



EUROPEAN COMMISSION

Brussels, 5.7.2013
C(2013) 4353 final

PUBLIC VERSION

This document is made available for information purposes only.

Subject: State aid SA.35834 (2012/N) – Spain
Extension of high speed broadband in Spain (PEBA-NGA)

Dear Sir,

1. PROCEDURE

- (1) With a letter dated 30 November 2012, pursuant to Article 108(3) of the Treaty on the Functioning of the European Union ("TFEU")¹, the Spanish authorities notified the continuation of the measure *Programa Avanza Nuevas Infraestructuras de Telecomunicaciones (SA.31229 ex. N 304/2010)*². The first request for information was sent on 17 December 2012 and the reply was submitted by the Spanish authorities on 5 February 2013. The second request for information was sent on 26 February 2013, to which the Spanish

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.

² State aid SA.31229 (ex. N 304/2010), OJ C 170 of 10.6.2011, page 1;
http://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=3_N304_2010

Excmo. Sr. D. José Manuel García-Margallo y Marfil
Ministro de Asuntos Exteriores y de Cooperación
Plaza de la Provincia 1
E-28012 MADRID

Commission européenne, B-1049 Bruxelles – Belgique
Europese Commissie, B-1049 Brussel – België
Teléfono: 00-32-(0)2-299.11.11.

authorities replied on 17 April 2013. Additional clarifications were received on 7 and 17 May as well as on 7 and 21 June 2013.

2. DESCRIPTION OF THE MEASURE

2.1. Factual background

- (2) In 2008, the Spanish authorities launched the programme *Avanza Infraestructuras (SA.25137 ex. N 73/2008)*³, which was designed to facilitate the investment needed to extend coverage of telecommunications services to rural areas (with similar conditions to those available in urban areas), in order to enhance the economic development and the incorporation of the local citizens and businesses to the Information Society.
- (3) These actions had continuity with the measure SA.31229 ex. N 304/2010 known as *Programa Avanza Nuevas Infraestructuras de Telecomunicaciones ("Plan Avanza")*.
- (4) Plan Avanza was designed to bridge the digital divide as far as basic broadband was concerned and to build NGA facilities in areas where private investment alone did not suffice.
- (5) The notified measure is based in substance on the previously approved scheme SA.31229 ex. N 304/2010⁴ which expired on 31 December 2011. On the basis of the experience gained with the implementation of that aid scheme, together with the fundamental technological shift due to the development of Next Generation Networks, the Spanish authorities intend to amend the scope of the measure. Contrary to the latter scheme, the notified measure specifically focuses on investments in high speed (above 30 Mbps) and very high speed (above 100 Mbps) broadband.
- (6) Indeed, the original Plan Avanza had two objectives translated into two lines of action:
 - i. **Technical Solution A:** extending to the entire Spanish population resident in white areas, broadband services of at least 1 Mbps (this was the minimum requested speed);
 - ii. **Technical Solution B:** creating the conditions for the deployment of NGA with download speed higher than 50 Mbps in NGA white areas.
- (7) In the notified scheme, the Spanish authorities removed the previous Technical Solution A as its objective was reached under the past scheme. The

³ State aid SA.25137 (ex. N 73/2008), OJ C 290 of 13.11.2008, p. 1; http://ec.europa.eu/competition/state_aid/cases/224223/224223_832481_20_3.pdf

⁴ Under that scheme, 101 projects were approved, representing an investment of €193 million out of which the Ministry of Industry, Energy and Tourism financed €164 million in form of soft loans. As a result, 676.884 residents benefited from basic broadband projects listed (Solution A), representing 83.8% of the target. There are already 34.719 new ultrafast broadband connections deployed (Solution B) out of 202.209 planned. In addition, new access points were created in 404 municipalities (out of 919 planned) which link backbone and high speed access networks.

previous Solution B is under the present scheme split into two sub-lines for the reason of higher clarity:

- i. Extension of very high speed NGA access networks (with download speed higher than 100 Mbps): **Solution A**;
- ii. Extension of the capillarity of the connection to backhaul network: **Solution B**.

In addition to those, a third support line is added as **Solution C**:

- iii. Extension of the coverage of high speed broadband networks (above 30 Mbps) in the areas with poor broadband coverage.

All the remaining provisions of the initial measure remain unchanged.

