



EUROPEAN COMMISSION

Brussels, 14.12.2009
C (2009)10259 final

PUBLIC VERSION

WORKING LANGUAGE

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**Subject: State aid N 323/2009 - Spain
Broadband in Rural Areas of Asturias**

Sir,

I. SUMMARY

- (1) I am pleased to be able to inform you that the European Commission has assessed the measure "*Concesión de ayudas e incentivos a la inversión de operadores de telecomunicación en el Principado de Asturias*" and decided not to raise objections as the State aid contained therein is compatible with Article 107(3)(c) Treaty on the Functioning of the European Union (TFEU)¹.

II. PROCEDURE

- (2) By letter registered on 27 May 2009, pursuant to Article 108 (3) of the TFEU, the Spanish authorities notified the above mentioned measure to the Commission. On 19 June 2009, the Spanish authorities submitted additional information. By letter registered on 20 August 2009, the Commission requested additional information on the proposed measure, for which the Spanish authorities submitted answers by letter registered on 16 September

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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2009. Additional information was submitted by the Spanish authorities on 28 October 2009 and on 23 November 2003.

III. CONTEXT

- (3) Asturias is a region situated in the North-East of Spain with a predominantly mountainous topography. Approximately 80% of its population is concentrated in urban areas, with the remaining 20% mostly residing in small villages in rural and isolated areas of the region. In terms of broadband coverage, as in many countries in the European Union, broadband services are available in more densely populated locations, whereas the rollout of basic broadband connections is lacking in rural and remote areas as these areas are not commercially attractive enough for the business operators to invest in new infrastructure. Consequently, only a minority of the public sector, business and residential users in rural areas of Asturias are able to access adequate broadband services.
- (4) The Kingdom of Spain has already predisposed two aid schemes for the benefit of rural areas of the country, positively assessed by the Commission in cases N583/2004² and N 73/2008³. However, according to the analysis conducted by the Spanish authorities and summarised in their *Plan Estratégico de ayudas e incentivos a la inversión de operadores de telecomunicación en el Principado de Asturias*⁴, despite these two subsidy programmes, there are still wide gaps in terms of broadband coverage in rural areas of the Asturias region. According to the studies, more than 100.000 Asturians are currently left without any adequate broadband access⁵.
- (5) The Spanish authorities state that the persisting lack of broadband availability in the rural areas of Asturias is due to the geographical characteristics of the region which have caused private investments to be insufficient. In particular, due to the mountainous nature of the territory, even when the telecommunication infrastructure exists, its distance from the users' premises is so large that adequate service cannot be ensured. As for mobile connectivity, the Spanish authorities identified certain rural areas in which coverage does not go above 25%. State subsidised satellite access⁶ has been made available only in some of the localities targeted by the measure, but the performance level is deemed unsatisfactory by the Spanish authorities⁷.

² Available at http://ec.europa.eu/community_law/state_aids/comp-2004/n583-04.pdf

³ Available at http://ec.europa.eu/community_law/state_aids/comp-2008/n073-08.pdf

⁴ Based on several studies: “e-Asturias 2007 Estrategia para el desarrollo de la Sociedad de la Información en el Principado de Asturias”, “Mapa de infraestructuras y servicios de telecomunicación del Principado de Asturias”, elaborado en 2007, “Sociedad de la Información en el Principado de Asturias, Estudio de Ciudadanía y Empresas, 2008” and more recently, the study “Definición de las líneas de actuación en relación con las infraestructuras de telecomunicaciones en el Principado de Asturias 2008-2012”.

⁵ According to the figures provided by the Spanish authorities, due to the limited state aid allocated in the framework of the previous programmes, 40% of the areas targeted by such schemes still lack adequate or affordable broadband coverage.

⁶ Based on current market prices, satellite broadband is not considered as an affordable option, as the very low take up rate proves.

⁷ Due in particular to the maximum download speed not going above 512 kbps.

