore, for this part of the project, the Spanish authorities have requested an authorisation following State aid rules and the *Community Guidelines for the application of State aid rules in relation to rapid deployment of broadband networks*²³ (hereafter: the "Broadband Guidelines").
- (31) **Budget and funding instruments:** Instead of the direct funding of the network rollout, the Spanish authorities intend to follow the model of project financing: an independent private company will be selected, through an open tender, to rollout, manage and operate the network and to provide electronic communications services to the public administration for a period of 20 to 30 years. The excess capacity of the network – i.e. the remaining capacity after supplying connectivity to the public administration – will be at the disposal of the selected undertaking for the provision of wholesale connectivity services on the private market.
- (32) The selected undertaking is expected to cover the costs of rolling out the Xarxa Oberta via two channels: the revenues for the provision of connectivity services to the public administration and the revenues for the supply of wholesale services to private operators. As regards the former, the regional government will pay for the connectivity services provided to all public administration sites during all the 20 to 30 years duration of the contract. The Spanish authorities capped the maximum admissible cost per connected public administration site to €1.050 EUR per month. The actual cost per site will be determined during the course of the open tender. The Spanish authorities will also introduce a cap on the maximum rate of return that the selected operator will be allowed to generate from serving the public bodies of Catalonia.
- (33) At the end of the concession, all the assets (i.e. the network elements and all support systems for the network operation) will be transferred back to the Generalitat, without any additional payment. The assets to be transferred include all parts of the network, i.e. both those already existing at the time of the project and those which will be built by the operator during the contract lifetime.
- (34) The total investment required for the assets is estimated at €354 million by the Spanish authorities (without VAT and not on present value).
- (35) In order to facilitate the deployment of the network, the regional government envisages to transfer the existing fibre infrastructure owned by the Generalitat to the

²³ OJ C 235 of 30.9.2009, p. 7.

* [...] the information in brackets is covered by the obligation of professional secrecy

selected operator so that such fibre can be integrated in the new network. According to the information submitted, the book value of the transferred infrastructure is [...] EUR. In the view of the Spanish authorities, a share of it proportional to the capacity devoted to the wholesale subproject has to be considered State aid.

- (36) ***Aid amount and intensity:*** The Spanish authorities consider the building of the network for self-provision purposes as falling outside the scope of State aid rules. Nevertheless, since the network thus built will be used not only for the self provision but also for the provision of wholesale services, the Spanish authorities have notified the measure as they consider that the latter requires state aid to be commercially viable and that the amount needed is above the notifiable thresholds²⁴.
- (37) ***Mapping and coverage analysis:*** The pattern that the network will follow is dictated by the need to connect all the public administration sites. However, to identify the municipalities in need of State-funded wholesale broadband infrastructure, mapping of existing infrastructure and coverage analysis is necessary. Initially, the Generalitat conducted a market analysis on the basis of the information publicly available to determine the areas to be targeted. The information collected by the Generalitat was aggregated on the assumption that the wholesale subproject is aimed predominantly at the provision of NGA services and that only high capacity services of at least 100 Mbit/s will be provided by connecting to the Xarxa Oberta.
- (38) On the basis of the market and coverage analysis, the Spanish authorities came to the conclusion that deployment of NGA infrastructure is very limited in the region (Telefónica is experimenting with pilot projects in Barcelona). Concerning basic broadband infrastructure, only Telefónica has an almost region wide coverage, the infrastructure of alternative operators' infrastructures are either (1) mainly concentrated in the most densely populated areas of Catalonia²⁵ or (2) almost exclusively serving business customers²⁶; or (3) their infrastructure is located outside urban settlements, and provide only basic passive infrastructure facilities²⁷.
- (39) ***Public consultation:*** The regional government has undertaken twice a public consultation to verify the results of its mapping and to obtain the opinion of other stakeholders on the project. First, they have contacted service providers²⁸ directly and second, they have published the details of the Xarxa Oberta project on the

²⁴ Such as "de minimis" aid. Commission Regulation (EC) No 1998/2006 of 15 December 2006 on the application of Articles 87 and 88 of the Treaty to de minimis aid Official Journal L 379 of 28.12.2006.

²⁵ For instance more than 80% of the cable operator, ONO's infrastructure is located in the Barcelona Province.

²⁶ Such as Colt, BT or Orange Catalonia.

²⁷ For instance, Abertis has the network that covers the Catalan coastline and the Tarragona-Lleida axis. The route is located outside townships, it is considered feasible for providing long-distance backbone networks.

²⁸ Operators contacted: Adamo, BT, Cablinter, Cadaqués Cable, Clara.net, Colt, Eircom, I.Solsonès, Megatrol, Ono, Orange Catalunya, TecnoColor TT Telecomunicacions, Verizon, Vodafone, Xarcom.

website of the Generalitat of Catalonia²⁹ describing the objectives of the measure, its main characteristics, the list of the targeted areas and requested all stakeholders to provide information on existing and planned NGA and fibre investments as well as their view on the project.

- (40) Of the stakeholders which submitted an answer to the public consultation, 3 were organizations representing interest groups (IT and telecommunications companies), 1 was a public consortium comprising more than 800 municipalities of Catalonia with the objective to promote and deploy IT and communications networks; finally 6 were private electronic communications operators (Abertis, Alpi-Orange Catalunya, BT, ONO, Telefónica, Vodafone).
- (41) The Spanish authorities informed the Commission that no operator indicated any existing or planned investment in NGA networks³⁰ outside Barcelona and the other provincial capitals. In the opinion of the Generalitat, the absence of submissions from operators of pure passive infrastructure (i.e. dark fibre, as opposed to backhaul) shall be interpreted in the sense that such operators do not consider the "Xarxa Oberta" project as a competing new infrastructure but rather as a potential "customer" which will pay to use the existing pure passive infrastructures.
- (42) **Market data provided by CMT:** In March 2010, the National Telecommunication Regulatory Authority, CMT provided the Commission with figures concerning the existing telecommunication infrastructure in the Catalonia region. According to such data, one fibre backhaul infrastructure reaches almost all municipalities targeted by the present measure except 13. By contrast, in a number of other municipalities, CMT registers the presence of alternative operators owning fibre infrastructures. However, it is not known whether they offer access to such fibre and, in case, whether the services on offer are actually used by telecom operators to provide connectivity at retail level. This point is relevant to clarify whether access conditions are conducive to competition or there is a market failure. The Spanish authorities finalised their project design on the basis of the data provided by the CMT.
- (43) In particular, the CMT data made it possible to group the municipalities reached by Xarxa Oberta in different categories on the basis of (i) availability of backhaul infrastructure(s) in any given area and (ii) number of operators offering basic broadband retail services³¹.
- (44) **Conditional access to Xarxa Oberta:** In order to achieve their public interest goals while at the same time minimising the distortions of competition and private investments, the Spanish authorities proposed a conditional market access of the

²⁹ Available:
http://www20.gencat.cat/docs/governacio/Telecomunicacions%20i%20Societat%20de%20la%20Informacio/Documents/Telecomunicacions/Arxius/XO_Public_consultation_Catalonian_fiber_optics_infrastructure_availability_eng.pdf

³⁰ According to publicly available information, Telefónica announced that it will deploy fibre optics in 12 major cities of Spain (including Catalonia, namely Barcelona) by 2010.

³¹ According to the market research conducted by the Generalitat, at the moment NGA-type of services are offered only in Barcelona.

Xarxa Oberta which takes into account the competitive conditions on the broadband markets in each target municipality, as detailed below.

