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Subject: State Aid SA.102847 (2022/N) – Spain – RRF - Spain- Support for connectivity in rural areas

Excellency,

1. PROCEDURE

- (1) Following pre-notification contacts, the Spanish authorities notified the measure Program UNICO Demanda Rural - RRF Spain - Support for connectivity in rural areas (the “Measure”) on 4 August 2022.
- (2) On 2 September 2022, 22 September 2022 and 14 October 2022, the Commission services requested further information and clarifications from the Spanish authorities, who replied on 8 September 2022, 27 September 2022 and 17 October 2022, respectively.
- (3) By letter submitted on 22 April 2022, Spain exceptionally agreed to waive its rights deriving from Article 342 TFEU in conjunction with Article 3 of the EC Regulation 1/1958¹ and to have this decision adopted and notified in English.

¹ Regulation No 1 determining the languages to be used by the European Economic Community (OJ 17, 6.10.1958, p. 385–386).

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2. DETAILED DESCRIPTION OF THE MEASURE

2.1. Context

- (4) Broadband connectivity is of strategic importance for European growth and innovation in all sectors of the economy and for social and territorial cohesion. It supports business efficiencies and growth, ensures that economies can remain competitive, and enables citizens and businesses to benefit from online services and offerings.
- (5) In recent years, Spain has promoted the deployment of broadband networks through both regulatory measures² and public support. In this sense, through the New Generation Broadband extension program (PEBA-NGA)³ and more recently through the program UNICO Banda Ancha⁴ (financed with funds from the Recovery and Resilience Facility (“RRF”)⁵), state aid has been granted to support the extension of next generation access networks providing a download speed of at least 300 Mbps symmetrical, upgradeable to 1 Gbps symmetrical in areas where private operators have not invested and/or did not plan to invest⁶.
- (6) Despite these public interventions, broadband coverage in some rural, more isolated and sparsely populated areas – of little or no commercial interest for private operators - is still deficient and the digital divide persists, in contrast with more profitable, usually urban, areas where most private investments in broadband networks are taking place. According to the Spanish authorities, broadband coverage with networks providing a download speed of at least 100 Mbps under peak time conditions reached around 88.3% of end users in Spain by 2021. This percentage is down to 70% in rural, remote areas⁷. Accordingly, in 2021, the gap between urban and rural areas was still of approximately 18%⁸.

² See Royal Decree 330/2016 of 9 September 2016 on measures to reduce the cost of deploying high-speed electronic communications networks; and the General Telecommunications Act 11/2022 transposing into the Spanish legal system the Directive (EU) 2018/1972 of the European Parliament and of the Council of 11 December 2018 establishing the European Electronic Communications Code.

³ <https://avancedigital.mineco.gob.es/es-es/Participacion/Paginas/Cerradas/PEBA-NGA-2019-2021.aspx>

⁴ <https://portalayudas.mineco.gob.es/InfraestructurasDigitales/Paginas/Index.aspx>

⁵ Regulation (EU) 2021/241 of the European Parliament and of the Council of 12 February 2021 establishing the Recovery and Resilience Facility (OJ L 57, 18.2.2021, p. 17) (the “RRF Regulation”) and Council Regulation (EU) 2020/2094 of 14 December 2020 establishing a European Union Recovery Instrument to support the recovery in the aftermath of the COVID-19 crisis (OJ L 433I, 22.12.2020, p. 23).

⁶ See Commission decision of 10 December 2019, State aid SA.53925 (2019/N) - Broadband Scheme for NGA White and Grey Areas – Spain and Commission decision of 14 June 2021, State aid SA.62696 (2021/N) – Spain - RRF - Extension of Broadband Scheme for NGA White and Grey Areas. See also <https://avancedigital.mineco.gob.es/es-es/Participacion/Paginas/Cerradas/PEBA-NGA-2019-2021.aspx> and <https://portalayudas.mineco.gob.es/InfraestructurasDigitales/Paginas/Index.aspx>

⁷ Report COBERTURA DE BANDA ANCHA EN ESPAÑA EN EL AÑO 2021 published in July 2022.

⁸ Report COBERTURA DE BANDA ANCHA EN ESPAÑA EN EL AÑO 2021 published in July 2022.

- (7) In 2020, the Spanish authorities elaborated a national plan for connectivity⁹ aimed to ensure adequate digital connectivity for the entire population in Spain and to overcome the digital divide between rural and urban areas. As indicated in this plan, the objective of the Spanish authorities is that 100% of the population has access to broadband networks providing a download speed of at least 100 Mbps by 2025.
- (8) The NextGenerationEU Communication¹⁰ identifies as one of the key priorities of the RRF the support to the digital transition through connectivity measures aimed, inter alia, at addressing market failures with respect to the deployment of performant networks. The RRF Regulation sets out that Member States should devote at least 20% of the allocated funding to measures fostering the digital transition¹¹. In this context, the Spanish authorities plan, under Component 15 of the Spanish Recovery, Transformation and Resilience Plan¹², to support rural, remote areas in Spain to achieve broadband connectivity with a download speed of at least 100 Mbps under peak time conditions.

2.2. Form and objective of the Measure

- (9) The Measure is an aid scheme designed as a temporary solution to facilitate and accelerate access to performant fixed broadband services at affordable prices in certain remote and rural areas in Spain. The Measure will support, over five years (2023-2027), the provision of wholesale access services, having the characteristics defined in recital (10), to facilitate the provision of retail broadband services (as defined in recital (11)) to individuals, self-employed persons, small and medium enterprises (“SMEs”), non-profit entities and local public administrations¹³ (the “end users”). The target areas are mainly remote, dispersed and sparsely populated rural areas where there is no terrestrial fixed network such as fibre-to-home (“FTTH”), hybrid fibre-coaxial cable (“HFC”) or fixed wireless access (“FWA”), providing retail fixed broadband services with a download speed of at least 50 Mbps under peak time conditions¹⁴ and where the

⁹ See Plan for Connectivity and Digital Infrastructure in Society, Economy and Territories (available here: https://portal.mineco.gob.es/RecursosArticulo/mineco/ministerio/ficheros/201202_Plan_para_la_Conectividad.pdf) and the Plan “España Digital 2025” (available here: https://www.lamoncloa.gob.es/presidente/actividades/Documents/2020/230720-Espa%C3%B1aDigital_2025.pdf).

¹⁰ Communication from the Commission COM(2020) 456 final to the European Parliament, the European Council, the Council, the Council, the European Economic And Social Committee and the Committee of the Regions of 27 May 2020, ‘Europe’s moment: Repair and Prepare for the Next Generation’.

¹¹ See Article 19(3)(f) and Annex VII of the RRF Regulation.

¹² Available at: https://ec.europa.eu/info/files/spains-recovery-and-resilience-plan_en

¹³ The Spanish authorities aim to enable public authorities to have fixed broadband connection services in premises where municipal services such as a municipal houses, public libraries, sports centres, fire brigade, municipal police or municipal service manager buildings are provided. Broadband services will be intended for municipal services themselves or for users of such services and may not under any circumstances be used to provide broadband access to the general public or the provision of services to third parties.

¹⁴ A first selection of target areas will be done on the basis of a preliminary mapping already carried out which is based on a threshold of 30 Mbps download speed under peak time conditions. A final list of target areas, selected on the basis of a mapping based on the threshold of 50 Mbps download speed

available retail broadband services that ensure a download speed of at least 100 Mbps at a fixed location under peak time conditions have a much higher price than similar connections in more competitive and populated areas of Spain. Accordingly, it is considered that, in these areas, such services are not affordable for end users. Spain explained that the availability of broadband services with the performances described in recital (11) was necessary to enable end users in these remote, dispersed and sparsely populated target areas to benefit from advanced digital applications, for example cloud computing, e-government services and e-health. Furthermore, performant broadband services will also allow end users to have access to remote educational services and teleworking that are of particular relevance, contributing effectively to overcome the digital divide for the benefit of end users in these remote areas.

- (10) To be eligible under the Measure, the network platform(s) for the provision of the relevant wholesale broadband services must guarantee compliance with the following minimum requirements (together, the “relevant wholesale services”)¹⁵:
- a) enable the provision of retail broadband services at a fixed location with a download speed of at least 100 Mbps under peak time conditions;
 - b) ensure an upload speed of at least 5 Mbps under peak time conditions;
 - c) ensure an average total latency of maximum 690 ms;
 - d) ensure 95% service continuity in any calendar month;
 - e) ensure availability of the service until 31 December 2027.
- (11) To be eligible under the Measure, the relevant retail broadband services at a fixed location must guarantee compliance with the following minimum requirements (together, the “relevant retail services”):
- a) provide a download speeds of at least 100 Mbps under peak time conditions and an upload speeds of at least 5 Mbps under peak time conditions;
 - b) ensure high priority data limit of at least 105 Gigabytes per month cumulating both upload and download traffic;
 - c) ensure an average total latency of maximum 690 ms;
 - d) ensure 95% service continuity in any calendar month;
 - e) ensure availability of the service until 31 December 2027.

under peak time conditions, will be finalised during the first half of 2023. This final list of target areas will be updated through annual mapping based on the threshold of 50 Mbps.

¹⁵ The Spanish authorities indicate that the aim of the Measure is to complete the extension of performant broadband networks in Spain in order to reach the target of 100 % of the population having adequate connectivity, thereby promoting the closing of the digital divide between rural and urban areas.

- (12) According to the Spanish authorities, currently, connectivity services based on satellite solutions¹⁶ are often the only technology present in the target areas. The Spanish authorities indicate that in some target areas there are no terrestrial broadband networks at a fixed location and some other target areas, there are some terrestrial networks that provide a download speed below 50 Mbps at a fixed location under peak time conditions (see also section 2.11). Recently, the available satellite based providers have started offering broadband services with a download speed of at least 100 Mbps under peak time conditions in the target areas. However, the retail prices for these services are significantly higher than the retail prices in more profitable areas, such as urban areas, for the same connectivity speeds (e.g. based on fibre-to-the-home (FTTH)).¹⁷ In such a context, end users in the target areas are not willing to subscribe to the existing retail services at the mentioned performances. This conclusion and the assumptions made by the Spanish Authorities on which it is based have been validated by an economic report prepared by NERA¹⁸ based on publicly available data sources (“the NERA Report”). The NERA Report indicates that, absent the Measure, users in target areas activated 12 000 satellite connections at lower performances and/or higher prices. With the Measure and the corresponding reduction of wholesale and retail prices, NERA forecasts a take up for the relevant retail services of 56 250 connections during the period in which the Measure is applicable.
- (13) According to the Spanish authorities, the public intervention under the Measure is thus motivated by (i) the existence of a market failure in the target areas in terms of both the availability of performant retail broadband services at a fixed location and in terms of their affordability, and (ii) the need to address it in order to ensure that the end users in these remote, dispersed and sparsely populated rural areas have access to an affordable broadband service at a fixed location with a download speed of at least 100 Mbps under peak time conditions. The Measure aims at ensuring that as many end users as possible in the target areas have access to broadband services at prices similar to those in more profitable areas, which in turn will allow them to access online services with improved performances. According to the Spanish authorities, the Measure is necessary considering that end users in rural, sparsely populated and isolated areas may be reluctant to subscribe to the only performant retail broadband services at a fixed location available in such areas, considering their high retail price (see recital (9)). The Spanish authorities also consider that supporting the demand for these broadband services in rural, remote areas is even more necessary in the context of the needs arising from the COVID-19 pandemic. The increased performances of the

¹⁶ Ka band geostationary satellites and, to a lesser extent, low earth orbiting satellites, which are currently in development phase in Spain.