2.2. Objectives of the measure

- (8) The notified measure aims at bringing NGA broadband connectivity in areas, where current networks are unable to satisfy the connectivity needs of citizens and businesses living and residing there. In relation to the classification in white, grey and black areas set forth by the *EU Guidelines for the application of State aid rules in relation to rapid deployment of broadband networks*⁵ ("Broadband Guidelines"), the Spanish authorities will direct their broadband investments aiming at the deployment of NGA in NGA white areas, where the broadband is not sufficient to meet the required needs and without any perspective for improvement through commercial investments by 2020 and beyond.

Public consultation with the stakeholders

- (9) The preliminary identification of the areas eligible for public intervention was chosen based on annual coverage reports of the "Dirección General de Telecomunicaciones y Tecnologías de la Información", which gathered information from principal market operators concerning coverage (in terms of municipality, technology and allowed speed) as well as related future plans.
- (10) This preliminary information together with the draft Order was subject of a public consultation⁶ which aimed at further determining the eligible areas. In particular, the consultation verified (i) the effective absence of (very) high speed broadband infrastructure, and (ii) the intention of the operators to invest in broadband connectivity in the short term (three years). This mapping exercise determined the final pattern of the network to be funded. The National Regulatory Authority ("NRA") has knowledge of the notified scheme

⁵ OJ C 25 of 26.1.2013, p.1.

⁶ The public consultation was launched on 21 February 2013 on the website http://www.minetur.gob.es/telecomunicaciones/es-ES/Participacion/Paginas/BasesReguladoras_BandaAncha.aspx and opened until 18 March 2013. Replies have been submitted by 27 operators, from which 11 operate locally (e.g. La Cala Fibra SL, Wimax On Line SL, T.V.C. Pinos Puente S.L.) and 2 nationally (e.g. Telefónica and Vodafone).

from the beginning of its planning and expressed its views on the original scheme⁷. It had further the opportunity to submit observations during the mentioned public consultation period but as the notified amended scheme applies the same conditions relative to the wholesale access, no new formal opinion was issued on the notified measure.

- (11) During the consultation phase, no concerns were raised by the existing operators. Indeed, they have not presented any investment plans which would duplicate the infrastructure to be constructed under the notified measure. The results of this consultation are published on the web portal "Ayudatec" of the Ministry of Industry, Energy and Tourism ("Ministry"). Based on this information, a map for the public intervention was finalized.
- (12) In relation to the above consultation, the annex to the notification "*Perspective analysis of the situation in the provision of broadband services: preliminary identification of areas of implementation*" provides some preview data and details as to the coverage of various broadband technologies installed on the Spanish territory, namely fix broadband: ADSL (at least 10 Mbps), VDSL (at least 30 Mbps), WIMAX (at least 10 Mbps), HFC (cable modem) and FTTH.

2.3. Design of the project

- (13) As indicated in point 2.1, the Spanish authorities envisage three types of initiatives under the notified measure:

Technical solution A - consists of initiatives aiming at the deployment of **very high speed broadband** (more than 100 Mbps). These initiatives will only cover white NGA areas, where NGA networks do not at present exist and are not likely to be built in the near future. Moreover, the population in these areas must be inferior to 50.000, thus not giving favourable conditions for the future development of such networks.

Technical solution B - consists of initiatives extending **access points (backhaul)** enabling connection to the networks of high or very high speed broadband in white NGA areas, where such NGA capable backhaul infrastructure is currently unavailable and is not likely to be built in the near future. These areas must count population not exceeding 20.000.

Technical solution C - under this solution, the Spanish authorities intend to deploy access networks of high speed broadband (more than 30 Mbps) in white NGA areas, where such networks do not at present exist, are not likely to be built in the near future and where the traditional broadband coverage does not reach the speed of 10 Mbps in 90% of the population. Additional conditions justifying the eligibility of areas under this solution are the non-existence of alternative offers via cable or ULL and population below 10.000.

⁷ The NRA (Comisión del Mercado de las Telecomunicaciones - CMT) gave its favourable opinion (without objections) on the previous measure on 1 December 2010.