- (45) The Spanish authorities designed a conditional system of access to the Xarxa Oberta with the objective (1) to foster NGA deployment in Catalonia by allowing only "NGA last mile infrastructures" within the meaning of the Broadband Guidelines³² to connect to the new network in approximately 70% of the municipalities; (2) and thereby also to limit the potential distortion of competition on existing operators by not allowing basic broadband infrastructures (such as xDSL, wireless, mobile, etc solutions) to connect to the new network where sufficient competition is available at the level of such networks.
- (46) The Spanish authorities will not allow third party operators to connect to the Xarxa Oberta with basic broadband infrastructures where basic broadband services seems to be already offered at competitive conditions or where at least two competing basic broadband infrastructure are already in place – in line with the provisions of the Broadband Guidelines. They argue that such limitations in the use of the Xarxa Oberta network will reduce any potential distortion of competition as regards basic broadband services providers, but at the same time will incentivize NGA network roll-out by contracting a capillar fibre backhaul network in the region.
- (47) On the basis of the above described mapping exercise, the list of targeted areas was finalised and the type of access to Xarxa Oberta per type of area was identified according to the following table³³.

³² According to paragraph 53 of the Broadband Guidelines, NGA networks are wired access networks which consist wholly or in part of optical elements and which are capable of delivering broadband access services with enhanced characteristics (such as higher throughput) as compared to those provided over existing copper networks, i.e. in the current case FTTx solutions capable of providing end user speeds of minimum 40 Mbps or cable networks able to deliver speeds up to and beyond 50 Mbps using the new 'DOCSIS 3.0' cable modem standard. According to footnote 60 of the Guidelines, at this stage of technological and market development, neither satellite nor mobile network technologies appear to be capable of providing very high speed symmetrical broadband services although in the future the situation may change especially with regard to mobile services (the next major step in mobile radio communications, 'Long Term Evolution' may theoretically reach, if and when adopted, increased peak data rates of 100Mbps downlink and 50Mbps uplink).

³³ Although the Spanish authorities argue that even if 2 competing infrastructure are already in place, the situation might not be conducive for competition. For instance they argue that the presence of dark fibre shall not be considered as an alternative infrastructure (see also paragraph (48)); or in areas where Telefónica has a high market share (for instance, Telefónica has a market share of 70% in Category 3 areas) suggests that there is no sufficient competition on the market; or the level of ULL deployment of alternative operators is not sufficient in several areas of categories 4 or 5 to prove that there is effective competition in place.

Table 1: Municipalities in Catalonia and type of available basic broadband access services

	<u>Number of municipalities</u>	<u>Infrastructure in place (including dark fibre)</u>	<u>Basic broadband retail offers</u>	<u>NGA infrastructures or plans for the near future</u>	<u>Conditional access to Xarxa Oberta</u>
1	13	None	No	No	All operators can connect to Xarxa Oberta, because no infrastructure is available
2	73	Telefónica	Telefónica	No	All operators can connect to Xarxa Oberta because the areas are not deemed to be competitive
3	29	Telefónica	Telefónica + ULL ³⁴	No	Only 'NGA last mile' infrastructures can connect to Xarxa Oberta
4	64	Telefónica + others	Telefónica	No	Only 'NGA last mile' infrastructures can connect to the Xarxa Oberta
5	81	Telefónica + others	Telefónica + ULL	No	Only 'NGA last mile' infrastructures can connect to Xarxa Oberta
6	17	Telefónica + others	Telefónica + ULL + Cable	No	Only 'NGA last mile' infrastructures can connect to Xarxa Oberta
7	4	Telefónica + others	Telefónica + ULL + Cable	Yes	In the 4 provincial capitals, (Barcelona, Girona, LLeida, Tarragona) the Xarxa Oberta cannot provide commercial wholesale services
Σ	281 municipalities				

- (48) At this stage, it was not possible for the Spanish authorities to ascertain whether in municipalities with dark fibre infrastructure³⁵ available (besides the incumbent's backhaul), such infrastructure is at all on offer to electronic communications operators or if they really demand access to it to serve end-users (this has relevance mainly for municipalities located in category 4 and 5). As a consequence, the categories of the table are at this moment rather conservative and could be updated in the future, subject to the availability of new information concerning the factual situation in the different municipalities³⁶. The detailed list of municipalities for each category is listed in the Annex of the present decision.

³⁴ ULL: Local loop unbundling allows telecommunications operators to use connections of other operators from the telephone exchange's central office to the customer's premises.

³⁵ The Spanish authorities refer to CMT Resolution MTZ 2008/1945, which states that dark-fiber infrastructures, trunk or backhaul, do not belong to the same market as active-fiber infrastructures.

³⁶ Subject to a future notification.

- (49) **Open tender process:** The Spanish authorities intend to select the operator in charge of rollout, management and operation of Xarxa Oberta by means of an open tender procedure. The selected operator will also supply the public administration sites with connectivity services. The regional government will follow a competitive dialogue procedure to select the preferred bidder in compliance with articles 163 to 167 of Spanish Law 30/2007, on 30th October, about Public Sector Contracts and Directive 2004/18/EC³⁷.
- (50) The tender documents foresee two phases: in Phase I, the public network will be deployed in the 281 municipalities, connecting the 4082 public administration sites and providing wholesale services in those same municipalities. In Phase II, the public network will be extended to cover all the municipalities in Catalonia, i.e. up to 946, thereby connecting the totality of public administration sites in the Region, i.e. 5.843. Only Phase I forms object of the present notification.
- (51) **Award criteria:** The published tender documents consider the most economically advantageous offer will be the selected one in compliance with Article 29 (1) of the Directive 2004/18/EC. The awarding authority set in the tender documents also the award criteria which be used to evaluate the bids. These criteria will apply throughout the competitive dialogue procedure, while being fine-tuned during the process and defined in detail before the final bids are requested, in conformity with the principles of the public procurement legislation. The main award criteria are: coverage, price, level of service, choice of technical solutions, operating plan, marketing plan, warranty services, monitoring methodology.
- (52) **State of play of the tender process:** The call for interest (in the form of a Public-Private dialogue procedure) was published by the Spanish authorities in January 2010: interested parties have been invited to submit their preliminary bids, pending approval by the European Commission³⁸. In particular, in the first step of the competitive dialogue, the applicants were informed of the relevant circumstances and of the state of the ongoing State aid notification process and were asked to propose different scenarios to take into account possible modifications to the project occurring during the State aid assessment. Three applicants submitted their proposals. These are currently under assessment by the granting authority to determine which undertakings will be invited to submit the final bids. Such final bids will have to take into account the possible modifications intervened during the course of the State aid procedure before the Commission.
- (53) **Use of existing infrastructure:** The roll-out of Xarxa Oberta is subject to an obligation to reuse, wherever possible, existing infrastructures to avoid unnecessary duplication of infrastructures and to reduce the public funding necessary. As a consequence, first of all, the *Generalitat* will transfer to the selected bidder the infrastructure³⁹ already deployed and owned by the regional government itself. Secondly, it plans to use all available passive infrastructures, for instance to use

³⁷ 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.

³⁸ The provisions of the contract notice under case number 2009/S 148-217012.

³⁹ I.e. existing portions of fibre networks, ducts etc.

ducts throughout the road network and the railway network managed by the *Generalitat*. Thirdly, through agreements with the municipalities within the scope of the project, it is planned to use their infrastructure, particularly ducting and, in some cases, fibre-optic networks for deployment of the Xarxa Oberta urban network. Fourthly, to the extent possible, and subject to agreement with the commercial operators, the Spanish authorities also plan to use the infrastructure of alternative connectivity services providers (typically by renting dark fibre capacity from them)⁴⁰.