¹⁷ According to the NERA Report provided by the Spanish authorities (see recital (22)), at present in the target areas the minimum price for a subscription to broadband access services via satellite with a download speed of at least 100 Mbps under peak time conditions is EUR 60 per month and the only other similar available service’s price is EUR 99 per month. Regarding terrestrial networks, the most diffused access service in more competitive areas is Movistar Conecta Fibra 300 Mb which is priced at EUR 38 per month per subscription (with a promotion of 12 months at 24 €/month).

¹⁸ *Analysis of economic costs for Programme UNICO – Rural Demand*, dated 21 June 2022, prepared by Dr Bruno Soria (NERA Economic Consulting) for the Secretaría de Estado de Telecomunicaciones e Infraestructuras Digitales

relevant wholesale and retail products contribute to reducing the digital divide in the target areas thus facilitating end users' access to advanced digital services (cloud services, smart working, telemedicine, gaming, etc.) which have been important during the COVID-19 pandemic to maintain an adequate quality of life.

- (14) The aid will cover the costs related to the creation and operation of the network platform(s) for the provision of the relevant wholesale access services, including the acquisition of transmission capacity, interconnection, invoicing and the management of clients (see recital (30)).¹⁹ The aid will allow the beneficiary to sell the relevant wholesale prices at a maximum wholesale price of EUR 16,68 a month per each wholesale service purchased by access seekers (the "Aided Wholesale Price"). According to the Spanish authorities, the Aided Wholesale Price is set with reference to the price of the regulated bitstream access service over FTTH ("NEBA") in more profitable areas, such as urban areas.
- (15) The wholesale access operators benefitting from the Measure will provide the relevant wholesale services via a platform of network resources and will charge the retail operators accessing such platform at most the Aided Wholesale Price.
- (16) The retail operators benefitting from the Aided Wholesale Price will in turn provide the relevant retail services at a maximum price of EUR 35 per month per subscription for end users, as established by the Measure (the "Maximum Retail Price"). The Measure also covers the costs directly related to the end users' access to that service, including the purchase of end-user equipment (e.g. satellite antennas) and its installation, up to a maximum of EUR 600 for each subscription (the "End users' Access Costs"), independently of the technology used.
- (17) In the event that an operator starts marketing its connectivity services at a speed of at least 100 Mbps under peak time conditions via fixed terrestrial networks in any of the target areas, these target areas will be excluded from the Measure, and
 - (i) the operator may inform the Secretary of State for Telecommunications and Digital Infrastructures about the provision of this new service;
 - (ii) the Secretary of State for Telecommunications and Digital Infrastructures will compile this information and, every three months, will inform the direct beneficiaries of such developments so that they can immediately inform the retail providers with whom they have concluded wholesale contracts for the target areas concerned;
 - (iii) in addition, the Secretary of State for Telecommunications and Digital Infrastructures, when carrying out geographic studies or the annual broadband coverage mapping based on a threshold of 100 Mbps, will identify the areas that will be excluded because they are already covered by any fixed terrestrial network able to provide connectivity services at a speed of at least 100 Mbps under peak time conditions. The Secretary of State for Telecommunications and Digital Infrastructures will inform the direct beneficiaries of such areas so that they can immediately inform the retail providers with whom they have concluded wholesale contracts for the target areas concerned.

¹⁹ According to the Economic Model elaborated by the Spanish authorities, the costs of a network platform providing the eligible services in the target areas for five years amount to EUR 59.5 Million.

- (iv) in both cases, retail providers must amend or terminate retail contracts concluded under the Measure within one month after receiving the information from the direct beneficiaries so that the benefits resulting from the Measure are no longer applied in an excluded target area; and
- (v) end-users will have one month to decide which commercial offer they choose within the excluded target area. The end users' contracts covered by the Measure must be amended or terminated without any hindrance and without any penalty or compensation. In addition, if end users have access to a commercial offer for connectivity services of a minimum speed of 100 Mbps under peak time conditions with terrestrial technology, they may also request the modification/termination of the contract concluded under the Measure without hindrance or penalty.
- (18) The Spanish authorities have explained that all financing covered by the Measure will be awarded via competitive selection procedures, as described in section 2.10, to the wholesale access operators benefitting from the Measure. To be eligible to become a beneficiary, the wholesale access operators must demonstrate that a retail service will be provided in the designated target area. This can be the case either when the wholesale access operators itself directly or indirectly provides a retail service or when it has secured at least one contract with a retailer²⁰ (subject to competitive safeguards, (see recital (38))). Wholesale access operators benefitting from the Measure have the obligation to pay to the operators providing the relevant retail services to end users ("retail broadband services providers") 100% of the aided End users' Access Costs in cases where these costs have been applied by them in their invoices to end users. In any event, the amount of the aid to cover the costs related to end users' access will only be established and paid following the submission of an invoice by the retail broadband services providers. The latter have the obligation to deduct the amount of the End Users Access Costs from the end-user's invoice. Since wholesale access operators will be allowed to provide retail services in the target areas, the Spanish authorities will require that, in order to participate in the competitive selection procedure, the wholesale access operators must demonstrate that sufficient competition safeguards will be put in place (see recital (38)).
- (19) The Measure is of hybrid nature, as it combines a supply-side and a demand-side public intervention. On the supply-side, the Measure aims to ensure that the Aided Wholesale Price in the target areas is comparable to the prices charged for access products in more profitable areas, such as urban areas, combined with certain requirements that aim to ensure the provision of the relevant retail services. More concretely, the Measure aims to fund the resulting costs for wholesale access operators arising from the obligation to serve access seekers as well as a reasonable profit. The expected costs at the wholesale level are estimated based on an economic model provided by the Spanish Authorities, which includes assumptions on the final number of end users that will request the relevant retail services in the target areas, the initial investment, the variable costs

²⁰ Pursuant to Article 9.2 of the draft Order, those bidders which do not have the necessary transmission capacity to set up the network platform for the provision of wholesale broadband services allowing the provision of retail fixed broadband services with at download speeds of at least 100 Mbps under peak time conditions must provide evidence of an agreement with at least one operator having such capacity.

per access seeker, a reasonable profit level, and growth models for end users and access seekers over the 5-year period of the scheme. On the demand-side, the Measure imposes the Maximum Retail Price and covers the End users' Access Costs.

- (20) The Spanish authorities are of the opinion that the market failure that the Measure seeks to address cannot be addressed by less distortive measures such as pure demand stimulation (e.g. vouchers) or regulatory interventions in the target areas.
- (21) According to the Spanish authorities, ex ante regulation, despite its crucial role in ensuring effective and sustainable competition in the market for electronic communications, is not a sufficient instrument to ensure the deployment or upgrade of networks that enable the provision of the relevant retail services under affordable conditions for end users in the target areas, particularly because of the inherent low profitability of such services in those areas and the lack or limited capability of the existent terrestrial networks. The cost of deploying fixed networks and the provision of such services in those areas is significantly higher than the cost in urban densely populated areas. Moreover, the achievable revenue base is more limited due to low population density in those areas. The Spanish authorities explain that regulatory measures (such as applying ex ante regulation establishing obligations to significant market power operators in the wholesale access market for passive and active services or adopting regulatory measures that facilitate the deployment of networks by eliminating permits and authorizations and granting aids for the deployment of networks) have not been enough to overcome the obstacles to the deployment of the necessary broadband infrastructure in the targeted areas. Furthermore, the Spanish authorities consider that the same factors affecting profitability mean that such regulatory measures would not suffice to ensure that the relevant retail services are provided to end users under affordable conditions.
- (22) As regards demand-side measures, considering that in the target areas, satellite solutions are currently the only technology providing broadband services with a download speed of at least 100 Mbps under peak time conditions, the Spanish Authorities have also compared the Measure with a hypothetical design for a purely demand-side voucher scheme that would subsidise the difference between the average market retail price of the largest two satellite operators accounting for decreasing retail prices over time and the reference retail price applied in urban areas for similar services. Under this hypothetical economic model, as in the notified hybrid Measure, the Spanish authorities have assumed that the same End users' Access Costs for all served users would be subsidised to ensure the same take-up. As a result of this comparison, the Spanish Authorities concluded that the Measure would be more cost-effective than such a hypothetical voucher scheme. Spain estimates that the costs associated to such a voucher measure would be 59% higher than the costs of the Measure. As mentioned above (see recital (12)), this conclusion and the assumptions made by the Spanish Authorities on which it is based have been validated by the NERA Report. In more detail:

- First, the Spanish Authorities estimate that around 5% of end users in Spain have no affordable broadband coverage with download speeds of at least 100 Mbps under peak time conditions at the start of the intervention period. Based on the NERA Report, this would be a reasonable estimate since out of 12% of Spanish end users without coverage with a download speed of at least 100 Mbps under peak time conditions or more in 2020, around 7% will have access to such speeds (based for instance on upgrades of current networks or newly deployed networks such as fixed 5G Fixed Wireless Access networks) within the intervention period, based on publicly available information²¹.
- Second, the Spanish Authorities assume that, out of all end users without affordable coverage, 6.3% of households in the target area without coverage will take up the relevant retail services. Given that based on publicly available information those end users only have options to connect to broadband services at lower speeds (mainly ADSL and other, lower performance satellite solutions), NERA considers that this is a reasonable assumption based on publicly available information.
- Third, the Spanish Authorities assume take up growth would be linear in 2023 and 2024 and zero between 2025 and 2027. They also assume that the churn rate would be 7% in the first two years and 15% in the last three years. NERA considers such an S-shaped adoption curve to be reasonable and compatible with trends in the expected extension of FTTH and other fixed networks providing broadband services with a speed of at least 100 Mbps under peak time conditions in the target areas.
- Fourth, the Spanish Authorities assume monthly subscription fees would be around EUR 60 per month for Eureka and EUR 108 for Starlink, which is confirmed by NERA based on publicly available data from the satellite providers. Moreover, the Spanish authorities assume a maximum cap at EUR 600 for End users' Access Costs, which NERA also confirms based on publicly available data on the websites of both satellite providers which indicate set-up costs of around EUR 400 for Eureka and EUR 560 for Starlink.
- Fifth, the Spanish Authorities assume a cap for a target retail price at EUR 35 per month, to ensure it remains comparable to urban areas. NERA finds the largest broadband operator, Movistar, prices at EUR 38 per month its fixed broadband services providing a download speed of at least 100 Mbps under peak time conditions (with a promotion of 12 months at EUR 24 /month) and thus considers this assumption reasonable. This corresponds to around EUR 35 per month on average over 4 years accounting for the lower fee during the promotion period.²²

²¹ Including information compiled by the Spanish Ministry of Economic Affairs and Digital Transformation based on results of recent and ongoing mapping exercises and public consultations.

²² According to the NERA Report, as the Movistar Conecta Fibra product comes with a promotion of 12 months at EUR 24 /month, in the economic model elaborated by Spain the price would be an average EUR 35 /month if the customer stays 44 months (or 3.7 years) with the service.

- Sixth, the Spanish Authorities assume the costs of a satellite capacity lease to be around EUR 60 million over the 5-year period of the intervention or EUR 12 million per year.
- Seventh, the Spanish authorities assume a reasonable profit of 5% on the initial investment costs. NERA confirms this is an acceptable assumption and notes that this is roughly the same rate that the Comisión Nacional de los Mercados y la Competencia (CNMC) has published as regulated WACC for electronic communications operators, which stands at 4.82% in 2021.