IV. DESCRIPTION OF THE MEASURE

- (6) **Objectives:** The project aims to develop infrastructures of electronic communication networks offering broadband services in rural areas of the Spanish region of Asturias, which are currently not served and where there are no plans for coverage in the near future. The Spanish authorities aim to improve broadband availability for the citizens and businesses in rural areas of Asturias, by giving incentives to the electronic communication operators to invest into the rollout of adequate broadband infrastructure to serve the most remote and isolated areas of the region.
- (7) The Spanish authorities argue that the availability of broadband services is one of the key factors for the local communities in attracting businesses, distance working, providing health care services and improving education and public services. The Spanish authorities are concerned that the residents of the isolated areas are currently demanding – and not obtaining – the same level of telecommunications services available to those in the urban and central areas of the region. This risks contributing to the further depopulation of the rural areas, with increasing dangers for the integrity of the territory itself, as abandoned areas are often threatened by arsons.
- (8) Moreover, the economy of the rural areas of the Asturias region is more and more based on the exploitation of the natural resources for the increasingly popular rural tourism. For these developments to be successful according to the Spanish authorities, reliance on an adequate telecommunication infrastructure, comparable to that of urban areas, is fundamental.
- (9) Broadband availability is therefore crucial to eliminate the digital divide, to preserve the integrity of the rural territories, to increase social cohesion and contribute to the economic growth of the region.
- (10) **Legal basis:** The notified measure is based on (i) Resolution of 18 June 2009 of the Consejería de Administraciones Públicas y Portavoz del Gobierno; (ii) Resolution of 29 July 2009, of the Consejería de Administraciones Públicas y Portavoz del Gobierno; (iii) Asturias Regional Development Plan 2007-2013; (iv) Ley 38/2003, of 17 November 2003 General de Subvenciones; (v) General Telecommunications Law 32/2003 of 3 November 2003.
- (11) **Target areas:** The Spanish authorities conducted a detailed mapping and coverage areas to identify the target areas where state intervention is necessary, in accordance with the *Community Guidelines for the application of State aid rules in relation to rapid deployment of broadband networks*⁸ (hereinafter: "Broadband Guidelines"). The measure will cover areas where no broadband infrastructure is present (90% of the localities) or where the infrastructure is not adequate to provide broadband services (the remaining 10%): for instance existing operators provide only limited internet services (nominal bandwidth below 512 kbps)⁹. The Spanish authorities carefully identified the targeted

⁸ OJ C 235 of 30.9.2009, p. 7.

⁹ Due to technical limitations, such as exchanges located at too long distance from the end user premises, actual speed may be even lower. See also Commission decision of 23/02/2009 in case N 238/2008 – *Broadband*

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areas so as to be sure that no overlap exists with areas benefitting from previously approved state aid schemes. The measure is expected to cover up to 4.819 localities, depending on the results of the tender procedure.

- (12) **Consultation with stakeholders:** The Spanish authorities conducted a public consultation¹⁰ with the electronic communication operators concerning the availability of broadband services in the region. Bilateral as well as multilateral meetings with the main operators active in Asturias have been conducted, followed up by further correspondence by the Spanish authorities to understand whether any of the existing operators can already provide such services or have plans to offer such services on commercial terms in the near future. On the basis of the information provided, the Dirección General de Modernización, Telecomunicaciones y Sociedad de la Información of the Asturias regional Government compiled the list of targeted areas.
- (13) The Spanish Competition Commission has been informed of the planned measure and provided its input for the preparation of the implementing resolutions. The notified measure also takes into consideration the resolutions of the National Regulatory Authority for the telecommunication sector (hereinafter the "CMT") concerning the sectoral best practices¹¹ as well as the other relevant resolutions and regulations.¹²
- (14) **Project design:** The scheme aims at subsidising projects based on all possible technologies supporting access to broadband Internet to areas currently not served. Regardless of the technology employed, and in accordance to the characteristics of the services available in urban areas, the minimum technical requirements to be fulfilled have been identified as follows:
- Bandwidth (download/upload): 2 Mbps/256 Kbps
Guaranteed minimum speed: 64 Kbps/32 Kbps
Availability: > 99%
unlimited download volumes.
- (15) Aid beneficiaries are subject to the obligation to accept new customers within the first two years after aid is granted.
- (16) Access to the subsidised infrastructures will have to be provided on an open, non-discriminatory basis to other electronic communication operators wishing to connect to it, with no temporal limitation for the obligation. The terms and conditions to facilitate third parties' access to the infrastructure will have to be fully spelt out by the applicants during the course of the tender procedure. Through the open access obligation on any subsidised infrastructure, the government of Asturias aims to stimulate competition to the maximum extent when using state aid. Access price will be set in accordance to the existing national regulation by following the cost-based model.

infrastructure development in Germany, available at
http://ec.europa.eu/competition/sectors/telecommunications/broadband_decisions.pdf.

¹⁰ <http://www.bandaancha.es/consultacobertura/Paginas/ConsultaCobertura.aspx?m=1&mostrar=33>

¹¹ Catálogo de buenas prácticas «La actividad de las Administraciones Públicas en el sector de las Telecomunicaciones».