- (54) **Technology:** The Generalitat considers that the single solution considered adequate for the self-provision of high capacity connectivity services to all public administrations sites with a minimum bandwidth of 100 Mbit/s is to build a fibre-based network. As for the wholesale subproject, the Spanish authorities indicate that the services provided on the wholesale market will be such as to enable the interconnection to the public backhaul network of any possible technology which operators wish to use for their access infrastructure. Backhaul (transport) services are technologically neutral in the sense that they can be used by any wireless, mobile or wire-based operator to connect its access network. Retail operators may provide access services using different technologies, whether based on wireline technologies (copper, HFC cable solutions, passive optical network PON or active point-to-point) or wireless (Wi-Fi, WiMAX, 2G, 3G, 4G/LTE, etc.). Therefore any third party operator, regardless of the type of technology used, can benefit from the measure – subject to the conditional opening as described in Table 1.
- (55) **Wholesale access:** The aim of the Xarxa Oberta, in its "wholesale subproject", is to sell the excess capacity to any third operator wishing to connect its last mile infrastructure according to the modalities highlighted above. Hence, naturally, wholesale access will be provided on non-discriminatory and open access terms. Wholesale services include active access by means of the provision of transport services as well as passive access by providing access to dark fibre renting services. The Spanish authorities also indicated that duct access will be available on the parts of the network owned by the public administration or built by the selected bidder. However, it will not always be possible to impose such obligation on the segments of the network which will be rented – on market terms – from operators of pure passive infrastructures⁴¹.
- (56) According to the tender documents, the winning bidder will have to establish a new undertaking to build and operate the network. If the winning bidder is also active on the wholesale and the retail market, it will have to ensure its legal, functional and accounting separation of the two businesses in order to avoid any concern of possible anticompetitive exploitation of the advantages created by the management of the Xarxa Oberta. Under no circumstances will the winning bidder be able to give preferential treatment to its retail branch with regard to the use of the Xarxa Oberta.

⁴⁰ For instance, the following operators are considered: Railways (ADIF), Motorways (Abertis), Electric utility network operators, Postal service (Correos), Gas utility (Gas Natural) and other operators.

⁴¹ See above paragraph (53).

- (57) **Duration of the measure:** The contract lifetime is expected to be 20 years, although the final duration will be determined in the course of the competitive dialogue, with the possibility to be extended up to 30 years.
- (58) **Monitoring and claw-back mechanism:** The compliance of the selected bidder with the contract will be monitored on a regular basis. Details of the monitoring mechanism will be discussed and agreed at the final stage of the competitive dialogue procedure with the possible bidders. The details of the mechanism will be described in the contract with the beneficiary. The Regional government envisages also a claw back mechanism for the "Xarxa Oberta" project, to avoid any overcompensation to the beneficiary. The calculation of the amount to claw-back will be dependent on the EBITDA⁴² for the wholesale subproject and will comprise the whole lifetime of the project. According to the Spanish authorities, the methodology will allow to take into account not only the operator's revenues but also whether the costs really faced are lower than those estimated in the business plan⁴³.
- (59) **Price Benchmarking:** A price benchmarking mechanism is incorporated in the funding agreement. The National Regulatory Authority, CMT will monitor the Xarxa Oberta's compliance with the legislative framework for telecommunications established in Article 6 of the LGT (implemented by Article 5 of Royal Decree 424/2005⁴⁴) once the Xarxa Oberta plans to commence operations.
- (60) The price for wholesale access will be based on average prices for comparable services in more competitive areas. The regulated prices will be in general lower than current prices for long distances (therefore ensuring that consumers benefit from a competitive price and remedying the perceived market failure) while Xarxa Oberta short-distance prices would be less attractive so as not to interfere with the business plans of operators which may have made investments to reach the incumbent operator's centres. The Spanish authorities believe that third party operators will primarily use Xarxa Oberta as the 'middle mile' to connect their (NGA) 'last mile' infrastructures with their own core network and to lesser extent to use it to provide wholesale terminal leased line services (i.e. dedicated fibre line) exclusively targeted to business users, hence the Spanish authorities argue that the potential crowding out of existing leased line operators will be limited.
- (61) The regional government indicates that whenever a reference offer is not available, wholesale prices and access conditions will be determined by the granting authority but will require the approval of the Spanish NRA, Comisión del Mercado de las Telecomunicaciones (CMT).

⁴² Earnings before interest, tax, depreciation and amortization. A widely used financial indicator in the telecommunication sector.

⁴³ Subject to the outcome of the competitive dialogue procedure, the Spanish authorities envisaging the following mechanism: if at the end of the concession the cumulative EBITDA exceeds the cumulative estimated EBITDA by more than a threshold percentage, part of the EBITDA in excess of the threshold difference must be clawed back.

⁴⁴ Royal Decree 424/2005, of 15 April 2005, approving the Regulations on the conditions for providing electronic communications services, the universal service and the protection of users, Spanish Official State Gazette number 102, of 29 April 2005, pages 14545 - 14588.

V. THE VIEW OF INTERESTED PARTIES

- (62) The Spanish incumbent operator, Telefónica is very critical towards the project. In particular, the operator is concerned by the substantial impact that the wholesale subproject will have on the broadband markets in which Telefónica is active and which may bring significant revenues for the winning bidder. In particular, Telefónica is concerned that⁴⁵:
- (a) The Generalitat's investment involves a rollout of capacity that exceeds by far the needs of connectivity for public administration offices (self-provision). According to Telefónica's calculations, schools are the most bandwidth intensive public bodies. However, even schools would only require 1% of the total capacity of only 1 fibre, hence with a network featuring 4 fibres, massive extra capacity would be released on the private market throughout the 20 year period.
 - (b) Telefónica asserts that it could provide the necessary broadband services to the public administration for a price about 65% cheaper than the foreseen investment by Generalitat but without releasing the ownership of the network at the end of the project
 - (c) On the basis of the previous points, Telefónica alleges the existence of aid also for the self-provision services due to over-compensation.
 - (d) They argue that the Generalitat's plan to roll out a parallel backbone network using public funding throughout the entire geographic area of Catalonia is unnecessary since Telefónica's network is already there and no market failure exists.
 - (e) Telefónica doubts the qualification of the Xarxa Oberta as a backhaul network: in its view, the project should be considered also as an access network because the access points will be very close to the end users (for example those in the schools). This would distort competition.
- (63) The Spanish authorities provided their comments on Telefónica's submission.
- (64) First, they argue that Telefónica estimated the extra capacity of the network assuming an access technology⁴⁶ that is not suitable for the connectivity of public administration sites and access applications and that properly calculated the excess capacity will not be as sizeable as Telefónica argues. In any case, the Generalitat notes that the decision to lay down 4 fibres per site is perfectly reasonable, since it does not entail excessive additional cost and it belongs to its discretion as public authority.

⁴⁵ Based on the submissions of Telefónica on 22/12/2009 and on 05/05/2010.

⁴⁶ DWDM, Dense Wavelength Division Multiplexing.

- (65) Secondly, concerning the self-provision project, the Spanish authorities remark that they are the best placed to assess their own bandwidth requirements and, accordingly, they are free not to take into account in their estimates Telefónica's allegations.
- (66) Thirdly, the Spanish authorities restate that the decision to roll out its own network will allow the public administration to satisfy its needs with a future-proof network solution that will be able to satisfy the continuously growing communication needs of the public authorities. The tender procedure will allow to obtain the best price to roll out this new network. The connectivity fees during 20 years will cover both the provision of services and the deployment of the network, bearing in mind that the assets (i.e. infrastructure, network elements and systems) will be transferred to the Generalitat at the end of the project lifetime without any additional payment. The Spanish authorities argue that they do not act as a market investor, hence it has no relevance whether Telefónica could make an allegedly cheaper offer (without the ownership of the infrastructure); it is the sole discretion of the Spanish authorities to ensure future proof connectivity service to its public administration bodies.
- (67) Fourthly, the Spanish authorities argue that they are also of the opinion that the wholesale subproject entails State aid within the meaning of the TFEU, hence has the potential to distort competition. That is the reason why they duly notified the Xarxa Oberta project to the Commission for State aid clearance.
- (68) Other stakeholders⁴⁷ commented in particular on the wholesale sub-project. Several operators highlighted the potential pro-competitive gains of the wholesale provision of connectivity services on the commercial market. Most stakeholders see that the market is currently not flexible enough (in terms of pricing and quality of service) to satisfy the connectivity needs of citizens and businesses of Catalonia. However, the undertakings operating existing telecommunication infrastructure highlighted the importance of not crowding out private investments by allowing public authorities to invest in areas in which private operators are already providing comparable services at competitive conditions.⁴⁸

VI. ASSESSMENT OF THE MEASURE: THE SPANISH AUTHORITIES DO NOT ACT LIKE A MARKET INVESTOR

- (69) First, it is assessed whether the aid measure is in line with the Market Economy Investments Principle ("MEIP") and accordingly does not constitute State aid within the meaning of the TFEU.
- (70) According to the relevant case law and Court jurisprudence⁴⁹ – in the absence of a private co-investor - the Commission has to verify whether the Spanish authorities

⁴⁷ ONO, Abertis Telecom, Alpi – Orange Catalunya, British Telecom, Colegio oficial Ingenieros de Telecomunicación (COET), Adamo Cablinter, Cadaques, Clara.net, Colt, Eureka, I. Solsonès, Megatronic, Tecnocolor TT Telecomunicacions, Verizon, Vodafone, Xarcom.