2.3. Legal Basis

- (23) The Measure is based on the draft Order establishing the legal basis and the call for the granting of aid for the setting up of a transmission capacity service and for the provision to end users of an affordable broadband service with a download speed of at least 100 Mbps under peak time conditions mainly in rural, remote areas and the installation of the necessary equipment (Program UNICO Demanda Rural; the “draft Order”). The draft Order will be adopted in the framework of the Spanish Recovery, Transformation and Resilience plan.
- (24) Royal Decree-Law 36/2020 of 30 December 2020²³ on urgent measures for the modernisation of the public administration and for the implementation of the Recovery, Transformation and Resilience Plan, as well the RRF Regulation, will be applicable to the Measure²⁴.
- (25) The present decision is an integral part of the legal basis.
- (26) In accordance with the Additional Provision of the draft Order, the aid will be put into effect only after the notification of the Commission’s approval of the Measure, in accordance with Article 108(3) TFEU and Article 3 of Council Regulation (EU) 2015/1589²⁵.

²³ Real Decreto-ley 36/2020, de 30 de diciembre, por el que se aprueban medidas urgentes para la modernización de la Administración Pública y para la ejecución del Plan de Recuperación, Transformación y Resiliencia. Boletín Oficial del Estado n. 341 de 31 de diciembre de 2020, páginas 126733 a 126793.

²⁴ The following are other Spanish domestic provisions applicable to the measure in question: General Telecommunications Law of 9 June 2022 and its implementing regulations; Law 38/2003 of 17 November 2003 on Subsidies and its Regulation, approved by Royal Decree 887/2006 of 21 July 2007; General Budget Law 47/2003 of 26 November 2003; Law 39/2015 of 1 October 2015 on the Common Administrative Procedure of Public Administrations; Organic Law 2/2012 of 27 April 2007 on budgetary stability and financial sustainability; Law 9/2017 of 8 November 2017(?) on Public Sector Contracts, transposing into Spanish law Directives 2014/23/EU and 2014/24/EU of the European Parliament and of the Council of 26 February 2014, in the event that, in the implementation of grants, contracts are concluded that must be subject to this law; Organic Law 1/2019 of 20 February 2015 amending Organic Law 10/1995 of 23 November 1995 on the Criminal Code; Regulation (EU) 2021/241 of the European Parliament and of the Council of 12 February 2021 establishing the Recovery and Resilience Facility; Order HFP/1030/2021 of 29 September 2021 setting out the management system for the Recovery, Transformation and Resilience Plan.

²⁵ Council Regulation No 2015/1589 of 13 July 2015 laying down detailed rules for the application of Article 108 of the Treaty on the Functioning of the European Union OJ L 248 of 24.9.2015, p.9.

2.4. Granting authority and implementing body

- (27) The granting authority is the Secretary of State for Telecommunications and Digital Infrastructures (the “Granting Authority”). The Granting Authority will implement the Measure as described in this decision.

2.5. Budget

- (28) The overall budget of the Measure is EUR 88 300 000, out of which EUR 84 800 000 will be made available through the RRF.
- (29) The Measure finances, through RRF, the relevant wholesale services until 31 December 2025. Secondly, the Measure also finances End users’ Access Costs through RRF until 31 December 2025 and through national funds from 1 January 2026 until 31 December 2027.

2.6. Eligible costs

- (30) The eligible costs are:
- the costs related to the creation of the network platform(s) for the provision of the relevant wholesale access services, including the acquisition of transmission capacity;
 - the costs related to the operation of the network platform(s) for the provision of the relevant wholesale broadband services, including interconnection, invoicing and the management of clients;²⁶
 - the set-up costs to enable end users to benefit from the services: antennas, its installation (see recital (16)).
- (31) A maximum amount of aid of EUR 22 075 000 will be allocated to each of the four lots into which the competitive selection procedure will be split (see recital (57)). Out of this total amount of aid per lot, a maximum amount of EUR 11 200 000 will cover the costs directly related to the provision of the relevant wholesale services, and a maximum amount of EUR 10 875 000 will cover the End users’ Access Costs. The aid cannot exceed in any event the eligible costs, as described in recital (30).
- (32) The body responsible for monitoring the implementation of the Measure²⁷ will carry out administrative and on-the-spot verifications aimed to confirm that the eligible costs are actually incurred for the implementation of the Measure. The part of the aid not spent in eligible costs must be repaid by the beneficiaries.

²⁶ According to Spain, the relevant economic model the subsidy plus the revenue from the sale of the relevant wholesale services at the Aided Wholesale Price (max EUR 16.68/customer) should correspond to the costs to set up the wholesale platform e.g. costs to acquire the necessary connectivity and costs associated with the provision of the wholesale service to retail operators (interconnection, billing, operator management, etc.) plus a reasonable benefit.

²⁷ Directorate-General for Telecommunications and Regulation of Audiovisual Communication Services within the Ministry of Economic Affairs and Digital Transformation.

2.7. Beneficiaries

- (33) The direct beneficiaries of the Measure, as selected via the competitive selection procedure, are wholesale access operators (“the wholesale access operators”), identified as the undertakings or groups of undertakings that will set up the network platform(s) for the provision of the relevant wholesale broadband services allowing the provision of the relevant retail services in the target areas with a download speed of at least 100 Mbps under peak time conditions²⁸.
- (34) The wholesale access operators will be selected following an open, transparent, non-discriminatory competitive procedure (described in section 2.10).
- (35) The wholesale access operators will ensure that the wholesale platform(s) will comply with the conditions listed in recital (10).
- (36) Wholesale access operators must set up the wholesale platform and be able to provide the relevant wholesale services within six months from the termination of the competitive selection procedure.²⁹ The wholesale access operators must publish a reference offer for the provision of the relevant wholesale services at least one month before the network platform is put into service (the start of wholesale services). This offer must comply with the requirements mentioned in recitals (10) and (35) and in section 2.15 and must include, among others, the description of the services, a standard contract, the price of the services, the equipment requirements, the points of interconnection, the available transmission capacity and the deadline for the provision of the relevant wholesale services.
- (37) The wholesale access operators will ensure open transparent and non-discriminatory wholesale access in accordance with section 2.14 to any access seeker for the provision of the relevant retail services to end users in the target areas, in accordance with the conditions set out under the Measure. The Granting Authority will be competent to resolve any dispute concerning the wholesale access operators’ access conditions. The Granting Authority may consult the NRA when necessary.
- (38) Since selected wholesale access operators will be allowed to provide retail services in the target areas, the Spanish authorities will require that in order to participate in the competitive selection procedure the wholesale access operators must demonstrate that sufficient competition safeguards will be put in place. Such safeguards must demonstrate that potential conflicts of interest will be prevented, that there will be no undue discrimination towards access seekers and that any other hidden indirect advantages are avoided, effectively preventing any anti-competitive behaviour towards other retail service providers. The wholesale access operators must provide effective wholesale access to all retail fixed broadband service providers able to provide the relevant retail services, on an

²⁸ In accordance with Article 9.1 of the draft Order, potential beneficiaries may be those natural and legal persons having the status of duly authorised operator and registered in the relevant Operators Registry in accordance with Articles 6 and 7 of General Telecommunications Law 11/2022, of 28 June. In the case of groups of undertakings, at least one of the undertakings part of the group must have the status of duly authorised operator and registered in the relevant Operators Registry.

²⁹ Bids proposing to reduce this period in order to reach the goal of the Measure in a shorter timeframe will be assessed favourably by the Granting Authority (see section 2.10).

open, transparent and non-discriminatory basis. A wholesaler can start providing retail services only after one month from the entry into service of the network platform. Other retail broadband services providers can start providing services as of the start of the service of the network platform (the start of wholesale services).

- (39) The wholesale access operators will charge retail broadband services providers for any wholesale access service, a price that cannot exceed the Aided Wholesale Price. The wholesale access operators will pay the retail broadband services providers providing the relevant retail services to end users 100% of the End users' Access Costs up to EUR 600 in cases provided that these costs have been applied by the retailers in their invoices to end users up to a maximum of EUR 600 for each subscription.
- (40) The Measure will thus also indirectly benefit retail broadband services providers who, through access to the relevant wholesale services, will be able to offer the relevant retail services in the target areas by relying on lower wholesale access prices and taking into account that end-user equipment, where necessary, is subsidised³⁰.
- (41) In order to benefit from the Measure, the retail broadband services providers have to enter into contracts with the end users for the provision of the relevant retail services in the target areas until 1 January 2027.
- (42) The retail broadband services providers must publish a reference offer for the provision of the relevant retail services. Such offer must include the possibility for broadband services to be purchased unbundled from the end users' equipment. The ownership over any end user equipment financed under the Measure will remain with the end users.
- (43) The retail broadband services providers will have to provide the relevant retail services within one month from the end user's request. The retail broadband services providers may charge end users only the Maximum Retail Price. End Users' Access Costs borne by the retailer must be indicated in the end-user's invoice to facilitate their reclaim from the wholesale access operators but without charging the end user.
- (44) The end users will be able to subscribe to the relevant retail services. Prior to the granting of aid, end users who are undertakings are required to declare that they do not exceed the limits for de minimis aid (laid down in Regulation (EC) 1407/2013), taking into account aid either already granted or received or applied for and approved, including the aid applied for within the framework of this Measure.
- (45) The Spanish authorities will suspend the award and/or the payment of any support under the Measure to any undertaking that has benefited from earlier unlawful aid declared incompatible by a Commission decision, until that undertaking has reimbursed or paid into a blocked account the total amount of unlawful and incompatible aid and the corresponding recovery interest.

³⁰ In accordance with Article 12.1 of the draft Order, the retail broadband services providers providing the relevant services to end users will be duly authorised operators and registered in the relevant Operators Registry in accordance with Article 7 of General Telecommunications Law 11/2022 of 28 June.

2.8. Duration

- (46) Aid can be granted under the Measure as from the notification of the Commission's decision approving the scheme until 31 December 2027.

2.9. Technological neutrality

- (47) The Spanish authorities consider that the Measure is technologically neutral³¹. The draft Order does not exclude any potential technology or any specific provider. Accordingly, any undertaking (or group of undertakings) capable of providing the relevant wholesale services enabling the provision of the relevant retail services in the target areas, regardless of the technology used, is eligible under the Measure.
- (48) The Measure does not pre-empt or preclude possible hybrid proposals in terms of different types of technologies and the number of suppliers involved. For instance, consortia can participate in the competitive selection procedure, and proposals based on combination of several technological solutions will be allowed.
- (49) The Measure is a temporary, last resort solution with the goal of providing the relevant wholesale services enabling the provision of the relevant retail services to end users in areas where there is no current terrestrial fixed network providing retail broadband services with a download speed of at least 50 Mbps under peak time conditions and where the available retail broadband services that ensure a download speed of at least 100 Mbps at a fixed location under peak time conditions have a much higher price than similar connections in more competitive areas of Spain. As concerns areas where there are credibly planned terrestrial fixed networks (i.e. networks planned by 31 December 2027), whether privately or publicly funded, that will provide broadband services with a download speed of at least 50 Mbps under peak time conditions, such areas are temporarily eligible under the Measure until such credibly planned networks are deployed.
- (50) Considering the presence of satellite solutions in the target areas (see recital (12)), the Spanish authorities estimate that, a priori, wholesale services provided via satellite could be part, alone or in combination with other technologies, of the technological solution that will be implemented by the wholesale access operators.
- (51) The target areas exclude areas covered by fixed terrestrial networks that provide fixed broadband services with a download speed of at least 50 Mbps under peak time conditions, such as FTTH, Hybrid Fiber Coaxial ("HFC") or Fixed-Wireless Access ("FWA") technologies.