¹² Resolution 07/04, of 26 February 2004 and others pursuant to General Telecommunications Law 32/2003 of 3 November 2003 and Law 38/2003 of 17 November 2003.

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- (17) **Technology:** The measure does not discriminate between operators or technological platform. It is specified that all technological solutions are eligible as beneficiaries of the subsidy to cover the unserved areas.
- (18) **Pricing:** The objective of the Spanish authorities is to provide retail broadband services in the targeted areas at a price similar to urban areas, hence maximum tariffs have been determined after a market research on the average retail price paid by end-users in urban areas that do not benefit from State funding. Therefore, the maximum price cap established by the Spanish authorities is of a one-time subscription fee of 39 €, with a monthly rate of 45 € during the first 36 months of the contract. Reductions of such prices in the bids submitted in the call for tender will be rewarded with additional points. According to the research conducted by the Spanish authorities, this arrangement will be attractive both for the operators and for the customers; after this time elapses, technological evolution may allow for new services and prices to emerge on a competitive market. In any event, the CMT will continue monitoring prices and tariffs, pursuant its statutory role as the sectoral regulator.
- (19) **Beneficiaries:** The recipients of the aid will be electronic communication operators who will provide access to residential and business customers residing in currently unserved areas. Indirect beneficiaries are third operators gaining access to the subsidised infrastructure and businesses of Asturias benefitting from the services offered on the new infrastructures.
- (20) **Budget and financing instruments:** The aid takes the form of grants. The overall aid amount is € 6.5 million. Subject to a Commission decision, the project will be financed from the resources of the European Regional Development Fund (ERDF). The Spanish authorities have confirmed that there is no cumulation possible with aid received from other local, regional, national or Community schemes to cover the same eligible costs.
- (21) **Aid intensity:** Given that population density is the main factor discouraging private investments in broadband in rural areas of Asturias, the maximum aid intensity is set to depend on the population of the targeted area:
- maximum 80% for localities or villages with less than 200 inhabitants;
 - maximum 65% for localities or villages with population between 200 and 1.000 inhabitants
 - maximum 50% for localities or villages with population above 1.000 inhabitants
- (22) **Duration of the measure:** The measure will be operational for the years 2009 and 2010. As usual, payment of the aid is explicitly made conditional to the approval by the Commission.
- (23) **Procurement:** The Spanish authorities envisage to run a tender procedure to award the aid in full compliance with the EU and national public procurement rules. The details of the tender as well as the documentation needed and the weighing criteria are detailed in the notice published in the Official Journal of Asturias. The Spanish authorities envisage the possibility to have different winners to cover different blocks of targeted localities. The final set up will depend on the outcome of the tender process. To select the most economically advantageous bids, the following criteria with the respective weights will be used: demographic and geographical coverage – max 20 points; technical performance

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above the minimum listed in paragraph (14) above – max 20 points; innovative character of the project with respect to the services offered – max 10 points; inclusion of innovative features to improve traceability – max 15 points; price and financial viability of the project – max 15 points; social and economic benefits of the project – max 15 points; demand stimulation actions – max 5 points. At comparable quality conditions, the bidder with the lowest amount of aid requested is preferred.

- (24) ***Monitoring and clawback:*** The winning bidder will be subject to reporting obligations vis-à-vis the granting authority concerning execution and implementation of the project, as well as with regard to the costs of the subsidised activity, to ensure that no excess aid is granted. Moreover, a clawback mechanism will be inserted in the final contract with the winning bidder, in line with the provisions of the Broadband Guidelines. In particular, if the return on the investment for the beneficiary is higher than the average return for the sector, the extra profits will be shared between the operator and the Asturias regional government, according to the aid intensity. After the start of the service, the mechanism will be running for 5 years. Furthermore, in line with the existing regulatory framework for electronic communication, after the start of the operations the CMT will exercise its supervisory powers over the telecommunications operators.

V. STATE AID ASSESSMENT OF THE MEASURE: PRESENCE OF AID

- (25) According to Article 107 (1) of the 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 to be qualified as State aid, the following cumulative conditions have to be met: 1) the measure has to be granted out of State resources, 2) it has to confer an economic advantage to undertakings, 3) the advantage has to be selective and distort or threaten to distort competition, 4) the measure has to affect intra-Community trade.
- (26) The current measure will be financed by state resources, namely from resources of the Spanish government. It will provide selective economic advantage to the electronic communication operators selected via the tender procedure and also for third party electronic communication operators that will be able to offer their services via wholesale access to the subsidised network. Moreover, the measure has the potential to distort competition by enabling local undertakings to subscribe to the services offered via the subsidised network instead of more expensive market-based solutions. Finally, insofar as the intervention is liable to affect providers of electronic communications services from other Member States and distorts competition between businesses located in Asturias and elsewhere in Europe, the measure has an effect on trade.
- (27) Therefore, as laid down in paragraphs 10-16 of the Broadband Guidelines, the Commission considers that the scheme constitutes State aid within the meaning of Article 107 (1) of the TFEU.