⁴⁸ In particular, ONO and Vodafone.

⁴⁹ See for instance Judgment of the Court of 8 May 2003 In Joined Cases C-328/99 and C-399/00: Italian Republic and SIM 2 Multimedia SpA v Commission [2003] ECR I-4035, paragraphs 37-38, "Seleco judgement"; Joined Cases 296 and 318/82, Netherlands and Leeuwarder Papierwarenfabriek BV v Commission [1985] ECR 809, paragraph 17; Application of Articles 92 and 93 of the EC Treaty and

invest in the construction of the Xarxa Oberta on the basis of a feasibility study and a sound business plan – i.e. taking steps which every private investor would have done before undertaking comparable investments⁵⁰.

- (71) The Spanish authorities stated that their decision to invest in the Xarxa Oberta project was based on their own estimates of costs and benefits, which did not include a detailed feasibility study or a business plan in the same way as a private investor would have done it. In fact, the Spanish authorities themselves argue that the measure is justified by public interest objectives. In its discretion as a public authority, the Generalitat has decided to procure an advanced network (point-to-point, very high speed fibre connection) for every public administration site in Catalonia and to put this network (the backhaul part of it), once rolled out, at the disposal of private operators to allow them to connect their own last mile infrastructures. This does not reflect the procurement behaviour one can expect from a private operator; rather it resembles a strategic decision driven by the specific choice of the public authority. Moreover, the Spanish authorities claim that public investment from state funds in the targeted municipalities is necessary precisely because market players are not willing to invest in order to deploy an infrastructure similar to the Xarxa Oberta, at least not on similar conditions.
- (72) Therefore, the Commission's view is that the Generalitat's action as regards the investment in the network infrastructure is not guided by revenue or profit-maximising behaviour but primarily by the aim of building a region wide infrastructure to its public authorities and to lower entry barriers for alternative operators to boost competitive supply of certain electronic communications services.
- (73) Having established that the measure does not comply with the Market Economy Investments Principle, it is necessary to assess whether the measure constitutes state aid within the meaning of the TFEU.
- (74) 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 trade between Member States.

Article 61 of the EEA Agreement to State aid in the aviation sector, op. cit. points 25 and 26; Commission Decision of 2 August 2004 (2006/621/EC) on the State Aid implemented by France for France Télécom, OJ L 257/11, 20.09.2006, p. 11-67.

⁵⁰ Commission decision of 7 June 2005 on Alitalia's restructuring plan, OJ L/069/49 08.03.2006, paragraph 194: *"In order to present its offer, Deutsche Bank carried out an assessment of the company's strategy and profitability prospects. In addition, before concluding the final contract, it proposes to carry out a due diligence operation which any investor should carry out before initiating the operation"*. See also Commission decision in case C53/2006 Citynet Amsterdam. JOCE L/247/2008.

VII. ASSESSMENT OF THE MEASURE

VII.1. PRESENCE OF AID

State resources

- (75) As explained above in paragraphs (31) to (33), the Xarxa Oberta project is going to be funded through a form of project financing: the tender documents asked the bidders to indicate how much they would request to the Generalitat as monthly payments per each public administration site connected for (at least) 20 years, with a cap of 1.050 € per site. After this period of time, the network will be transferred back to the Generalitat. Hence, the notified measure is financed out of the central budget of the Catalan Regional Government and therefore State resources are involved.
- (76) In addition, as explained above in paragraph (34) the Generalitat will transfer to the winning bidder the existing infrastructure it currently owns. To the extent such infrastructure will be used for the provision of wholesale connectivity services on the private market, additional State resources are involved.
- (77) In State aid broadband cases, aid amounts and aid intensities are usually known only *ex post*, i.e. after the tender process ("gap funding"): the Commission requests aid to be granted through an open tender procedure, which guarantees that it will be the minimum necessary. Hence also for this case it is not crucial to quantify the aid amount in advance.

Economic advantage

- (78) *Selected operators*: The contract for building and managing the public network, as well as providing the communications services to the public administration will be awarded to a company that will be also entitled to use the public network for the provision of wholesale communications services on the private market.
- (79) In particular, funding the rollout of a broadband network in areas in which a private operator would not otherwise invest, implies that the fees paid by the Generalitat to the selected operator will also cover the additional costs needed to invest in such non profitable areas.
- (80) Therefore, the selected operator will receive financial support which will enable it to provide broadband services at conditions not otherwise available on the market. The aid will allow the operator to offer end-to-end services *prima facie* at lower prices than if it had had to bear all costs itself and thus attract more customers than under normal market conditions. The selected operator will also acquire ownership of certain tangible and intangible assets with State funds (e.g. existing portions of infrastructure, equipment, customer relations). In view of the above, an economic advantage will be granted to the selected operator.
- (81) *Third party providers*: The Xarxa Oberta will provide third party operators wholesale broadband services with access to a state of the art, future-proof backhaul

infrastructure. This way, third party operators will be granted an economic advantage since they will have access to wholesale capacity made available by State funding, as they will be customers of the selected electronic communication operators. By using such capacity, they can sell advanced broadband services to end customers.

- (82) *End users: regional public administrations.* The Spanish authorities' intention is to rollout a NGA network to connect all the public administration sites under the responsibility of the Generalitat. The sites to be connected include all governmental departments and agencies, sites of the health care administration, primary and higher education institutions, research institutes, museums, libraries and cultural institutes, fire and police service, heritage conservation, environmental protection. As explained above in paragraph (23), the regional government is currently already aggregating the demand of the mentioned public administration bodies and is procuring centrally the connectivity services for all of them.
- (83) The Commission has already accepted in the past that the fact that a public authority builds its own public-sector network to satisfy its needs for Internet connectivity (instead of procuring such services from private operators) does not entail an economic advantage for the beneficiaries since they do not exercise an economic activity⁵¹. Furthermore, as explained in paragraph (27) above, for the public entities conceivably performing an economic activity (such as health care providers) – thus potentially, recipients of an "advantage" – any compensation received for connectivity services would not be covered by the present decision.
- (84) *Other end users:* The measure aims at improving the provision of existing broadband services to residential and business users in Catalonia. Undertakings in the targeted areas will therefore ultimately benefit from the provision of the new and improved services.

Distortion of competition

- (85) The intervention of the State alters existing market conditions by allowing the provision of enhanced wholesale broadband services by the selected electronic communication operator and third party providers that would not be available under normal market conditions. The measure will alter the conditions of competition between wholesale operators who are likely to use the services offered by Xarxa Oberta in the targeted areas and wholesale operators elsewhere in Spain and the EU.
- (86) The scheme is also selective in that it is addressed to undertakings active only in a specific region and in certain markets for electronic communications services. These selectivity elements also induce a potential distortion of competition⁵².
- (87) Therefore, the fact that an improved broadband service and additional (wholesale) capacity becomes available has the effect of distorting competition.

⁵¹ See the Prague and Welsh Decisions referred in paragraph (26).

⁵² Judgement C-143/99, Adria Wien Pipeline, Slg. 2001, I-8365.

Effect on trade

- (88) 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 business users located in Spain and those located elsewhere in the European Union.

Conclusion

- (89) The Commission therefore concludes that in so far as Spanish state funds are used to finance the deployment of a backhaul network for wholesale provision of services on the private market, the notified measure "Xarxa Oberta" constitutes State aid within the meaning of Article 107 (1) TFEU as moreover confirmed by the notifying Member State during the notification contacts. Having established that the project involves aid within the meaning of Article 107(1) TFEU to the selected service providers, third party providers and undertakings, it is necessary to consider whether the measure can be found to be compatible with the internal market.