³¹ In their assessment, the Spanish authorities were supported by an expert opinion provided by Professor Jorge Perez Martinez, professor at the Polytechnic University of Madrid.

- (52) The Spanish authorities indicate that more structural, long-term technological solutions, which will allow much more performant connectivity services, are promoted and supported by other aid schemes implemented in parallel to the Measure³². However, these aid schemes have not yet been implemented in the target areas. Any new deployments of performant terrestrial fixed networks under another State aid measure will result in the exclusion of the area covered from the benefit of the Measure, as explained above.
- (53) The Spanish authorities indicate that, in any event, the draft Order guarantees the principle of technological neutrality and lays down conditions and technical requirements that can be met by all technologies, without excluding any of them. Based on this, two additional mechanisms have been designed to encourage the use of various technologies :
- The timeline for the provision of the relevant wholesale services and of the relevant retail services: Wholesale access operators must provide the relevant wholesale services within six months from the termination of the competitive selection procedure. Wholesale access operators must publish a reference offer for the provision of the relevant wholesale service at least one month before the network platform is put into service (the start of wholesale services). A wholesale access operator can start providing retail services only after one month from the entry into service of the network platform. Other retail broadband services providers can start providing services as of the start of the service of the network platform (the start of wholesale services). All retail broadband services providers must provide the relevant retail services within at most one month from the end user’s request. The Spanish authorities consider that this design will enable all technologies to participate in the tender on technologically neutral terms, while ensuring the delivery of the objectives of the Measure, taking into account its hybrid nature.
 - EUR 600 is established as the maximum amount of eligible costs directly related to end users’ access, regardless of the technology used for the provision of the service. In any event, the amount of the aid to cover the End users’ Access Costs will only be determined and paid following the submission of an invoice, so it is ensured that the amount of EUR 600 is a maximum without prejudging the specific technology used. The Spanish authorities consider that this design of the maximum amount of eligible costs is technologically neutral and at the same time ensures delivery of the objectives of the Measure.

2.10. Competitive selection procedure

- (54) Aid for the provision of the relevant wholesale services through the configuration of the network resources platform(s) is awarded to the best priced bids on the basis of transparent, proportionate and non-discriminatory assessment criteria guaranteeing the quality of the service (higher transmission capacity offered, higher load speed, lower aid amount, etc.), without excluding any potential technology and allowing applications to be submitted with hybrid proposals in

³² For example, through the UNICO Banda Ancha aid program. See Commission decision of 10 December 2019, State aid SA.53925 (2019/N) - Broadband Scheme for NGA White and Grey Areas – Spain and Commission decision of 14 June 2021, State aid SA.62696 (2021/N) – Spain - RRF - Extension of Broadband Scheme for NGA White and Grey Areas.

terms of technologies or number of providers. The award procedure should be an open, transparent and non-discriminatory competitive selection procedure in line with the principles of public procurement.

- (55) The invitation to the competitive procedure will be published in the National Subsidies Database and in the Official State Gazette. The call notice will also be published on the website of the Ministry of Economic Affairs and Digital Transformation.
- (56) For the selection of applications, an evaluation procedure involving the body responsible for handling the competitive procedure³³ and the Evaluation Commission³⁴ is carried out.
- (57) The tender is split in four equal lots each of them accounting for one quarter of the overall capacity (0-25%, 25-50%, 50-75%, 75-100%). Each interested wholesale operator is allowed to bid for one, more or all of these lots (the whole capacity). With this design of the tender, the Spanish authorities seek to encourage the participation of smaller operators that could have the ability to bid for only a segment of the overall capacity. For each lot, the corresponding aid budget will allow the beneficiary to acquire the capacity needed to provide the relevant wholesale services for the end users that will take advantage of the retail offers based on the measure. The number of end users is estimated in the economic model elaborated by Spain on which the Measure is based. According to the evaluation made in the NERA Report, the number of end users that will benefit from the Measure is estimated at 56 250. Spain explained that taking into account the design of the Measure, its target areas and target population, the Measure will likely have a limited impact on the national markets for wholesale and retail ultra-broadband access services (including all available technologies) and therefore the Measure is unlikely to strengthen the market position of the beneficiaries.
- (58) The overall amount of the aid (see recital (28)) will be divided proportionally between the four lots, so that the maximum amount to be received for each lot under the Measure will be EUR 22 075 000.
- (59) The overall maximum amount to be received for each beneficiary will be based on the aid applied for in each lot, but not more than the maximum amount per lot. There are no limitations to the number of lots that can be awarded to each applicant, so the overall maximum amount to be received for each beneficiary will be the sum of the maximum amount per lot awarded to it.
- (60) The bids for each lot will indicate the amount of aid applied for, broken down between the support for the provision of the relevant wholesale services and that intended to cover the set up costs.

³³ The Deputy Director General of Telecommunication Operators and Digital Infrastructures.

³⁴ The Evaluation Commission consists of the Deputy Director General of Telecommunication Operators and Digital Infrastructures, the Deputy Director general of Planning and Management of Spectrum, a person appointed by the Sub-secretariat of Economic Affairs and Digital Transformation, a person appointed by the State Secretary of Telecommunications and Digital Infrastructures, a person appointed by the General Directorate of Telecommunication and Organisation of Audiovisual services and an official of the State Secretary of Telecommunications and Digital Infrastructures.

- (61) The following information must be submitted together with each bid:
- a report containing detailed information about the project proposed by the bid to set-up the wholesale platform providing the relevant wholesale services. The report will also include a financial model for the project, covering up to December 2027 and describing in detail the expected costs and revenues in relation to both the provision of the relevant wholesale services through the configuration of a network resources platform and the costs associated with end users' set up;
 - a contract signed with at least one retail provider for the provision of services to end users that ensures the retail broadband services providing the performances requested by the Measure (see recital (18));
 - for wholesale access operators that will also provide retail services, sufficient safeguards demonstrating that potential conflicts of interest will be prevented, that there will be no undue discrimination towards access seekers and that any other hidden indirect advantages are avoided, effectively preventing any anti-competitive behaviour towards other retail service providers, as described in recital (38).
- (62) The evaluation of the bids in the tender process is carried out in accordance with the assessment criteria included in the regulatory bases and in the call for applications. The Granting Authority has no discretionary power to select the aided projects.
- (63) At the pre-evaluation stage, the compliance with the following conditions will be checked:
- the applicant has the status of duly authorised operator of public electronic communications networks, in accordance with the Spanish Act 11/2022, of 28 June 2022, of Telecommunications;
 - the applicant certifies compliance with the economic and technical solvency conditions referred to in the Draft Order;
 - the project's objective will be to provide the relevant wholesale services that will enable the provision of the relevant retail services in accordance with the requirements described in the present Decision.

- (64) Applicants who have passed the pre-evaluation phase will be assessed against the following requirements and objective criteria:
- i. the reduction of the overall maximum amount of aid;
 - ii. higher Download speed;
 - iii. higher Upload speed;
 - iv. net job creation in Spain, participation of SMEs, micro-SMEs, self-employed and start-ups, and territorial cohesion;
 - v. capacity of the network platform for the provision of VoIP services;
 - vi. higher Data Limit;
 - vii. timing for the provision of wholesale services.
- (65) The award decision will be published on the website of the Ministry of Economic Affairs and Digital Transformation no later than six months after publication of the call in the Official State Gazette.

2.11. Mapping and public consultation

- (66) The funding under the Measure is based on a map of broadband terrestrial networks in Spain for 2022.
- (67) Each year, the Ministry of Economy and Digital Transformation carries out a mapping and public consultation exercise³⁵, whereby it requests all stakeholders to provide information on broadband coverage, in terms of technology and speed at address level on the basis of premises passed³⁶. The information gathered during these annual exercises is used to produce coverage maps and reports, which are published on the website of the Ministry, as well as to provide the Commission with data for broadband coverage studies at the Union level.
- (68) In accordance with the draft Order, following the mapping and public consultation exercises, the Granting Authority will identify and publish the final list of target areas, corresponding to those areas without any existing terrestrial network providing retail broadband services at a fixed location with a download speed of at least 50 Mbps under peak time conditions and where the available retail broadband services at a fixed location that provide a download speed of at

³⁵ The mapping is performed on the basis of premises passed. These are end users' premises to which, upon request from end users and within four weeks from the date of the request, an operator can provide broadband electronic communication services (regardless of whether those premises are already connected to the network or not). The price charged by the operator for providing such broadband electronic communications services at end users' premises in this case must not exceed normal connection fees. This means it must not include any additional or exceptional cost as compared to the standard commercial practice and, in any case, must not exceed the usual price in the Member State concerned. That price must be determined by the competent public authority or the national regulatory authority. For fixed wireless access networks, it can be at address level on the basis of premises passed or on the basis of maximum 100 x100 metre grids.

³⁶ The last mapping and public consultation exercise was carried out on 30 June 2022. Until such date the Spanish authorities carry out on an annual basis mapping exercises based on the thresholds of 30 Mbps and 100 Mbps. As from 2023 and for the duration of the Measure an additional mapping based on the threshold of 50 Mbps under peak time conditions will be carried out on an annual basis.

least 100 Mbps under peak time conditions are not affordable for end users.³⁷ The Spanish authorities also clarify that based on the most recent information collected through the annual mapping⁽³⁸⁾ and public consultation exercise, in some of the target areas there are no fixed terrestrial broadband networks at all and, in most of the target areas, networks do not reach the speed of 30 Mbps. Given the temporary nature of the Measure mainly aimed at providing connectivity with much higher speeds before higher performance terrestrial networks are deployed, areas with credibly planned terrestrial fixed networks that will provide broadband services with a download speed of at least 50 Mbps under peak time conditions are temporarily eligible under the Measure until such credibly planned networks are deployed. When the planned networks are put into operation, those target areas will be excluded from the Measure, based on the annual mapping and public consultation exercises.

- (69) The Spanish authorities expect that the number of target areas under the Measure, which are identified through mapping and public consultation exercises, will be progressively reduced. The reduction of target areas will derive from the following mapping mechanisms:
- (a) the map of target areas will be annually reviewed and areas where performant terrestrial networks have been deployed to provide broadband services at a fixed location with a download speed of at least 50 Mbps under peak time conditions will be excluded from the Measure. The exclusion will not regard premises passed that have already subscribed to the relevant retail services.³⁹
 - (b) Based on the annual mapping exercise of the networks providing 100 Mbps, the areas that are already covered by any fixed terrestrial network able to provide connectivity services at a speed of at least 100 Mbps under peak time conditions will be excluded from the Measure.⁴⁰

³⁷ A first, preliminary mapping has already been carried which is based on a threshold of 30 Mbps download speed under peak time conditions. In order to identify the final list of target areas, a mapping based on the threshold of 50 Mbps download speed under peak time conditions will be carried out in the first half of 2023, and will be continuously updated through periodic mapping and public consultation exercises, as described in this Decision. The public consultations concerning both the mapping based on a threshold of 30 Mbps and the update of the mapping up to 50 Mbps will be carried out simultaneously.

³⁸ The Spanish authorities carry out on an annual basis mapping exercises based on the thresholds of 30 Mbps and 100 Mbps (see footnote 36). The mapping based on the threshold of 50 Mbps mentioned in footnote 35 will be carried on an annual basis during the duration of the Measure.