- (14) The described solutions will be undertaken and carried out in compliance with the same pro-competitive principles as in the previous scheme.
- (15) As for the choice of technical solutions, the notified measure expressly foresees that **existing infrastructures** will be used wherever available for the deployment. To this aim, the Spanish authorities have put in place a number of regulatory and administrative instruments to facilitate operators' access to existing infrastructures and obtainment of rights of way. More concretely, the operator who owns or controls the existing infrastructure in the target area and wishes to participate in the tender, has the obligation to inform the granting authority about it as well as to provide all relevant information about that infrastructure to other bidders sufficiently in time to allow them to consider it in their bid. The granting authority will then publish the information about the availability of the existing infrastructure in that area.
- (16) The setup of the infrastructure will be adjudicated by **public tenders**. The mechanism is the same as the one already used for the existing aid scheme SA. 31229 (ex N 304/2010)⁸, even if the award criteria were slightly modified⁹. Preference will be given to the operator requesting the lowest amount of aid.
- (17) **Effective Wholesale Access** will be granted at all possible levels, including access to ducts, the cable network and bit-stream for at least 7 years. The ducts used for the deployment of the network (comprising both existing and newly built ducts) will be made available to other operators interested in posing their own infrastructure. Where the building of ducts is supported, operators have to install multi-fibre ducts. In case of deployment of optical fibre, the access will include the possibility to access the dark fibre, with complete unbundling as well as access to ducts, poles and cabins without limitation in time.
- (18) As regards **access wholesale prices** for the subsidized infrastructure, they will be based on the average published (regulated) wholesale prices that prevail in other comparable, more competitive areas of the country or the Community or, in the absence of such published prices, on prices already set or approved by the NRA for the markets and services concerned. In this respect, the Spanish authorities have clarified that, the prices taken as a reference will be those set by CMT (Comisión del Mercado de las Telecomunicaciones) with respect to

⁸ See footnote 2.

⁹ The criteria are resumed in 8 headings:

- Lowest amount of aid per beneficiary (max. 20 points);
- Quality of project definition and service provision (max. 16 points);
- Broadband availability improvement (max. 16 points);
- Economic and financial quality and viability (max. 12 points);
- Business plan and dissemination of results (max. 12 points);
- Socio-economic impact (max. 8 points);
- Characteristics of the wholesale access (max. 8 points);
- Use of existing infrastructures (max. 8 points).

the operator with significant market power. In addition, the CMT has powers to regulate access at fair prices.

- (19) The measure is *technologically neutral*, as the participation in the tender is not limited to the use of a particular technology. The applicants need to explain and justify in their project that the chosen technological solution is the most convenient for each territory. Further, all telecommunication operators, regardless of the technology employed, will have access and ability to use the infrastructure and the network access facilities.
- (20) A *claw back mechanism* is foreseen to ensure that any profit generated via the subsidized network in excess of the costs will be paid back to the Member State. Indeed, in order to make the mechanism effective and able to assess possible extra-profits, all costs for the construction and management of the infrastructure shall be included in a business plan and shall be in line with those borne by an efficient operator for the realisation of a similar project. To ensure prompt recovery of the extra-profits, the contract with the beneficiary shall include a clause mandating the repayment of a share of the extra profits in proportion to the aid intensity. Furthermore, every year, a financial statement shall be drafted outlining the revenues and the costs associated with the infrastructure and its operation.
- (21) In summary, the project to set up a broadband infrastructure envisages that already existing infrastructures be used for the installation of cables and other equipment; that any solution adopted be technologically neutral; that all infrastructures be accessible to third parties at fair, reasonable and non-discriminatory terms and that tender procedures be employed in order to adjudicate the necessary works.

2.4. Legal Basis

- (22) The fundamental legal basis for the measure is the Draft Order which regulates the granting of aid related to the Extension Programme of the NGA broadband network in Spain (PEBA-NGA). The General Law on Telecommunications 32/2003 of 3 November 2003 and the General Law on Subsidies 38/2003 of 17 November 2003 complete the national legal framework.

2.5. Other characteristics of the measure

- (23) The *budget* for the measure amounts to €360 million over a three-year period. The budget is equally split between Technical Solutions A, B and C. The measure will take the form of (i) soft loans with an interest rate 0% or reduced interest rate to be repaid in a maximum term of fifteen years, including a maximum three-year grace period, or the form of (ii) direct grants.¹⁰ The major part of the budget (€300 million) is foreseen for soft loans. The *aid*

¹⁰ The aid under the previous scheme was provided only in form of soft loans. The Spanish authorities decided to amplify the aid form by providing direct grants in order to support also projects which are commercially less attractive for the operators.

intensity will amount to a maximum 35% of all eligible costs but cannot be higher than the profitability gap for a similar long-term project not needing aid. Moreover, the aid is limited to €4 million per project.