VII.2. ASSESSMENT OF THE MEASURE: COMPATIBILITY

- (90) 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*⁵³. The Broadband Guidelines 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 essentially analysed the measure in the light of the criteria developed in particular in paragraphs 31-79 of the Broadband Guidelines.

VII.2.1. The balancing test and its application to aid for the broadband network deployment

- (91) 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), the Commission balances 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:

⁵³ OJ C 235 of 30.9.2009, p. 7.

- (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?

VII.2.2. Objective of the measure

The aid is in line with the policy of the Union

- (92) The importance of full high speed internet coverage of the territories of Member States and the need to encourage joint initiatives of stakeholders has been explicitly identified by the European Council of March 2009: *"the European Council recalled the fundamental role of telecommunications and broadband development in terms of European investment, job creation and overall economic recovery. Taking account of the risks taken by the investing undertakings, efficient investment and innovation in new and enhanced infrastructure should be promoted."*
- (93) The Commission defined in its Europe 2020 strategy of 3 March 2010⁵⁴ the Flagship Initiative: "A Digital Agenda for Europe", which has the *"aim to deliver sustainable economic and social benefits from a Digital Single Market based on fast and ultra fast internet and interoperable applications, with broadband access for all by 2013, access for all to much higher internet speeds (30 Mbps or above) by 2020, and 50% or more of European households subscribing to internet connections above 100 Mbps."*
- (94) The wholesale subproject of the Xarxa Oberta project has as its main target *"white NGA areas"*⁵⁵, i.e. areas where no NGA broadband coverage is currently available and where there are no plans by private investors to roll out such infrastructure in the near future of three years. By granting access to the backhaul of the Xarxa Oberta to third party NGA operators, the measure facilitates and encourages investments in NGA (last mile) networks, in line with the objectives of the Broadband Guidelines. As a secondary objective, the Spanish authorities also intend to allow the use of the backhaul of the Xarxa Oberta to bridge the traditional digital divide (i.e. as regards basic broadband) wherever necessary. This concerns specifically traditional "white areas" where no broadband infrastructure is present or problematic "grey areas", in which the presence of one infrastructure does not exclude the existence of a market failure or cohesion problem.
- (95) By extending NGA broadband coverage to areas where private operators have no commercial interest to invest in the near future, the Spanish authorities pursue

⁵⁴ EUROPE 2020 - A strategy for smart, sustainable and inclusive growth, COM(2010) 2020, page 12.

⁵⁵ See section 3.3 of the Broadband Guidelines.

genuine cohesion and economic development objectives which is in line with the Digital Agenda and Sections 2.3.2. and 3.1 of the Broadband Guidelines.

Aid is the appropriate instrument

- (96) In the situation currently under assessment, due to the economics of NGA networks, the problem of the lack of supply of high speed broadband networks cannot be solved by measures involving demand stimulation or regulatory interventions.
- (97) Demand-side measures in favour of broadband (such as vouchers, tax breaks, awareness-raising measures or demand aggregation) could be an instrument of public intervention. However, these measures do not solve the illustrated problems on the supply side. As regards regulation, despite its crucial role in ensuring competition and supply in the market for electronic communications, evidence shows that in some areas of Catalonia regulation has not fully been able to ensure effective competition in some of the markets for electronic communications and has not led to sufficient investments to bridge the digital divide affecting certain areas. Regulation is, indeed, a necessary, but not a sufficient instrument for the development of broadband services as alternative providers need to combine the use of wholesale products from the incumbent with own network investments which may not be profitable in areas where demand is low.
- (98) In order to ensure the supply of high-speed broadband services to all its citizens, the Regional Government of Catalonia sees no alternative but to grant public aid to the construction of a backhaul network for the provision of NGA services.
- (99) The Commission can agree that, in line with paragraphs 47 and 48 of the Broadband Guidelines, without further public intervention, avoiding the emergence of a new "*digital divide*" between different areas of the country seems not possible, which could lead to the economic exclusion of the local 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

- (100) As set out in paragraph 50 of the Broadband Guidelines, regarding the incentive effect of the measure, it needs to be examined whether the broadband network investment concerned would not have been undertaken without any State aid. According to the results of the public consultation and market research referred to above in paragraph (48) and following, in the targeted areas no NGA network investment would take place without public funding, hence the aid produces a change in the investment decisions of the operators. Moreover, by granting access to the spare capacity of the backhaul of the Xarxa Oberta to third party NGA operators, the measure facilitates and encourages investments in NGA (last mile) networks. Therefore, the aid shall provide a direct and appropriate investment incentive for the selected operator and for third party beneficiaries.

VII.2.3. Design of the measure and the need to limit distortions of competition

- (101) The Spanish authorities have designed the measure in such a way as to minimise the State aid involved and potential distortions of competition arising from the measure.

Pro-competitive nature of the project

- (102) The wholesale provision of services is not aimed to develop an access network but only a transport "*backhaul*" network. Use of the transport network is a necessary input for retail telecommunication operators to provide (high speed and very high speed) access services to the end users. The operator of the new network will connect 281 municipalities and offer access to wholesale products (such as ducts, dark fibre or active access products) on a commercial basis, limited to the extra capacity after serving the needs of the self provision sub-project. Construction of backhaul networks is generally a measure that fosters competition and investment and, for NGA networks, encourages third party operators to rollout last mile infrastructures capable of supplying advanced connectivity services to end-users. Backhaul networks have the potential to stimulate competition on all access technologies, while leaving the bulk of the investments to connect end-users to private operators.
- (103) However, backhaul networks are "hybrid networks" in the sense that they are able to sustain both basic and NGA types of networks: it is the (investment) choice of the telecommunication operators what type of 'last mile' infrastructure they wish to connect to the backhaul network. In particular, operators could decide to use ADSL or wireless solutions (i.e. basic broadband infrastructures), but they could also opt for rolling out, for example, an FTTH architecture (i.e. an NGA infrastructure).
- (104) Hence from competition point of view, the possible distortion of competition resulting from the deployment of subsidised backhaul networks shall be assessed on two levels: (1) the level of basic broadband networks and (2) the level of NGA networks in line with the distinction made in the Broadband Guidelines.
- (105) With respect to (1), the measure could cause distortions of competition in those municipalities in which market forces seem to work adequately to provide basic broadband services to citizens. In these areas, public intervention would not be justified, since it would not address a market failure (as competitive broadband providers exist), it would not bring any significant benefits for the targeted areas (as citizens would receive the same level of services), state aid would not have any incentive effect and it could crowd out private investments. By contrast, in municipalities where a market failure exists with regards to basic broadband, the provision of subsidised backhaul services has a pro-competitive character.
- (106) As regards point (2), i.e. concerning NGA networks, according to the information submitted by the Spanish authorities, almost the whole of Catalonia (except the four provincial capitals Barcelona, Girona, Lleida and Tarragona,) has to be considered a "white NGA area": even where the incumbent's backhaul infrastructure is present, the access infrastructure is not yet upgraded nor will it be in the next three years (as

no "credible investment plans" have been reported in the public consultation within the meaning of paragraph 68 of the Broadband Guidelines).

The system of conditional market access to Xarxa Oberta

- (107) To alleviate these different concerns, the Spanish authorities have proposed a system of conditional market access to Xarxa Oberta, depending on the existing market situation in the various municipalities, as explained above in Table 1.

1. "NGA white" and traditional "white areas"

- (108) As showed in Table 1 above, there are 13 municipalities in which there is no backhaul infrastructure at all (Category 1). These areas are "white" also from the perspective of basic broadband, hence there is no need to impose restrictions on the type of last mile infrastructures allowed to use Xarxa Oberta's excess capacity, provided that the conditions indicated in paragraph 51 of the Broadband Guidelines are respected (see below in paragraph (124) and following).