³⁹ These premises will continue to benefit from the Measure until they will be passed with a network providing broadband services at a fixed location with a download speed of at least 100 Mbps under peak time conditions.

⁴⁰ In this case, differently from what explained at recital (69(a)), the premises passed will be excluded from the application of the Measure regardless of whether relevant end users have subscribed to the relevant retail services.

- (c) As indicated in recital (17), in the event that an operator starts marketing its connectivity services at a speed of at least 100 Mbps under peak time conditions via fixed terrestrial networks in any of the target areas in between two of the mapping exercises mentioned under (b), these target areas will be excluded from the Measure.
- (70) In cases (b) and (c), as a result of the connectivity services at a speed of at least 100 Mbps being available in a target area, the retail broadband services providers are informed about the new services (see recital (17)) and they must amend or terminate the retail contracts benefitting from the Measure within one month after receiving such information. Furthermore, the end users will have one month to decide which commercial offer they choose in order to amend or to terminate their contracts, without any hindrance, penalty or compensation.
- (71) Spain also carried out a general public consultation on the Measure, which took place between 6 May 2022 and 9 June 2022 and was published on the national website of the Spanish Ministry Economic Affairs and Digital Transformation⁴¹. The public consultation provided a description of the Measure, the methodology for identifying the target areas based on the available mapping each year, and invited any potentially interested stakeholders to provide comments. Twenty two responses were received and assessed. The submissions mainly concerned the following topics.
- (72) *Form of the aid.* Although most of the stakeholders in the public consultation welcomed the form of the aid as designed by the Spanish authorities, some respondents asked for a pure demand-side measure in the form of vouchers for end users, without any support for the provision of wholesale services. The Spanish authorities consider that a pure demand-side measure, such as a voucher measure, will not be as cost efficient as the envisaged measure (see also recital (22)). More concretely, the Spanish authorities estimate, based on available information⁴², that the costs associated to a hypothetical voucher measure would be 59% higher than the costs of the Measure.
- (73) *The temporal scope of the Measure.* Many stakeholders in the public consultation considered that the duration of the Measure should be extended from five years to seven years, so that the Measure could be aligned with other types of aid such as those assessed under the EU Guidelines for the application of State aid rules in relation to the rapid deployment of broadband networks and the General Block Exemption Regulation⁴³. The Spanish authorities consider that, since the Measure does not constitute a structural or definitive solution, but is a transitory instrument, a duration of seven years is excessive and would only be appropriate for other more definitive or structural aid measures. Moreover, a period of five years is appropriate to the Measure's objective, which is to contribute to the

⁴¹ <https://portal.mineco.gob.es/es-es/ministerio/participacionpublica/consultapublica/Paginas/consulta-publica-ayudas-programa-unico-demanda-rural.aspx>

⁴² *Analysis of economic costs for Programme UNICO – Rural Demand*, dated 21 June 2022, prepared by Dr Bruno Soria (NERA Economic Consulting) for the Secretaría de Estado de Telecomunicaciones e Infraestructuras Digitales.

⁴³ Commission Regulation (EU) No 651/2014 of 17 June 2014 declaring certain categories of aid compatible with the internal market in application of Articles 107 and 108 of the Treaty. OJ L 187 26.6.2014, p. 1.

provision of access to high speed broadband access to up to 100% of end users in Spain, while considering future technological innovation and the development of new commercial or technical systems.

- (74) *The geographic scope of the Measure and the identification of the target areas.* Some stakeholders in the public consultation argued that the geographic scope of the Measure should be narrower than national. The Spanish authorities consider that the interest of enabling further competition for the market by fostering smaller geographical lots needs to be balanced against the interest of foreseeing a national scope that would use the synergies and economies of scale provided by the Measure and would limit the fragmentation of the demand in areas, such as the target areas, which are remote, dispersed and sparsely populated rural areas. Supporting from the outset several wholesale network platforms in different geographic areas would risk significantly increasing the overall budget of the Measure by adding the marginal costs of each of the platforms, leading to a loss of economies of scale and synergies generated if the Measure were to have a national scope. On balance, the Spanish authorities have modified the design of the Measure to include four equal lots, as described in section 2.10, and allow each interested wholesale operator to bid for one, several or all of these lots, this is, for part or for the whole capacity. The Spanish authorities consider that this flexibility will foster competition at the wholesale level, not only in the competitive selection process but also in the implementation of the aid programme, allowing up to four operators to compete with each other throughout the national territory. Moreover, as there is no limit on the number of lots to be applied for and obtained per beneficiary, it is ensured that the projects selected will always be those that use the least public resources and/or those bringing most advantages to the users, facilitating synergies that allow for the provision of a more ambitious service and better performance.
- (75) *Financing for End users' Access Costs.* Some respondents to the public consultation considered that the amount of the financing for the set up costs should be increased and periodically updated. According to the Spanish authorities, the Measure establishes a maximum eligible amount of EUR 600 per each end user to support the set up costs, regardless of the technology used for the provision of the service. Therefore, the Measure does not pre-empt or favour any specific technology. On the other hand, to update periodically the amount of the aids would make the management of the scheme very complicated and would imply amendments to the budget forecast. Therefore, the Spanish authorities consider it appropriate to keep the scheme as notified and thus to provide legal certainty to the operators and end users.
- (76) *Award criteria for the competitive selection procedure.* Some stakeholders argued during the public consultation that new award criteria should be added to the draft Order. In particular, they understood that additional criteria concerning the proper definition and execution of the project addressing the objective of the Measure should be considered in the selection procedure. The legal basis, as amended after the public consultation, contains the following new award criteria:

- higher download and upload speeds;
- the capacity of the wholesale network platform to support the provision of other services in addition to internet access, in particular IP voice services;
- commitments from applicants proposing an offer that would enable the provision of more performant retail fixed broadband services (including: additional services, such as IP voice services; a higher data limit);
- faster availability of the wholesale service.

2.12. Opinion of the National Commission for the Markets and Competition

- (77) On 21 June 2022, the Spanish regulator (Comisión Nacional de los Mercados y la Competencia, “CNMC”) issued an opinion on a previous version of the Measure.⁴⁴ On a general note, the CNMC agreed that a measure supporting the demand for affordable broadband services is a tool to promote effective competition at both the wholesale and retail levels.
- (78) In the latest version of the draft Order, many of the comments made by the CNMC in its report have been taken into account, including:
- The possibility to award the aid to more than one beneficiary, so that competition may arise not only in the provision of the services to end users but also, at the wholesale level, in the configuration of the network platform, as the Measure is divided into four lots (see section 2.10). The Spanish Authorities indicate that the new structure of the tender will facilitate the participation of small operators in the tenders while, at the same time, guaranteeing adequate economies of scale and synergies.
 - The dimensioning of the target areas below the national level. The Spanish Authorities consider that the division of the aid into four lots also addresses this comment.
 - The identification as eligible only areas where end users cannot access broadband coverage with download speeds lower than those identified by the Measure (the CNMC indicates 30 Mbps). The Spanish Authorities indicate that they have modified in the Draft Order the threshold for identifying the target areas. In the new version, target areas are those where there is no terrestrial fixed network providing retail broadband services with a download speed of at least 50 Mbps under peak time conditions.
 - The need to specify the characteristics of the network resources platform.
 - The need to introduce an obligation for the beneficiary(ies) to publish a reference offer.
 - The necessity to remove the mechanism that quantifies the amount of set up costs to be subsidised based on the average costs of the different technologies. The maximum amount of EUR 600, previously applied only to satellite users, is now applicable to all end users regardless of the technology used.

⁴⁴ <https://www.cnmc.es/sites/default/files/4224047.pdf>

- (79) The CNMC also made several comments that were not taken up in the Draft Order. The most relevant are the following:
- Eligible areas must exclude areas already financed by previous measures (e.g. PEBA and UNICO Banda Ancha)⁴⁵. The Spanish Authorities indicated that as the objective of the Measure was to immediately, albeit temporarily, provide up to 100 % of the population with the relevant retail services under affordable conditions in rural and dispersed areas, such exclusion would not be appropriate. Furthermore, the Measure is not a structural or long-term measure. It will not be applicable if the broadband coverage of the target areas under the Measure is achieved by means of other measures and or other technologies that provide better technical or economic conditions to the end users.
 - Excluding existing satellite customers from the programme in order not to distort competition with operators already providing services to end users in those areas. The Spanish Authorities considered that such an exclusion would not achieve the Measure’s objective. The objective of the Measure is in fact: (i) to allow all end users access to retail services ensuring a download speed of at least 100 Mbps under peak time conditions at affordable prices and (ii) to avoid that end users in rural or remote areas are discriminated against as regards the prices at which such services are available. Moreover, the Spanish Authorities also confirmed that operators currently providing services in these areas can benefit from the Measure.

2.13. Step change

- (80) According to the Spanish authorities, the Measure ensures a step change, since it provides a significant improvement in the availability of affordable performant broadband connectivity in the target areas. According to the Spanish authorities, performant online services and applications are not currently accessible in the target areas. The target areas are remote, dispersed and sparsely populated rural areas where there is no terrestrial fixed network providing retail fixed broadband services with a download speed of at least 50 Mbps under peak time conditions. According to the Spanish authorities, generally, the only technology present in the target areas that is providing similar services in those areas is based on satellite solutions. However, the retail prices for these services are from two to three times higher than the retail prices in more profitable areas, such as urban areas, for the connectivity speeds of at least 100 Mbps (see footnote 17). Such high retail prices are a disincentive for end users in these remote rural areas to subscribe to the available retail broadband services providing the relevant speeds, which risks deepening the digital divide.
- (81) The Spanish authorities consider that the Measure will deliver a significant step change by financing the provision of the relevant wholesale services that will in turn foster the provision of the relevant retail services under affordable conditions, to the benefit of end users in the target areas. The Spanish authorities also indicate that as an effect of the Measure, in the target areas the download speeds of broadband services available will at least double, considering that, as

⁴⁵ See Commission decision of 10 December 2019, State aid SA.53925 (2019/N) - Broadband Scheme for NGA White and Grey Areas – Spain and Commission decision of 14 June 2021, State aid SA.62696 (2021/N) – Spain - RRF - Extension of Broadband Scheme for NGA White and Grey Areas.

indicated in section 2.11, in some of the target areas there are no fixed terrestrial broadband networks at all, in the other target areas there are some fixed terrestrial networks that, however, provide a download speed of only up to 50 Mbps under peak time conditions. According to the Spanish authorities, these networks in most cases reach speeds not higher than 30 Mbps under peak time conditions.⁴⁶ As a consequence, thanks to the Measure, end users will be able to have access to retail access services doubling and, in most cases, more than tripling the speed of the equally affordable services available absent the Measure.

2.14. Wholesale access

- (82) The Spanish authorities explained that the wholesale access operators must offer bitstream wholesale access services to all access seekers on open, transparent, fair and non-discriminatory basis. According to the Spanish authorities, bitstream is the only available wholesale product that can be easily be provided over any type of network platforms, including those based on satellite technology. The Spanish authorities have explained that bitstream wholesale access services are appropriate in light of the specificities of the Measure, considering that connectivity services based on satellite solutions are often the only technology present in the target areas, and that wholesale services provided via satellite could be part, alone or in combination with other technologies, of the technological solution that will be implemented by the wholesale access operators (see recital (50)). The Spanish authorities explained that imposing additional or different access obligation would result in the exclusion of such networks from the application of the Measure thus risking to render the measure ineffective in practice. The relevant wholesale offer products must be provided at least under the following minimum conditions:
- The relevant wholesale services will include the provision of the transmission capacity service through the configuration of network resources platform(s), including the provision of bitstream access services. Effective access will be guaranteed for at least 5 years (i.e. until 31 December 2027).
 - Wholesale access operators have to design the wholesale platform network in order to provide for sufficient transmission capacity and wholesale access operators have to commit to ensure sufficient capacity in case demand for wholesale services increases.
 - Wholesale access will be granted to all access seekers, without any restriction.
 - Where a wholesale operator also provides retail services, adequate safeguards will be put in place to prevent any conflict of interest, undue discrimination towards access seekers or content providers and any other hidden indirect advantages, as described in recital (38).