- (24) The aid paid under this measure is not compatible with any other aid to cover the same eligible costs i.e. no *cumulation* is allowed.
- (25) The *duration* of the aid covers the period 2013-2015. In compliance with the stand-still obligation foreseen in Article 108(3) TFEU, the aid can be granted from the day of approval by the Commission until 31 December 2015.
- (26) The direct *beneficiaries* of the aid will be the electronic communication operators¹¹ which will gain access to capital resources to build the infrastructures at lower cost than they should have faced otherwise. Moreover, third party electronic communications operators and businesses located in the targeted areas will indirectly benefit from the possibility of purchasing broadband access at lower costs than those entailed by existing market solutions.
- (27) The Ministry will *monitor* whether the beneficiaries comply with all requirements to receive aid. The notified measure envisages the adoption of a monitoring scheme capable of capturing the costs incurred for the realization of the subsidized project. In addition, the CMT will intervene during a period of 7 years for all aspects of wholesale access (prices, technical characteristics, deadlines, etc.). In case the operator does not respect the wholesale access obligation, the CMT will apply sanctions (up to 5 times of the benefit) as foreseen in the General Law on Telecommunications.
- (28) For reason of *transparency*, the full text of the approved aid scheme, the beneficiaries of the aid and amounts of state aid granted to them as well as the aid intensity and technology used will be published on the website of the Ministry (Ayudatec).
- (29) The Spanish authorities have committed to submit *reports* on the implementation of the amended scheme (including the date the network was put into use, the wholesale access products offered, the number of access seekers and service providers on the network, the number of houses passed and take-up rates) every 2 years during the whole duration of the aid measure.

3. ASSESSMENT OF THE MEASURE

3.1. Presence of aid

- (30) 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*

¹¹ Natural and legal persons, registered in the Operators registry, providing network or Internet access services or telecommunication services.

certain goods shall, in so far as it affects trade between Member States, be incompatible with the common 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.

- (31) The notified measure will be financed from State resources, namely from resources set aside in the budget of the Kingdom of Spain (budgetary chapter of the Ministry).
- (32) 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. There will be also an advantage for the businesses located in the targeted areas.
- (33) The measure has the potential to distort competition. At the level of network operators, support given to one operator may discourage other competitors to deploy or expand their own networks in the targeted areas. Distortion of competition could also arise at the level of business customers of the broadband network: public funding could encourage local undertakings to subscribe to the services offered via the subsidized network instead of more expensive market-based solutions. Insofar as the intervention affects providers of electronic communications services from other Member States and distorts competition between end users located in Spain and elsewhere in Europe, the measure has an effect on trade. The markets for electronic communication services are open to competition between operators and service providers, which generally engage in activities that are subject to trade between Member States.
- (34) Therefore, as laid down in paragraphs 10-15 of the Broadband Guidelines, the Commission considers that the scheme constitutes State aid within the meaning of Article 107(1) TFEU.

3.2. Compatibility assessment

- (35) The Commission has assessed the compatibility of the notified measure in accordance with Article 107(3)(c) TFEU and in the light of the Broadband Guidelines.
- (36) 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 against the criteria developed in particular in paragraphs 33-48, 78 and 80 of those Guidelines.

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

- (37) As described in points 32 and 34 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 measure in reaching an objective of common interest against its potential negative side effects, such as distortions of trade and competition.
- (38) 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?
- (39) The Commission assessment of the notified measure is described in further detail in what follows, in line with Section 2.5. of the Broadband Guidelines.

The aid is in line with EU policy

- (40) The Commission has defined in the Europe 2020 Strategy¹² its flagship initiative "A Digital Agenda for Europe", which acknowledges the socio-economic benefits of broadband by highlighting its importance for competitiveness, social inclusion and employment. That initiative seeks to ensure that, by 2020, (i) all Europeans have access to much higher Internet speeds of above 30 Mbps and (ii) 50% or more of European households subscribe to Internet connections above 100 Mbps. In pursuing this aim, "at EU level, the Commission will work ...to facilitate the use of the EU's structural funds in pursuit of this agenda", and "at national level, Member States will need ... to draw up operational high speed internet strategies, and target public funding, including structural funds, on areas not fully served by private investments." Key Action 8 of the Digital Agenda calls Member States "to use public financing in line with EU competition and State aid rules" in order to meet the desired coverage, speed and take-up targets.