VI. COMPATIBILITY ASSESSMENT

(28) The Broadband Guidelines contain a detailed interpretation of Article 107 (3) (c) of the TFEU in this area of State aid law. As regards the applicable substantive provisions, the Commission has essentially analysed the measure in the light of the criteria developed in particular in paragraphs 31-51 of the Broadband Guidelines.

The balancing test and its application to aid for broadband network deployment

(29) As described in points 34 and 35 of the Broadband Guidelines, in assessing whether an aid measure can be deemed compatible with the internal market, the Commission balances the positive impact of the aid measure in reaching an objective of common interest against its potential negative side effects, such as distortions of trade and competition.

(30) In applying this balancing test, the Commission will assess the following questions:

- a. 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)?
- b. Is the aid well designed to deliver the objective of common interest? In particular:
 1. Is the aid measure an appropriate instrument, i.e. are there other, better placed instruments?
 2. Is there an incentive effect, i.e. does the aid change the behaviour of firms?
 3. Is the aid measure proportional, i.e. could the same change in behaviour be obtained with less aid?
- c. Are the distortions of competition and the effect on trade limited, so that the overall balance is positive?

(31) The individual steps of the balancing test in the field of broadband are set out in detail in Sections 2.3.2 and 2.3.3. of the Broadband Guidelines.

Objective of the measure

Market failure and cohesion considerations, paragraphs (37) to (42) of the Guidelines

- (32) As stated in paragraph (39) of the Broadband Guidelines, State aid in the broadband sector may remedy a market failure, i.e. a situation in which private investment is less than what is optimal from the viewpoint of society as a whole. Likewise, State aid might be used as a tool to achieve equity considerations, i.e. to improve access to an essential means of communication, thereby improving social and territorial cohesion.
- (33) Broadband connectivity is of strategic importance because of its ability to accelerate the contribution of information and communication technologies (ICT) to growth and innovation in all sectors of the economy and to social and regional cohesion. The

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Commission actively supports the widespread availability of broadband services for all the European citizens as laid down in the Lisbon strategy and subsequent Communications¹³.

- (34) Moreover, availability of adequate broadband services would be beneficial from a wider economic perspective, e.g. due to the positive spill-over effects on the local economies (such as increased economic activity, job creation and retention). The availability of such services would also improve access to an essential means of communication services to all actors in society, thereby improving social and regional cohesion.
- (35) A well targeted state intervention in the broadband field can contribute to reducing the 'digital divide' that sets apart areas or regions within a country where affordable and competitive broadband services are on offer and areas where such services are not, thus achieving greater cohesion in line with the common interest.
- (36) The current measure targets "*white areas*"¹⁴, where adequate broadband is currently not available and where there are no plans by private investors to roll out such infrastructure in the near future. Hence the objective of the measure is in line with paragraphs 37-40 of the Broadband Guidelines, by extending broadband coverage to such unserved areas, the Spanish authorities pursue genuine cohesion and economic development objectives.
- (37) In addition, in the context of the financial and economic crisis affecting severely the European economies, it was further recognised by the Commission¹⁵ that broadband investments can be considered as "*smart investments*" that are able to provide short term (employment) benefits and long term (economic) advantages for the EU economies. Hence by accelerating broadband deployment, the current measure is also in line with the European interest to support fast recovery of the European economies.¹⁶

Aid is the appropriate instrument

- (38) In the situation currently under assessment, no private investments have taken place in the targeted areas as the operators would not be able to recoup their investments. The current legal and regulatory framework does not provide for any means to oblige operators to make this investment. According to the Spanish authorities, regulation is unlikely to lead to sufficient investments for the provision of broadband services in these un-served areas, where profitability of investments is low.
- (39) Without further public intervention, reducing the "*digital divide*" between rural and urban areas does not seem possible, which could lead to the economic and social exclusion of the local citizens and undertakings. Hence in the current situation, as set out in paragraphs 47 and 48 of the Broadband Guidelines, State aid is an appropriate instrument to achieve the set objectives

¹³ See for instance "i2010 – A European Information Society for growth and employment, COM(2005)229 final, 1 June 2005; "*eEurope 2005: An information society for all*" COM(2002)263 final, "*Bridging the broadband gap*", COM(2006)129.