⁴⁶ Existing fixed terrestrial networks are in fact relying on copper based technologies, 4G FWA or less performant satellite connections. The few exceptions where speeds can reach 50 Mbps under peak time conditions mostly regard areas served with WIMAX based connections.

- A wholesaler can start providing retail services only after one month from the entry into service of the network platform. Other retail broadband services providers can start providing services as of the start service of the network platform (the start of wholesale services). All wholesale access operators must provide the wholesale service within six months from the termination of the competitive selection procedure.
- The wholesale access obligations will be enforceable irrespective of any change in ownership, management or operation of the wholesale network platform;
- The maximum wholesale price is set at EUR 16,68 a month per each wholesale service purchased by access seekers for the provision of retail services to end users in the target areas (the Aided Wholesale Price).
- In the event of a disagreement regarding wholesale access products conditions and pricing, each party will be able to call on the Granting Authority, who will act as the dispute settlement body, in order to avoid unjustified refusals to deal or the imposition of unreasonable conditions. The Spanish authorities may consult the NRA on dispute resolution.
- The Spanish authorities will ensure that wholesale access under the Measure is not be granted or used to meet any legal obligations.
- The bids must refer to a reference wholesale offer to be published by the winning bidder which contains all the conditions for the provision of the wholesale access, including the prices. The reference wholesale offer will be based on the wholesale access obligations and related conditions as identified by the Granting Authority. The Granting Authority will also will be outlined in a transparent manner in the procurement documents and clearly mentioned in future contracts.
- In any case, bidders are encouraged to provide additional access products and improved wholesale access conditions as part of their bid in the competitive selection procedure.

2.15. Accounting separation

- (83) The wholesale access operators must ensure accounting separation that identifies all costs and revenues related to the Measure. Furthermore, if a beneficiary under other State aid measures will be among the wholesale access operators, the Spanish authorities will ensure that there is no double financing for the same eligible costs and will also check that no undue transfer takes place between the funds allocated to the Measure and those allocated to other measures and that there is no cumulation of aid for the same eligible costs.
- (84) The Spanish authorities explained that Measure does not envisage a similar mechanism for retail broadband services providers the structure of the Measure already prevents risks of overcompensation. As regards the set up costs, the providers will receive the relevant amount exclusively on the basis of an invoice issued to the end-user. As regards the Aided Wholesale Prices at which they can purchase the relevant capacity, both this price and the Maximum Retail Price are predefined, as described in recitals (14) and (16). There is therefore no room for double financing for the same eligible costs, cumulation of aid or overcompensation.

2.16. Clawback mechanism

- (85) The Spanish authorities indicate that the body in charge of monitoring the implementation of the Measure⁴⁷ will review the conditions for the granting of the aid, on the basis of the information provided by the beneficiaries. The Spanish authorities have designed a mechanism that will allow the Granting Authority to clawback any amount exceeding a reasonable profit, in order to avoid over-compensation. According to the Spanish authorities, a reasonable profit is exceeded if the total sum of aid received by a wholesale access operator under the Measure added to revenues generated from the operation of the wholesale platform are 7% higher than the costs incurred in the setting up of the wholesale platform. In such a case, the Spanish authorities will claw back such excess amounts. To allow the authorities to perform the checks, the wholesale access operators must ensure accounting separation, in accordance with section 2.16. The Spanish authorities will monitor the existence of possible extra-profits on a yearly basis, for the entire duration of the Measure⁴⁸. The Spanish authorities indicate that a specific clawback mechanism as concerns End users' Access Costs is not necessary, as overcompensation will be excluded by ensuring that in any event, the amount of the aid to cover the costs related to end users' access will only be determined and paid by wholesale access operators following the submission of an invoice by the retail broadband services providers.

2.17. Transparency

- (86) The Spanish authorities committed to comply with applicable transparency requirements. In particular, the aid granted must be publicised in accordance with Article 34(2) of the RRF Regulation and other applicable legislation. The provisions of the rules on Next Generation EU funds will also apply.
- (87) The aid granted will also be published in the Spanish National Subsidies Database in accordance with Law 38/2003 of 17 November 2003 (“the Spanish subsidy Law”).
- (88) As regards the selection process, the invitation to tender will be published in the National Subsidies Database and in the Official State Gazette. The tender notice will also be published on the website of the Ministry of Economic Affairs and Digital Transformation and will be updated during the duration of the Measure.
- (89) The preliminary decisions⁴⁹ and the award decision and any subsequent amendments thereto and the other acts of the procedure will be published on the website of the Ministry of Economic Affairs and Digital Transformation.

⁴⁷ Directorate-General for Telecommunications and Regulation of Audiovisual Communication Services within the Ministry of Economic Affairs and Digital Transformation.

⁴⁸ For each year the aid beneficiary will submit the final balance of costs and profits.

⁴⁹ The decision listing the bids preliminary selected to be evaluated and the decision identifying the selected bid. The latter will be notified to the selected bidder and seek its acceptance.

- (90) The relevant information about the Measure will be published on the website of the Ministry of Economic Affairs and Digital Transformation. On this website both operators and end users will have easy access to all relevant acts and information regarding the Measure and its implementation. The Spanish authorities will publish the following information⁵⁰:
- full text of the approved Measure;
 - wholesale access operators name and identifier;
 - retail broadband services providers;
 - type of aid beneficiary (SME, large enterprise);
 - aid element expressed in full in EUR or, where different from the aid element, the nominal aid amount, expressed in full in EUR;
 - aid instrument;
 - identity of the granting authority;
 - reference of the Measure, as stated in the present State aid decision.
- (91) This information must remain published for at least ten years and be available for the general public without restrictions.
- (92) The wholesale access operators will provide entitled third parties with comprehensive and non-discriminatory access to information on the network platform for the provision of wholesale broadband services and will publish detailed information concerning wholesale access conditions and prices.

2.18. Reporting and monitoring

- (93) The Spanish authorities commit to annually submit to the Commission the reports provided for by Article 26 of Council Regulation (EU) 2015/1589⁵¹.
- (94) The Spanish authorities will report to the Commission about the application and the progress of the Measure every two years. The report will contain, besides the information already made public pursuant to recital (92), the following key data concerning the Measure:
- name of the aid beneficiary or beneficiaries;
 - duration of the Measure
 - costs covered under the Measure;
 - aid amount awarded, aid expenditure, aid intensity;
 - sources of public financing;
 - coverage rates and number prior to and after the State intervention;

⁵⁰ The information will be updated every 6 months.

⁵¹ Council Regulation (EU) 2015/1589 of 13 July 2015 laying down detailed rules for the application of Article 108 of the Treaty on the Functioning of the European Union (OJ L 248, 24.9.2015, p. 9).

- date when the platform was put in use, date of start of the provision of wholesale services, date of start of the provision of retail services;
 - technology deployed;
 - upload and download speeds of services provided;
 - wholesale access products offered, including conditions for access and prices/pricing methodology;
 - number of access seekers and service providers using wholesale access;
 - retail products and prices before and after implementation of the measure;
 - type of retail services eligible, including end users' costs;
 - take-up rates and the number of end users having benefited from the aid measure (by category, for instance individual end users or SMEs and by type of subscriptions/service supported);
 - number of eligible retail broadband services providers;
 - number of retail broadband services providers that have actually benefited from the aid measure.
- (95) The Spanish authorities also committed to closely monitor the implementation of the Measure during its entire duration, including the competitive selection procedure, the set-up of the network platform, the provision of relevant wholesale services, the provision of retail services and the fulfilment of all requirements under this decision, for the entire duration of the Measure. The Granting Authority will regularly monitor and review the project's sound implementation by performing checks on the fulfilment of the compatibility criteria. Spain will maintain for at least ten years from the date of award of the aid detailed records containing the information and supporting documentation necessary to establish that all compatibility conditions are met, and provide them, upon written request, to the Commission within a period of twenty working days or a different period as may be fixed in the request.
- (96) The beneficiary of the aid will be required to facilitate the activities of the body responsible for monitoring the aid in order to check that the activities covered by the aid have been carried out, in accordance with the decision granting the aid. Similarly, in relation to the project for which aid is granted, the beneficiary will be subject to any other checks and financial control measures that may be carried out by the competent national and European authorities, in accordance with the rules applicable to the management of aid financed from the RRF.
- (97) Failure to comply with the requirements laid down in the Draft Order and other applicable rules, as well as with any conditions laid down in the corresponding award decision, will give rise, prior to the appropriate recovery procedure, to the obligation to repay all or part of the aid received and the corresponding default interest.
- (98) In view of the specific characteristics of the scheme, the Spanish Authorities will provide the Commission with an interim and final report with key information on the application of the measure. This special reporting aims to produce an

evaluation of the implementation and effectiveness of the scheme⁵². Accordingly, the special reporting aims to verify (i) whether the assumptions and conditions which led to the compatibility decision have been realised; (ii) the effectiveness of the aid measure in light of its predefined objectives; (iii) its impact on markets and competition and that no undue distortive effects arise under the duration of the aid scheme that is contrary to the interests of the Union.

- (99) The special reporting will be conducted by experts with the necessary specific skills and evaluation expertise and independent from the Granting Authority.
- (100) Spain commits that the special reporting will be conducted in order to identify the causal impact of the scheme, undistorted by other variables that may have had an effect on the observed outcome.
- (101) An interim special report will be submitted to the Commission at the latest by 31 December 2025. The interim report will include information on: the wholesale services that have been put in place, including prices and conditions; the retail services that have been put in place; the number of wholesale access operators and retail broadband services providers benefitting from the Measure; the take-up rates and price evolution. The interim report will be focused on the implementation of the measure in terms of effectiveness and efficiency and to help improve its design in parallel with other digital measures included in the Plan for Connectivity and Digital Infrastructure in Society, Economy and Territories and the Plan “España Digital 2025” (see recital (7)). The final special report will be submitted to the Commission by 31 December 2027 and will describe in detail the implementation of the measure in terms of effectiveness and efficiency and to help improve its design in parallel with other measures included in the Spanish national plan.
- (102) Spain has confirmed that all the data used for the reporting will be made available to the Commission in anonymised form for the purpose of verification and replicability.
- (103) Spain has confirmed that the interim report and the final report will be published on the relevant website.
- (104) Spain has committed to take into account the results for the development of any future interventions of similar scope, with the aim of increasing the future measures' effectiveness and reducing any negative effects on competition.
- (105) In case additional broadband schemes of similar scope are implemented in Spain, the special reporting described in recitals (94)-(101) could be integrated in an overall evaluation covering several broadband State aid schemes. This option would be considered for reasons of efficiency and implemented only if the timeline for the deployment of the additional State aid schemes were compatible to the present scheme and if the modified evaluation would not generate additional administrative burden. In this case, the key elements of the special reporting will be maintained while the evaluation calendar will be updated. The

⁵² See Annex 1: Technical appendix on relevant methods to identify the causal impact; Commission Staff Working Document on Common methodology for State aid evaluation, SWD(2014) 179 final.

planned evaluation reports would then provide an overall analysis of the impact of various funding programmes.