2. "NGA white" and traditional "grey areas"

- (109) Category 2 comprises 73 municipalities which are only served by the incumbent, not only in the backhaul but also in the access segment. These areas are "grey" from the perspective of basic broadband, but the Spanish authorities demonstrated that the conditions laid down in paragraph 46 of the Broadband Guidelines are fulfilled.
- (110) In target areas the provision of a broadband infrastructure is still a *de facto* monopoly only provided by Telefónica. The Spanish authorities provided evidence that (i) no affordable or adequate services are offered to satisfy the needs of citizens or business users and that (ii) there are no less distortive measures available (including ex ante regulation) to reach the same goals.
- (111) For the purpose of establishing the above, the Spanish authorities provided evidence that:
- (a) the overall market conditions are not adequate, by looking, *inter alia*, into the level of current broadband prices, the type of services offered to end-users (residential and business users) and the conditions attached thereto as described in section III.2. The Spanish authorities explained indeed that the price/quality levels offered on the existing infrastructure are not adequate. In particular, the Spanish authorities explained that where high-capacity wholesale leased lines of the incumbent are available in towns of Category 2, these services remain expensive despite the fact that prices and access conditions are subject to regulation and no retail operator is present other than the incumbent. As leased line prices depend on distance, due to the remoteness of the municipalities from the network connection points, prices

are considerably higher than in urban and profitable areas, such as Barcelona⁵⁶.

- (b) access conditions are not conducive to effective competition; and (c) the overall entry barriers preclude potential entry of other electronic communication operators which is evidenced by the lack of third party operators using the network (for instance, ULL operators) in the target areas;
 - (d) any measures taken or remedies imposed by the competent national regulatory or competition authority with regard to the existing network operator have not been able to overcome such problems. For instance, according to the Spanish authorities, even if regulation may have been successful in establishing a competing offer of broadband services, the geographical remoteness and demand characteristics in the areas of Category 2 still prevent the achievement of supply conditions similar to those prevailing in urban areas.
- (112) Hence although a broadband infrastructure exists on the target areas, the evidence provided by the Spanish authorities suggests that a market failure exists. Accordingly, there is no need to impose restrictions on the type of last mile infrastructures allowed to use Xarxa Oberta's excess capacity in the municipalities belonging to category 2, provided that the conditions indicated in paragraph 51 of the Broadband Guidelines are respected (see below in paragraph (124) and following).
- (113) For all other targeted municipalities of Catalonia, the Spanish authorities will allow third operators to connect to Xarxa Oberta only if they deploy NGA capable 'last mile' infrastructures⁵⁷ (except in the four provincial capitals). Those municipalities can be considered 'NGA white areas' where there are no existing NGA infrastructures, no NGA services are currently offered to end users and there are no plans for investment in NGA in the near future of three years. However, in terms of basic broadband networks, on the basis of the available data sufficient competition seems to exist (i.e. traditional "black" areas or unproblematic "grey" areas)⁵⁸.
- (114) In particular, as far as Category 3 is concerned, the data show the presence of only one infrastructure at the wholesale level, but there are operators alternative to the

⁵⁶ To illustrate the lack of affordable connectivity services, the Spanish authorities argue that a symmetrical 20Mbps connection (symmetrical broadband connection are usually used by business users) would cost approximately [...] EUR in smaller towns of Catalonia (i.e. towns with less than 40.000 inhabitants) in comparison with a price of approximately [...] EUR in urban areas. Furthermore, according to the data presented by the Spanish authorities, services in excess of 100Mbp are almost non-existent in these areas because of price and availability.

⁵⁷ For the definition of "NGA last mile" see footnote 32.

⁵⁸ Despite this, the Spanish authorities still argued that competition is not sufficient in many of these areas since (1) Telefónica's backhaul network in place is not subject to regulation and (2) since the prices based on distance are too high to reach many areas of the territory. During the notification discussion, the Commission has not been provided with sufficient evidence to prove this market failure.

incumbent active on the retail market offering basic broadband services. This fact suggests that, although the area is "grey" (for traditional broadband), it is not problematic as Category 2 above: a competitive retail market could ostensibly develop due to ULL operators gaining access to the incumbent's network. In presence of the mentioned factors and lacking evidence supporting the existence of a market failure⁵⁹, the conditions of paragraph 46 of the Broadband Guidelines cannot be considered fulfilled and the areas in question can be considered competitive from the point of view of basic broadband.

- (115) With respect to the conditions laid down in paragraph 73 of the Broadband Guidelines concerning "white NGA areas" which are "grey" from the perspective of basic broadband, the Spanish authorities proved that (a) the broadband services provided over the existing networks are not sufficient to satisfy the continuously growing needs of citizens and business users in the areas in question and commercial operators do not have sufficient commercial incentives to upgrade the existing networks and (b) there are no less distortive means (including ex ante regulation) to reach the stated goals as described in section III.2 of the current decision.
- (116) Accordingly, in the municipalities belonging to category 3, Xarxa Oberta can be used to obtain backhauling only by those third party operators that are investing in *NGA last mile infrastructures* (as described in footnote 32) – but not by operators wishing to obtain backhaul services from Xarxa Oberta for their *basic broadband* infrastructures (for instance, adsl, basic cable, wireless or mobile solutions).

3. "NGA white" and traditional "black areas"

- (117) As regards Category 4, there appear to be more than one wholesale infrastructure, i.e. backhaul and other (possibly "pure") passive infrastructures, although only Telefónica is offering broadband services at retail level. Even if at this stage it is not known whether such "other" infrastructures are available for access by third party operators and adequate to the provision of retail broadband services by alternative providers, there is not sufficient proof to exclude it either⁶⁰.
- (118) In Category 5 municipalities are listed in which not only there appear to be several wholesale infrastructures, but also a competitive retail market due to the presence of ULL operators. In absence of evidence to the contrary⁶¹, these areas as well as those

⁵⁹ In fact, it may still be the case that access to certain facilities necessary for alternative operators (e.g. dark fibre) is not available and/or regulated wholesale prices (for backhaul or terminal leased lines) are too high (perhaps due to difficult geographic conditions, long distances, etc.). As a result, existing alternative retail services may not be adequate to the needs of the end users [e.g. 'triple play' offers are not possible based on the current infrastructure for alternative operators and/or retail prices are higher than in other competitive areas (such as Barcelona)]. However at this stage there is no evidence to support the occurrence of these facts.

⁶⁰ This would be the case if for example only dark fibre is present but not available for access by retail broadband operators and/or the cost of using existing infrastructures is too high in comparison with other competitive areas. At this stage the Spanish authorities are not in possession of such information.

⁶¹ Similar to the previous footnotes 59 and 60.

of Category 4 could be considered as "black" from the point of view of traditional broadband and therefore, in line with paragraph 43 of the Broadband Guidelines, State aid cannot be allowed.

- (119) Category 6 comprises 17 municipalities in which there are at least two backhaul infrastructures (besides "other" passive infrastructures) and a competitive retail market not only with the presence ULL operators accessing the network of the incumbent but with also an alternative cable infrastructure. These municipalities also constitute black areas from the point of view of traditional broadband.
- (120) The Spanish authorities contend that the areas belonging to categories 4, 5 and 6 are "white NGA areas" and hence submitted information to prove that the conditions laid down in paragraphs 75 and 78 of the Broadband Guidelines are fulfilled (as these areas are traditional "black areas"). In particular, the Spanish authorities demonstrated (as described in detail in section III.2 of the current decision) that:
- (a) the overall market conditions are not adequate: there is no provision of NGA services in any of the areas belonging to the three categories (as evidenced by the public consultation conducted by the Spanish authorities, see paragraph (48)) and demand for new services cannot be met by existing networks;
 - (b) since no NGA network exists, even in presence of regulation imposed by the NRA, network access cannot be conducive to effective competition in NGA;
 - (c) due to the geographical or competitive situation of the areas in question, there are significant entry barriers precluding potential entry by new NGA network investors;
 - (d) measures and remedies imposed by the national regulatory authority cannot be able to overcome the problems, in the absence of investments plans;
 - (e) existing basic broadband infrastructure operators are not proceeding to invest in upgrading their broadband infrastructures within the next three years to provide higher speeds in response to users' demands.
- (121) Hence although several broadband infrastructures exists in the municipalities belonging to category 4 to 6, according to the evidence provided by the Spanish authorities, no operator has plausible commercial plan to upgrade its infrastructure to NGA network in the near future of 3 years. Concerning basic broadband services, based on the data provided by CMT, it seems that these areas are served by at least 2 competing infrastructures, hence there is no evidence that these services are not offered at competitive conditions⁶².