¹⁴ See paras 41 and 42 of the Broadband Guidelines.

¹⁵ Brussels European Council, 19/20 March 2009 Presidency Conclusions.

¹⁶ Communication from the Commission to the European Council: *A European Economic Recovery Plan*, Brussels, 26.11.2008.

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The aid provides the right incentives to operators

- (40) 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 within the same timeframe without any State aid. According to the results of the public consultation and market research referred to above in paragraph (11) and (12), in the targeted areas no investment would take place without public funding, hence the aid is expected to produce a change in the investment decisions of the operators. Moreover, as explained in paragraph (23), the recipients of the aid will be selected by public tender. Tenderers will submit investment plans indicating the amount of aid that they consider to be necessary to carry out the investment given the anticipated investment and operating costs and revenues. Therefore, the aid should provide a direct and appropriate investment incentive for the selected operators.

Design of the measure and the need to limit distortions of competition

- (41) As set out in paragraph 51 of the Broadband Guidelines, in assessing the proportional character of the notified measures in "white" areas a number of necessary conditions has to be met in order to minimise the State aid involved and the potential distortions of competition:
- (a) *Detailed mapping and coverage analysis, consultation with stakeholders:* the Spanish authorities have undertaken an analysis of the existing broadband infrastructures in order to clearly identify the areas where state intervention is necessary. By consulting existing operators and updating the target areas accordingly and by consulting with the relevant stakeholders as described in paragraph (11) and (12) above, in an open and transparent manner, the Spanish authorities ensure that public funds are used only in areas where it is necessary and limit the possibility of crowding out private investments and distortion of competition to the minimum possible.
 - (b) *Open tender process* the Spanish authorities will select the beneficiaries of the aid in full compliance with national and EU public procurement rules. Open tender procedures are considered to be effective means to minimise the aid necessary for the measure.
 - (c) *Most economically advantageous offers:* within the context of an open tender, the Spanish authorities will select the most economically advantageous offers among those presented by the operators according to the specifications detailed in paragraph (23) above.
 - (d) *Technology neutrality:* The current measure 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 broadband services to end users.
 - (e) *Use of existing infrastructures:* the operators are encouraged in their bids to make use of existing infrastructures where they exist, but since the targeted areas are uncovered by adequate broadband infrastructure, it is expected that no such network infrastructure can be utilised.

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- (f) *Open wholesale access*: on all the infrastructures rolled out with the help of state funding, the network operator will provide effective access to all interested parties in an open, transparent and non-discriminatory manner. Such provision has been interpreted by the Spanish authorities in the widest possible sense in order to make sure that State aid fosters competition on the targeted areas.
 - (g) *Price benchmarking*: access prices on the subsidised network will be cost-based, following the regulation established by the CMT, the Spanish National Regulatory Authority.
 - (h) *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. Moreover, the Spanish authorities committed themselves to claw back extra profit generated through the operation of the networks in a proportion equivalent to the aid intensity. This way, 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.
- (42) The Commission concludes that the notified measure will offset a geographical and commercial handicap and is objectively justified to address the lack of broadband services in rural areas. The measure is in line with the objectives of Article 107(3)(c) TFEU as it facilitates the development of certain economic activities (broadband services) in certain remote and rural areas.
- (43) In view of the characteristics of the project and of the safeguards applied by the Spanish authorities as described above, the overall impact on competition is deemed to be positive. Any distortion of competition is limited, as the investment is carried out in areas where no comparable infrastructure exists yet and where market research does not indicate that private investment will enter in the foreseeable future.

Conclusion

- (44) The Commission concludes that the compatibility criteria set out in the Broadband Guidelines are met, hence the aid involved in the notified measure is compatible with Article 107(3) (c) of the TFEU.

VII. DECISION

- (45) On the basis of the foregoing assessment, the Commission has accordingly decided that the aid measure "*Concesión de ayudas e incentivos a la inversión de operadores de telecomunicación en el Principado de Asturias*" is compatible with Article 107(3)(c) of the TFEU.
- (46) The Spanish authorities are reminded that, pursuant to Article 108(3) of the TFEU, they are obliged to inform the Commission of any plan to extend or amend the measure.
- (47) 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

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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.

- (48) 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,

Neelie KROES

Member of the Commission