¹² EUROPE 2020 - A strategy for smart, sustainable and inclusive growth, COM (2010) 2020, 3.3.2010, p. 12.

- (41) A well-targeted State intervention in the broadband field contributes to bridge 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. The notified measure addresses a market failure as it targets only so called "*NGA white areas*"¹³, where (very) high speed broadband is currently not available and where there are no plans by private investors to roll out such infrastructure in the near future. By promoting the development of NGA networks in such areas, the measure will contribute greatly to the achievement the strategic Digital Agenda objectives.

The aid is the appropriate instrument

- (42) As set out in paragraphs 40-44 of the Broadband Guidelines, in the situation currently under assessment, despite efforts undertaken by the Spanish authorities through alternative instruments, private investments have taken place in the targeted areas only to a limited extent. Without further public intervention, reducing the "*digital divide*" between rural and urban areas seems not possible. Hence, in the current situation, State aid is an appropriate instrument to achieve the set objectives.

The aid provides the right incentives to operators

- (43) As set out in paragraph 45 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 market research and the subsequent public consultation referred to above in paragraphs (9), in the targeted areas no investment would take place without public funding within three years, hence the aid produces a change in the investment decisions of the operators.
- (44) Moreover, as explained in paragraph (16), the partners for the setup and operation of the network will be selected by public tenders. The measure aims at creating an infrastructure essential for the provision of a wide array of advanced services and at attracting additional investments in rural areas by undertakings exploiting the broadband infrastructure.

The aid is limited to the minimum necessary

- (45) In assessing the proportional character of the notified measure, the Commission has assessed in paragraph (52) and following a number of necessary conditions to minimise the State aid involved and the potential distortions of competition.

Limited negative effects

- (46) The significance of the distortion of competition has been assessed in terms of expected effects on competitors in paragraph (52) and following. Given the design of the project, it is unlikely to anticipate a crowding out effect on potential future investments of private operators.

¹³ See paragraph 75 of the Broadband Guidelines.

Transparency

- (47) As further explained in paragraph (52)(j) below, the aid will be awarded in a transparent manner and it will be ensured that the public authorities, economic operators, the interested public and the Commission have easy access to all relevant acts and pertinent information about the aid.

The overall balancing exercise and the compatibility conditions

- (48) The Spanish measure has been carefully designed to ensure that the overall balance of its effects is positive.
- (49) As mentioned above, the primary objective of the measure is to bridge the digital divide and provide access to NGA broadband services where they are currently unavailable by making a significant new investment in sparsely populated areas in which private operators are not planning any investments in the near future. That investment will bring significant new capabilities to the market in terms of broadband service availability and capacity, speeds and competition, in particular through the upgrade from basic to high and very high speed NGA broadband networks, extending access points (backhaul) enabling connection to these networks as well as effective access at different levels of the infrastructure adjusted to NGA deployment. The measure will prevent duplication of existing infrastructure and help overcome limits of the basic broadband connections in providing innovative services, which businesses and citizens require. Consequently, such investments ensure a "step change" in terms of broadband availability for the target areas, in line with the requirements of paragraph 51 of the Broadband Guidelines.
- (50) Furthermore, the projects supported under the measure are open for access to all operators and technologies, which as confirmed in paragraph 81 of the Broadband Guidelines, exhibit especially pro-competitive features.
- (51) The Spanish authorities have designed the measure in such a way as to minimise both the State aid involved as well as the potential distortion of competition arising from it. As set out in paragraph (8), the measure will only target localities classified as NGA 'white' areas.

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

- (52) As set out in paragraph 78 of the Broadband Guidelines, in assessing the proportional character of the notified measure, 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 analysis of coverage:* the Spanish authorities have undertaken an analysis of the existing broadband infrastructures in order to clearly identify the areas where state intervention is necessary.
- (b) *Public consultation:* the Spanish authorities have consulted in an open and transparent manner existing operators and all the relevant stakeholders in order to determine the pre-selected target areas. In this way, the public funds will be used only in areas where it is necessary and the possibility of

crowding out private investments as well as distortion of competition will be limited to the minimum possible.