⁶² It is important to note that Table 1 above is based on the data provided by the CMT concerning the availability of broadband infrastructure, including not only actual backhaul networks but also "pure" passive infrastructure (i.e. dark fibre). The Commission is aware that dark fibre in most cases does not constitute a real competitive alternative infrastructure to a full fledged backhaul, thus it is conceivable

- (122) Accordingly, in the municipalities belonging to categories 4, 5 and 6, Xarxa Oberta can be used to obtain backhauling only by those third party operators that are investing in *NGA last mile infrastructures* (as described in footnote 32) – but not by operators wishing to obtain backhaul services from Xarxa Oberta for their *basic broadband* infrastructures (for instance, adsl, basic cable, wireless or mobile solutions).

4. "Grey or black NGA" and traditional "black areas"

- (123) On the basis of the available information, the 4 provincial capitals of category 7 (namely Barcelona, Girona, Lleida and Tarragona) can be considered to be traditional "black" areas and "grey or black NGA" areas: as also acknowledged by the Spanish authorities, in these four cities most likely NGA investments will take place in the near future in the meaning of the *Broadband Guidelines*. As a result, with the objective to limit any possible crowding out of future investment plans of commercial operators, Xarxa Oberta cannot be used to offer commercial wholesale services in these four municipalities.

The other proportionality conditions of the Broadband Guidelines

- (124) As set out in paragraphs 51 and 79 of the Broadband Guidelines, in assessing the proportional character of the notified measure in "white NGA areas" (in the current case, for all target areas from category 1 to category 6) a number of conditions has to be met in order to minimise the State aid involved and the potential distortions of competition.
- (125) **Market research and consultation:** As set out in detail in paragraph (36) and following, the Spanish authorities have undertaken an analysis of the existing broadband infrastructure in order to identify the areas where State intervention is necessary. A public consultation has been conducted as described above in paragraph (48) and following. All the relevant stakeholders have had the opportunity to submit their views and the regulatory authority's opinion has been gathered. This way, the Spanish authorities ensure that public funds are used only in areas where there are no plausible private investment plans to build commercially based high speed or very high-speed (NGA) networks.
- (126) Doubts on the projects have been raised by the incumbent operator Telefónica, as highlighted above in paragraph (62). As far as the decision to rollout a new network for self-provision is concerned, the Commission is of the opinion that it is in the discretion of Spain and its public authorities to assess their internal needs and

that in a number of additional municipalities it could be justified to provide basic broadband services. Unfortunately, on the basis of the information currently available, it was not possible to determine more precisely the characteristics of the existing infrastructures, the availability for commercial operators and their actual usage.

evaluate the best way to serve its citizens, provided that their behaviour does not prejudice to an unacceptable extent the functioning of the market, which is assessed below.

- (127) As far as the wholesale sub-project is concerned, Telefónica is right that the measure will distort competition and shall be subject to state aid assessment. To the extent NGA last mile infrastructures will be allowed to be connected to the Xarxa Oberta where existing basic broadband services are available, the conditional access delineated in Table 1 takes into account the presence of (basic broadband) infrastructure already rolled out and of investments already realised, but considers also the evidence of the existence of certain market failures presented by the Spanish authorities.
- (128) In addition, according to paragraph 67 of the Broadband Guidelines, at present, some advanced basic broadband networks (for instance ADSL 2+) can, up to a certain point, also support some of the types of broadband services that in the near future are likely to be offered over NGA networks (such as basic triple play services). However, and without prejudice to the imposition of ex-ante regulation, it should be noted that novel products or services which are not substitutable from both demand and supply side perspectives may emerge and will require broadband speeds in excess of the upper physical limits of basic broadband infrastructure. Hence, such conditional access will ensure that distortion of competition to existing basic broadband infrastructures will be in line with the provisions of the Broadband Guidelines⁶³.
- (129) Furthermore, no operator (including Telefónica), in the context of the public consultation, has put forward the existence of NGA investment plans for the near future⁶⁴ for the municipalities belonging to categories 1 to 6. Thus, the Commission considers that the system of conditional access above delineated allows to exploit the pro-competitive aspects of the present measure while minimising the negative impact on competition and investment.
- (130) **Open tender procedure:** To minimise the amount of aid involved, the Spanish authorities run a selection procedure in line with the principles of openness, competition and transparency of the national and EU procurement rules, to select the undertaking for the construction and the management of the network. Details of the procedure and its outcome are described above in paragraph (49) and following. This procedure has the effect of maximising the effect of the aid provided while minimising any potential advantage granted for the selected operator. The Spanish authorities designed the selection procedure so as to choose the most economically advantageous offer among those presented by the operators, as detailed above in paragraph (49) and following. The awarding authority specified in advance the

⁶³ See also Commission decision in case N157/2006 - South Yorkshire Digital Region Broadband Project. JOCE C/80/2007.

⁶⁴ No evidence within the meaning of paragraph 42 of the Broadband Guidelines has been presented by any operators (such as a business plan, detailed calendar deployment plan as well as proof of adequate financing) to demonstrate the credible and plausible character of any planned NGA investment.

relative weighting, which it will give to each of the qualitative criteria chosen. The system is designed in such a way as to ensure that the bidder requesting the lower amount of aid will be awarded the project, in line with the provision of the Broadband Guidelines and in line with the principles of the public procurement legislation.

- (131) The measure prevents a distortion of competition which could arise from a conflict of interest if the selected network operator provided access to wholesale capacity at the upstream level while at the same time competing downstream on the retail market. By being excluded from entering the downstream market, the operator will have no strategic incentive to deny certain retail companies access to its wholesale capacity.
- (132) **Technological neutrality:** At the current state of technological development, as acknowledged in paragraph 53 of the Broadband Guidelines, only optical fibre can provide the backhaul capacity necessary to provide NGA retail services. On the other hand, as regards the provision of retail broadband services to end users, the design of the measure under assessment does not favour any particular technology or network platform, leaving it to commercial operators to come up with the most appropriate technological solutions to provide retail broadband services to end users. Therefore any third party operator, regardless of the type of technology used, can benefit from the measure in line with the conditions detailed in Table 1. It also has to be highlighted that the definition of NGA last mile infrastructures (which is explained in footnote 32) might change in line with the forthcoming revision(s) of the Broadband Guidelines.
- (133) **Use of existing infrastructures:** The Spanish authorities have designed the measure with the objective to minimize the impact of the new network on the market and on the investment plans of existing electronic communication operators. Wherever possible, the new network will use existing infrastructure, whether owned or leased. This way, the Spanish authorities avoid the unnecessary and wasteful duplication of existing networks and minimise the overall costs of the project. In particular, the infrastructure in the ownership of the Generalitat will be given in use to the selected operator, as explained in paragraph (53) and following.
- (134) **Wholesale access:** The selected operator will offer wholesale services and access to the subsidised network to other operators in an open, transparent and non-discriminatory manner. This will represent in fact the core business model of the winning bidder, due to the obligation of vertical separation with the retail business. The access obligations will be supervised by CMT.
- (135) **Price benchmarking:** A price benchmarking mechanism is incorporated in the funding agreement. In line with the provision of the Broadband Guidelines, the price for wholesale access will be based on average prices for comparable services in more competitive areas and whenever a reference offer is not available, wholesale prices and access conditions will be approved by the Spanish NRA (CMT), as detailed in paragraphs (59) and (60).