2.19. Cumulation

- (106) According to the Draft Order, aid granted under the Measure cannot be cumulated with other aid, revenue or resources granted for the same purpose from any public administration or public or private body, national, from the European Union or from other international organisations⁵³.
- (107) The Spanish authorities confirmed that no other State aid measure would cover the same eligible costs. Irrespective of which public authority is granting aid in Spain, the Spanish authorities will ensure that the aid granted is accounted for, and compatible with, State aid rules.

3. ASSESSMENT OF THE MEASURE

3.1. Existence of aid

- (108) 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’.
- (109) It follows that in order for a measure to qualify as State aid, the following cumulative conditions have to be met: (i) the beneficiary of the measure has to be an undertaking, (ii) the measure has to be granted through State resources and be imputable to the State, (iii) the measure has to confer an economic advantage, (iv) which is selective, (v) and has an effect on trade and competition.

3.1.1. Undertaking

- (110) Undertakings within the meaning of Article 107(1) TFEU are entities engaged in an economic activity, regardless of their legal status and the way in which they are financed.⁵⁴
- (111) The Measure will benefit wholesale access operators that are electronic communications networks providers that will set up the network platform(s) for the provision of the relevant wholesale services allowing the provision of the relevant retail services in the target areas. The eligible wholesale access operators are undertakings or groups of undertakings.
- (112) The Measure will also benefit retail broadband services providers that are electronic communications services providers capable of offering the relevant retail services in the target areas. They will be able to offer their services to a

⁵³ Article 7(9) of the Draft Order.

⁵⁴ Judgment of the Court of Justice of 10 January 2006, *Cassa di Risparmio di Firenze SpA and Others*, C-222/04, ECLI:EU:C:2006:8, § 107.

larger number of users thus expanding their customer base in the eligible areas. The eligible retail broadband services providers are also undertakings.

- (113) The final beneficiaries of the Measure are end users that will be able to purchase the relevant retail services under affordable conditions at the maximum retail price of EUR 35/month per subscription and may receive a subsidy covering the End users' Access Costs up to a maximum of EUR 600. End users under the Measure are individuals, self-employed persons, SMEs, non-profit entities and public administrations. Certain end users engage in economic activities and thus are undertakings. The end users that are individuals cannot be considered as undertakings performing an economic activity falling within the scope of Article 107(1) TFEU and thus assistance to them falls outside the scope of the State aid rules.

3.1.2. State resources and imputability

- (114) The concept of State aid applies to any advantage granted through State resources by the State itself or by any intermediary body acting by virtue of powers conferred on it. As described in recital (28), the Measure is financed from the RRF and from the budget of Spain. The Spanish authorities control the financing allocated to the beneficiaries. The Grating Authority will decide on the granting of the aid and will check that the aid will be used in compliance with the present decision (see recital (27)).
- (115) Hence, State resources are involved and the Measure is imputable to the State.

3.1.3. Economic advantage

- (116) An advantage, within the meaning of Article 107(1) TFEU, is any economic benefit which an undertaking could not have obtained under normal market conditions, that is to say in the absence of State intervention⁵⁵.
- (117) The overall amount of subsidies that will be awarded under the Measure amounts to EUR 88 300 000. This will enable the wholesale access operators to set up network platform(s) for the provision of the relevant wholesale services allowing the provision of the relevant retail services in the target areas on conditions that would otherwise not be available under normal market conditions. Retail broadband services provider's benefit, first, from more advantageous prices and conditions for the relevant wholesale services which allow them to provide retail services at lower prices and second, the equipment that their end users need for the provision of retail services may be subsidised. Thus, the Measure reduces the costs for end users that are undertakings, by lowering their costs for the take up of the relevant retail services.
- (118) Therefore, the Measure confers an economic advantage on wholesale access operators that will be able to provide the relevant wholesale services in the target areas at a lower cost than they would have to bear under normal market conditions as compared to undertakings investing and operating without public support. The Measure also confers an advantage to retail broadband services

⁵⁵ Judgment of the Court of Justice of 29 April 1999, Spain v Commission, C-342/96, ECLI:EU:C:1999:210, paragraph 41.

providers that will be able to provide the relevant retail services in the target areas at a lower cost than they would have to bear under normal market conditions as compared to undertakings investing and operating without public support. The Measure will thus enable wholesale access operators and retail broadband services providers to strengthen their market position and offer services to a larger number of customers. The Measure also confers an economic advantage to end users in the target areas that are undertakings, as these undertakings can benefit from the relevant retail services under conditions that would not be available under normal market conditions.

3.1.4. *Selectivity*

(119) To fall within the scope of Article 107(1) TFEU, a State measure must favour ‘*certain undertakings or the production of certain goods*’.

(120) In the case at hand, the Measure is selective because:

(a) end users that are undertakings are limited to the identified categories of end users located in the target areas;

(b) as concerns wholesale access operators wholesale access operators and retail broadband services providers that are providers of electronic communication networks and services, the measure confers an advantage to undertakings that are active in one industrial sector (fixed broadband services sector), and who offer the relevant wholesale services and the relevant retail services (which ensure a certain quality), respectively in the target areas, to the exclusion of other undertakings active in other segments of the overall electronic communications market or in civil engineering works and infrastructure operation that cannot meet the requirements set out in the Measure.

(121) The provision of electronic communication networks and services are liberalised economic activities usually conducted by private operators on market terms, subject to the regulatory framework, without State support.

(122) It follows that the Measure confers a selective economic advantage to the identified beneficiaries that are undertakings.

3.1.5. *Distortion of competition and impact on trade*

(123) State measures fall within the scope of Article 107(1) TFEU in so far as they distort or threaten to distort competition and affect trade between Member States. According to the case-law of Union courts, the concept of ‘effect on trade between Member States’ is linked to the notion of distortion of competition and both are often inextricably linked. In this regard, the Court has stated that “[i]n particular, where State financial aid strengthens the position of an undertaking as compared with other undertakings competing in intra-Community trade, the latter must be regarded as affected by that aid”⁵⁶.

⁵⁶ Judgment of 4 April 2001, Regione Friuli Venezia Giulia v Commission, T-288/97, ECLI:EU:T:2001:115, recital 41.

- (124) The Measure applies to the electronic communications sector, which is subject to intra-EU and international competition. As the Measure gives an economic advantage to wholesale access operators, retail broadband services providers and end users that are undertakings, it strengthens the competitive position of its beneficiaries and may distort competition.
- (125) The beneficiaries of the Measure are active in sectors in which intra-Union trade exists. In particular, the electronic communications sector has undertaken a significant process of liberalisation at the level of the Union.
- (126) It must therefore be considered that the Measure is capable of distorting competition and has an effect on trade between Member States.

3.1.6. Conclusion on the existence of aid

- (127) In view of the above, the Commission considers that, as the Measure is imputable to the State, involves State resources, provides a selective advantage to certain beneficiaries, distorts or threatens to distort competition in the internal market and affects trade between Member States, the Measure constitutes State aid within the meaning of Article 107(1) of the TFEU.

3.2. Lawfulness of the Measure

- (128) By notifying the Measure before putting it into effect, the Spanish authorities have respected their obligations under Article 108(3) TFEU (see recital (26)).

3.3. Compatibility of the Measure

- (129) The Commission assesses the compatibility of the Measure pursuant to Article 107(3)(c) TFEU, according to which: *‘aid to facilitate the development of certain economic activities or of certain economic areas, where such aid does not adversely affect trading conditions to an extent contrary to the common interest’* may be considered compatible with the internal market.
- (130) The Measure has a hybrid nature since it combines a supply-side intervention with a demand-side intervention by combining direct grants for wholesale access operators, together with a mandatory Aided Wholesale Price, and aid covering the End users’ Access Costs, while imposing a Maximum Retail Price on retail broadband services providers wholesale access operators which benefit from the relevant wholesale services at a lower price. Considering these characteristics, the Measure does not fall within the EU Guidelines for the application of State aid rules in relation to the rapid deployment of broadband networks (the “Broadband Guidelines”)⁵⁷. Therefore, the Commission will assess the compatibility of the Measure pursuant to Article 107(3)(c) TFEU and, where appropriate (i.e. where there are significant analogies between the Measure and the measures addressed by the Broadband Guidelines), will apply the general principles of the corresponding provisions of the Broadband Guidelines as well as case practice, taking into account the adjustments needed to reflect the differences between the

⁵⁷ Communication from the Commission – EU Guidelines for the application of State aid rules in relation to the rapid deployment of broadband networks (OJ C 25, 26.1.2013, p. 1).

structure of the Measure and that of the measures to which those provisions and decisions refer.

- (131) To be declared compatible, the aid must contribute to the development of certain economic activities or areas (first condition) and it must not adversely affect trading conditions to an extent contrary to the common interest (second condition)⁵⁸.
- (132) Under the first condition, the Commission assesses:
- (i) The economic activity facilitated by the Measure;
 - (ii) The incentive effect of the Measure, in that it changes the behaviour of the undertakings concerned in such a way that they carry out an additional activity which they would not carry out without the Measure or would carry out in a restricted or different manner or location;
 - (iii) The existence of a breach of any provision of Union law in relation to the Measure.
- (133) Under the second condition, the Commission weighs up the positive effects of the Measure for the development of the activities that the aid is intended to support and the negative effects that the aid may have on the internal market, in terms of distortions of competition and adverse effects on trade caused by the aid. In this regard, the Commission assesses:
- (i) The positive effects of the aid;
 - (ii) Whether the aid is needed and targeted to addressing a situation where it can bring about a material improvement that the market cannot deliver itself, for example by remedying a market failure or addressing important inequalities;
 - (iii) Whether the aid is an appropriate policy instrument to meet its objective;
 - (iv) Whether the aid is proportionate and limited to the minimum necessary to induce additional investment or activity in the area concerned;
 - (v) Whether the aid is transparent. To measure and minimise the impact on the internal market, Member States, stakeholders, the general public and the Commission must have easy access to information on the aid awarded;
 - (vi) The negative effects of the aid on competition and trade between Member States.
 - (vii) As a final step, the Commission balances the identified negative effects on the internal market of the Measure with the positive effects of the planned aid on the supported economic activities.

⁵⁸ Judgment of 22 September 2020, *Austria v Commission*, C-594/18 P, EU:C:2020:742, paragraph 19.