- (c) *Competitive selection process*: the Spanish authorities will select the undertakings which will benefit from the aid for the construction, operation and maintenance of the networks through open and transparent competitive procedures, with the application of the principles and safeguards provided for by public procurement rules (see paragraph (16) above). Open tender procedures are considered to be effective means to minimise the aid necessary for the measure.
- (d) *Most economically advantageous offer*: within the context of an open tender, the Spanish authorities will select the most economically advantageous offers among those presented by the operators. Pursuant to the Broadband Guidelines, the awarding criteria are established in the call for tender. At similar quality conditions, the bidder with the lowest amount of aid requested should receive more priority points in the assessment of its bid.
- (e) *Technological 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. In this respect, in addition to the standard cable technologies based fully or partially on optical fibre, the measure promotes projects based on radio electric systems, both fixed and mobile, employing technologies allowing NGA access (e.g. LTE).
- (f) *Use of existing infrastructure*: as described in paragraph (15), the Spanish authorities will ensure that during the tender procedure existing civil infrastructures are considered by the bidders in the design of their offers. Moreover, coordination with other civil works shall be taken into account by the tenderers in order to limit the use of public funds. Existing regulatory obligations will ensure that incumbents are not unduly favoured.
- (g) *Wholesale access*: the operators of the new networks will provide open wholesale access to all interested parties in an open, transparent, non-discriminatory manner for at least seven years. The access obligation will also apply to passive infrastructures. The CMT will monitor the compliance of operators with their access obligations.
- (h) *Wholesale access pricing*: In order to ensure effective wholesale access and to minimise potential distortion of competition, wholesale prices on the subsidized network will be benchmarked on wholesale prices approved by the CMT for the operator with significant market power, as explained in paragraph (17), and will be monitored by the NRA with the objective to offer similar access prices to those charged in non-subsidised areas in conformity with paragraph 78(h) of the Broadband Guidelines. Price benchmarking is an important safeguard to ensure that the aid granted will serve to replicate market conditions like those prevailing in other competitive broadband markets.

- (i) *Monitoring and claw-back mechanism:* 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. Furthermore, by ensuring that any extra profit generated through the operation of the networks will be clawed back (see paragraph (20) above), 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.
 - (j) *Transparency:* As described in paragraph (28), the Ministry will publish all information relative to the notified aid measure on its website (Ayudatec). Furthermore, the aid beneficiaries will be obliged to provide entitled third parties with comprehensive and non-discriminatory access to information on their infrastructure deployed under the State aid measure in conformity with paragraph 78(j) of the Broadband Guidelines.
 - (k) *Reporting:* The State aid granting authority will submit reports to the Commission on the implementation of the measure every two years from the date the network is put in use. Hence, the Spanish authorities fulfil the requirement set in the paragraph 78(k) of the Broadband guidelines.
- (53) ***Additional conditions for NGA networks:*** to support NGA deployment, additional conditions have to be met, as laid down in paragraphs 79 and 80 of the Broadband Guidelines. In this respect, the Spanish authorities proved the following:
- (a) *Wholesale access:* under the notified measure, the access obligations imposed on the chosen operator include effective access to both passive (such as ducts, dark fibre, poles and street cabins) and active infrastructure (bit stream and unbundled access to the local loop), as detailed in paragraph (17), 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. In the notified case, the wholesale access is granted for 7 years and access to ducts and poles is not limited in time. Consequently, it can be concluded that the measure is in compliance with paragraph 80(a) of the Broadband guidelines.
 - (b) *Fair and non-discriminatory treatment:* According to paragraph 80(b) of the Broadband Guidelines, if the network operator is vertically integrated, adequate safeguards must be put in place to prevent any conflict of interest, undue discrimination towards access seekers or content providers and any other hidden indirect advantages. In this respect, the Spanish authorities limit the eligible project costs only to those for adaptation of the network infrastructure which might be used by the other operators. Such limitation permits the provision of competitive and affordable services to end-users by competing operators. Consequently, in case of "wholesale model only", all the costs are eligible. The Spanish authorities considered this when drafting the award criteria and intend to give maximum points to the bidder proposing a wholesale-only model. On the contrary, a vertically integrated operator should receive less point.

Conclusion

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

4. DECISION

On the basis of the foregoing assessment, the Commission has accordingly decided that the aid measure "*Extension of high speed broadband in Spain (PEBA-NGA)*" is compatible with Article 107(3)(c) TFEU and not to raise objections to it.

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/competition/elojade/isef/index.cfm>.

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
1 Place Madou / Madouplein 1
MADO 12/59
B-1210 Brussels
Fax No: +32 2 29 61242

Yours faithfully,

For the Commission

Joaquín ALMUNIA
Vice-President