- (136) ***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 if the beneficiary fails to comply with the rules, the granting authorities will be in the position to recover the aid granted. By ensuring that any extra profit generated through the operation of the networks will be clawed back as explained in paragraph (57), the Spanish 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.
- (137) ***Additional conditions for NGA networks:*** concerning the conditions laid down in paragraph 79 of the Broadband Guidelines for the authorisation of aid measures to NGA networks, the Spanish authorities proved the following:
- (a) ***Effective wholesale access:*** under the current scheme the access obligations imposed on the chosen operator include effective access to both passive (such as ducts, dark fibre) and active infrastructure, as detailed in paragraph (55), 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.
 - (b) ***Role of the NRA:*** In the case at hand, the Spanish regulatory authority CMT has been consulted on the project and has provided input necessary to finalise the mapping of the targeted areas. In the phases of implementation of the Xarxa Oberta project, CMT will have the competence to supervise compliance with the agreed access conditions and will approve access tariffs whenever necessary.
 - (c) ***Effective and full unbundling:*** 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 access to ducts, fibre and bitstream) and supports both "point-to-point" and "point-to-multipoint" topologies.

VII.2.4. Conclusion

- (138) The Commission concludes that the Xarxa Oberta project meets 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.
- (139) 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 amendments to the scheme necessary.

VIII. DECISION

On the basis of the foregoing assessment, the Commission has accordingly decided that the measure "*Optical fibre Catalonia (Xarxa Oberta)*" is compatible with Article 107(3)(c) TFEU.

The Spanish 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.

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

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
B-1049 Brussels
Fax No: +32 2 2961242

Yours faithfully,

For the Commission

Joaquín ALMUNIA
Vice-President of the Commission

IX. ANNEX – DETAILED LIST OF MUNICIPALITIES IN CATALONIA – EXPLAINING TABLE 1 OF THE DECISION

#	Type 1	Type 2	Type 3	Type 4	Type 4	Type 6	Type 7
1	Alt Àneu	Aiguamúrcia	Aguilar de Segarra	Alcover	Abrera	Badalona	Barcelona
2	Das	Alcoletge	Alella	Alp	Aiguaviva	Barberà del Vallès	Girona
3	La Cellera de Ter	Aldover	Argentona	Arenys de Mar	Amposta	Canovelles	Lleida
4	Llavorsí	Alfés	Avinyonet de Puigventós	Artesa de Lleida	Badia del Vallès	Esplugues de Llobregat	Tarragona
5	Montesquiu	Alió	Balaguer	Ascó	Banyeres del Penedès	Granollers	-
6	Puigdàlber	Amer	Banyoles	Avinyonet del Penedès	Bellvei	L' Hospitalet de Llobregat	-
7	Queralbs	Anglès	Berga	Balsareny	Blanes	Les Franqueses del Vallès	-
8	Rasquera	Argelaguer	Bescanó	Bellpuig	Cabrera de Mar	Manresa	-
9	Riudecols	Bagà	Jorba	Calaf	Calonge	Mataró	-
10	Sant Esteve de la Sarga	Baix Pallars	La Vall de Bianya	Campdevàrol	Cambrils	Reus	-
11	Sant Joan de Mollet	Belianes	La Vall d'en Bas	Capellades	Cardedeu	Sabadell	-
12	Viladamat	Bellver de Cerdanya	L'Ametlla del Vallès	Cassà de la Selva	Castellbell i el Vilar	Salt	-
13	Vinebre	Benifallet	Les Preses	Castellnou de Seana	Castelldefels	Sant Adrià de Besòs	-
14		Bolvir	Lliçà d'Amunt	Celrà	Castellgalí	Sant Cugat del Vallès	-
15		Callús	Lliçà de Vall	Cervera	Castell-Platja d'Aro	Santa Coloma de Gramenet	-
16		Canyelles	Olot	El Pont de Suert	Cercs	Terrassa	-
17		Cardona	Pals	Figaró-Montmany	Cerdanyola del Vallès	Vilafranca del Penedès	-
18		Castell de Mur	Puig-reig	Flaçà	Cervelló		-
19		Castellfolit de la Roca	Sant Feliu de Guíxols	Fornells de la Selva	Constantí		-
20		Castellvell del Camp	Sant Fruitós de Bages	Gandesa	Cornellà de Llobregat		-
21		Ciutadilla	Sant Joan de Vilatorrada	Garcia	El Masnou		-
22		Conca de Dalt	Santa Margarida de Montbui	Ger	El Prat de Llobregat		-
23		Corçà	Santa Pau	Ginestar	El Vendrell		-
24		El Pinell de Brai	Serinyà	Gironella	Esparreguera		-
25		Esterrí d'Àneu	Torrent	Hostalric	Figueres		-
26		Falset	Vallfogona de Balaguer	La Bisbal d'Empordà	Fondarella		-

27		Flix	Vallirana	La Granada	Gavà		
28		Guardiola de Berguedà	Vilablareix	La Pobla de Claramunt	Golmés		
29		Guissona	Vilafant	La Pobla de Segur	Igualada		
30		La Guingueta d'Àneu		La Riba	La Garriga		
31		La Pera		L'Albi	La Llagosta		
32		La Seu d'Urgell		L'Ametlla de Mar	La Roca del Vallès		
33		La Tallada d'Empordà		L'Ampolla	Malgrat de Mar		
34		Les Masies de Voltregà		L'Arboç	Martorell		
35		Llardecans		Les Borges Blanques	Martorelles		
36		Llorenç del Penedès		L'Espluga de Francolí	Molins de Rei		
37		Maials		Masquefa	Mollerussa		
38		Maldà		Monistrol de Montserrat	Mollet del Vallès		
39		Masllorenc		Montblanc	Montcada i Reixac		
40		Miravet		Móra d'Ebre	Montgat		
41		Montellà i Martinet		Naut Aran	Montmeló		
42		Montferrer i Castellbò		Orís	Montornès del Vallès		
43		Montmaneu		Puigcerdà	Olèrdola		
44		Móra la Nova		Puigpelat	Olesa de Montserrat		
45		Navata		Puigverd de Lleida	Palafrugell		
46		Pradell de la Teixeta		Ribera d'Ondara	Palamós		
47		Rialp		Ribes de Freser	Palau-solità i Plegamans		
48		Rodonyà		Ripoll	Pallejà		
49		Roquetes		Riudellots de la Selva	Parets del Vallès		
50		Sant Feliu de Pallerols		Sallent	Piera		
51		Sant Jaume de Llierca		Sant Jaume dels Domenys	Pineda de Mar		
52		Sant Joan de les Abadesses		Sant Quirze de Besora	Premià de Dalt		
53		Sant Martí de Riucorb		Sant Vicenç de Torelló	Premià de Mar		
54		Sant Ramon		Santa Susanna	Rajadell		
55		Santa Coloma de Farners		Tàrraga	Ripollet		
56		Santa Fe del Penedès		Vallbona d'Anoia	Rubí		
57		Sarrià de Ter		Valls	Sant Andreu de la Barca		
58		Sarroca de Lleida		Verges	Sant Boi de Llobregat		
59		Senterada		Vielha e Mijaran	Sant Celoni		

60		Solsona		Vilagrassa	Sant Cugat Sesgarrigues		
61		Sort		Vilaller	Sant Esteve Sesrovires		
62		Talarn		Vilanova del Camí	Sant Feliu de Llobregat		
63		Tarroja de Segarra		Vilaverd	Sant Joan Despi		
64		Térmens		Vinaixa	Sant Julià de Ramis		
65		Torrebellès			Sant Just Desvern		
66		Torre-serona			Sant Pere de Ribes		
67		Tremp			Sant Quirze del Vallès		
68		Verdú			Sant Vicenç de Castellet		
69		Vidreres			Sant Vicenç dels Horts		
70		Vilalba Sasserra			Santa Coloma de Cervelló		
71		Vilanova de la Barca			Santa Maria de Palautordera		
72		Vilanova del Vallès			Santa Perpètua de Mogoda		
73		Vila-rodona			Sitges		
74					Subirats		
75					Tordera		
76					Tortosa		
77					Vic		
78					Viladecans		
79					Vilanova i la Geltrú		
80					Vila-seca		
81					Vilassar de Mar		