3.3.1. *First condition*

3.3.1.1. Economic activities facilitated by the Measure

- (134) The Measure will support the creation of wholesale platform(s) providing the relevant wholesale services allowing for the provision of the relevant retail services under affordable conditions to end users in the target areas, which are remote, dispersed and sparsely populated rural areas of Spain. As described in recital (13) and proved by both the mapping exercise and the public consultation (see section 2.11), the aid will address only end users in areas where: (i) there is no current terrestrial fixed network⁵⁹ providing broadband services with a download speed of at least 50 Mbps under peak time conditions, and (ii) the limited available retail fixed broadband services that provide a download speed of at least 100 Mbps under peak time conditions are not affordable for end users⁶⁰ in the target areas. The Spanish Authorities consider that, therefore, the Measure is necessary to facilitate the take-up of the relevant fixed services thus enabling the development of a range of economic activities, notably the provision internet access services of performant and affordable retail fixed broadband services.
- (135) The Measure will cover the costs related to the creation and operation of the network platform(s) for the provision of the relevant wholesale access services, including the acquisition of transmission capacity, interconnection, invoicing and the management of clients (See recital (30)). The wholesale access operators will provide the relevant wholesale services via platform(s) of network resources, in line with the requirements set out in section 2.14, and will charge the retail broadband services providers the Aided Wholesale Price. In turn, the retail broadband services providers will provide the relevant retail services at the Maximum Retail Price to the end users. The Measure also covers the End users' Access Costs.
- (136) The Measure will thus finance the provision of the relevant wholesale services and the relevant retail services at prices that would not be available in the absence of the State support. Accordingly, the Measure's purpose is not to generally reduce the current operating expenditures. On the contrary, its objective is to finance costs specifically and directly related to investments necessary for the provision of the relevant wholesale services at affordable prices (see recital (30)). The Measure in turn aims to facilitate the provision of the relevant retail services capable of addressing connectivity needs of end users in the target areas. The Measure will enable end users in the target areas to have access to fixed broadband services capable of addressing their needs at affordable prices. It increases the economic competitiveness of target areas, ensures equal growth opportunities in the entire Spanish territory and provides a stimulus for the development of a modern digital economy in Spain. According to the Spanish authorities, absent the Measure, end users in target areas would be prevented from having access to advanced digital applications such as cloud computing, e-government services, e- health, etc. Furthermore, the possibility to access higher

⁵⁹ Such as fibre-to-home (FTTH), hybrid fibre-coaxial cable (HFC) or FWA.

⁶⁰ The Spanish authorities have explained that retail prices for these services are significantly higher (see footnote 17) than the retail prices in more profitable areas, such as urban areas, for the same connectivity speeds (generally related to FTTH services).

performance broadband connections will also allow end users to benefit from much better conditions for teleworking (see recital (7)⁶¹). On this basis, the Commission acknowledges that the Measure contributes to the development of economic activities related to the provision of the relevant wholesale services and of the relevant retail services in the target areas.

3.3.1.2. Incentive effect

- (137) As described in section 2.2, the support to the creation of wholesale platform(s) providing the relevant wholesale services at limited prices allows the reduction of the retail price for the relevant retail services which is capped at EUR 35, accompanied by a further cap to the a subsidy for End users' Access Costs. The Measure, therefore, incentivises the provision of both the relevant wholesale services and the relevant retail services under affordable conditions in the target areas, while also incentivising as well as the take-up by end users of the relevant retail services. Without the Measure, in fact, network operators and service providers would not provide the relevant wholesale services and the relevant retail services under affordable conditions and, in turn, the take-up by end users of the relevant retail services would remain more limited, while, in most cases, access to such services would not be ensured in the absence of fixed terrestrial networks deployment. The temporary nature of the Measure does not compromise its incentive effect as both the economic model underlying the Measure and the corresponding business plans of the bidders are based on the temporary nature of the subsidy⁶².
- (138) To ensure an incentive effect for the development and facilitation of the indicated economic activities, electronic communications networks operators and services providers, other interested stakeholders and the wider public in general have been consulted on the Measure in the public consultation organised by the Spanish authorities in 2022 (see section 2.11). The Spanish authorities will moreover verify through additional annual mapping and public consultations exercises the target areas and the services available in those areas and request the submission of information about any network deployment in these areas at least once per year throughout the duration of the notified Measure. As a result the Measure will only cover areas without any fixed terrestrial network providing broadband services with a download speed of at least 50 Mbps under peak time conditions and where the limited available retail fixed broadband services that provide a download speed of at least 100 Mbps under peak time conditions are not affordable for end users, at any time during its duration.
- (139) On this basis, the Measure demonstrates an incentive effect for the development of the economic activities described under section 3.3.1.1 above in the target areas. The Measure will change the behaviour of potential beneficiaries in such a way that they will carry out activities, which they would not carry out without the

⁶¹ As mentioned at recital (81), in most target areas existing terrestrial connections have speeds of 30 Mbps or lower. In these areas, teleworking is in many cases not possible. In the remaining cases, the poor quality of the connection substantially reduces the quality and effectiveness of teleworking.

⁶² The Spanish authorities have explained that retail prices for these services are significantly higher (see footnote 17) than the retail prices in more profitable areas, such as urban areas, for the same connectivity speeds (generally related to FTTH services).

Measure or would carry out in a restricted or different manner or not in the target areas.

3.3.1.3. Compliance with other provisions of Union law

- (140) If a State aid measure, the conditions attached to it (including its financing method when that method forms an integral part of the aid measure) or the activity it finances entail a violation of a provision or general principles of Union law, the aid cannot be declared compatible with the internal market⁶³. The Commission has not received any information regarding a possible breach of other provisions of Union law that would prevent the Measure from being declared compatible with the internal market.

3.3.2. *Second condition*

3.3.2.1. Positive effects of the aid

- (141) The Spanish authorities will award aid for the provision of the relevant retail services to end users in remote, dispersed and sparsely populated rural areas of the Spanish territory where, based on the results of the mapping and the public consultation (see section 2.11), there is no fixed terrestrial network providing broadband services with a download speed of at least 50 Mbps under peak time conditions and where the limited available retail fixed broadband services that provide a download speed of at least 100 Mbps under peak time conditions are not affordable for end users.
- (142) The Measure will have positive effects in that it will facilitate, in the target areas, the provision of the relevant wholesale services and of the relevant retail services and also the access of end users to the relevant retail services, which are necessary in the modern society and the digital economy (see recitals (7) and (136)).
- (143) At the same time, considering that the target areas are in rural and remote parts of the country, the Measure is expected to contribute to the correction of social or regional inequalities and the reduction of the digital divide between rural and urban areas in Spain. The Measure will enable end users in the target areas to reap the benefits of performant digital connectivity, by improving access to an essential means of communication and participation in society and economy, facilitating their use of various applications and services (see recitals (7) and (136)), thereby improving social and territorial cohesion.
- (144) Furthermore, the Commission considers that the design of the Measure i.e. the fact that it supports the creation of a wholesale platform for each of the lots in which the tender is divided, subsidising the availability of cheaper wholesale products and allowing any retail operator to access such platforms, will have positive effects on competition both at the wholesale and at the retail level. Wholesale operators will all be able to bid in each of the relevant tenders thus enhancing competition for the wholesale market. At the same time, all retail operators will have the right to access the wholesale platform at prices not higher than those of corresponding wholesale products in more competitive areas and,

⁶³ Judgment of 22 September 2020, *Austria v Commission*, C-594/18 P, EU:C:2020:742, paragraph 44.

thus, they will be able to offer to end users services and performances that they would have not been able to provide under affordable conditions absent the aid.

- (145) The Measure will also contribute to the achievement of objectives of Union digital policy and, more specifically, to reduce the digital divide across Spain (see recitals (7) and (8)).
- (146) Hence, the Measure has positive effects in the intervention areas.

3.3.2.2. Necessity for State intervention

- (147) State intervention may be deemed necessary where it can bring about a material improvement that the market alone does not deliver. Indeed, State aid measures can, under certain conditions, correct market failures, thereby improving the efficient functioning of markets and enhancing competitiveness.
- (148) A market failure exists if markets, left to their own devices, without public intervention fail to deliver an efficient outcome for society. This may arise, for instance, when certain investments are not being undertaken even though the economic benefit for society exceeds their cost. In such cases, the granting of State aid may produce positive effects and overall efficiency can be improved by adjusting the economic incentives for stakeholders.
- (149) In the present case, the necessity for State intervention is supported by the following considerations:
- The Spanish authorities have demonstrated that there is a market failure in the target areas in terms of both the availability of performant retail fixed broadband services and in terms of their affordability, and that there is a need to address it in order to ensure that the end users in these target areas have access to the relevant retail services under affordable conditions. Moreover, the Measure will contribute to achieving Spain's objective to ensure that 100% of the population has access to broadband connectivity with a download speed of at least 100 Mbps under peak time conditions by 2025 (see section 2.1). The Commission acknowledges that this is necessary in order to be prepared for the continued strong increase in global data usage in private and professional contexts as well as the ever-increasing performance of devices, even more necessary in the context of the COVID-19 crisis. Therefore, the design of the Measure is justified with a view to offering end users in the target areas access to performant broadband services at prices comparable to those available in more profitable areas in Spain. The intervention guarantees Spain's objectives of ensuring equal opportunities for all end users in terms of their ability to fully participate in the possibilities of digitalisation.
 - The Spanish authorities carry out an annual detailed mapping and public consultation exercise whereby they request all stakeholders to provide information on broadband coverage, in terms of technology and speed. The methodology applied for the mapping exercise is adequate and consistent with good practices at EU level (see recital (67)). For the purposes of the Measure, following the mapping and public consultation exercises, the Granting Authority will identify and publish the final list of target areas, corresponding to those areas without fixed terrestrial connection coverage with a download speed of at least 50 Mbps under peak time conditions and where the available

retail broadband services at a fixed location that provide a download speed of at least 100 Mbps under peak time conditions are not affordable for end users (see recital (68)). The Measure also provides for the yearly update of the list of target areas excluding those areas where performant terrestrial networks have been deployed to provide broadband services at a fixed location with a download speed of at least 50 Mbps under peak time conditions.⁶⁴ The Measure also provides for the interruption, within a reasonable timeframe, of the subsidies for the wholesale access services for the provision of the relevant retail services in case an operator starts marketing connectivity services at a speed of at least 100 Mbps under peak time conditions via terrestrial networks in any of the target areas or the annual mapping shows that networks have been deployed to provide broadband services at a fixed location with a download speed of at least 100 Mbps in that area (see recitals (17) and (69)). The Spanish authorities carried out a general public consultation, thereby allowing interested parties to comment on the Measure (see section 2.11). In particular, the Spanish authorities published on the official websites of Ministry for Economic Affairs and Digital Transformation the main features of the Measure, the methodology to identify the target areas based on annual mapping and public consultation exercises, and invited any potentially interested stakeholders to provide comments. Twenty-two submissions were received and assessed and the Measure was adjusted where relevant. The Spanish authorities also consulted CNMC whose comments have been in large part upheld in the final version of the Measure (see section 2.12);

- The proposed approach, based on an annual mapping, will ensure that the Measure will only target areas where there is no current fixed terrestrial network providing a download speed of at least 50 Mbps under peak time conditions and where the limited available retail fixed broadband services that provide a download speed of at least 100 Mbps under peak time conditions are not affordable for end users.
 - Furthermore, the temporary, last resort nature of the Measure (i.e. the fact that it is exclusively aimed at filling the time gap in which equally performant or higher performance terrestrial networks have not been deployed) will limit the risks of crowding-out private investments and distorting competition. This will be ensured via the annual review of target areas, as well as on the mechanism to dynamically review the target areas even between annual mapping exercises, as a result of the start of the provision of similar retail services in the target areas (see recitals (49) and (69)).
- (150) Hence, the Measure is needed and targeted to address a situation where it can bring about a material improvement that the market cannot deliver itself, due to market failures in the target areas in terms of both the availability of performant retail fixed broadband services and in terms of their affordability. The Commission therefore considers the notified measure necessary to support the development of the economic activities at issue (the provision of the relevant wholesale services and the provision of the relevant retail services) in the target areas.

⁶⁴ The exclusion will not regard premises passed that have already subscribed to the relevant retail services until the moment when performant terrestrial networks are deployed to provide broadband services at a fixed location with a download speed of at least 100 Mbps in that area.

3.3.2.3. Appropriateness of the Measure as a policy instrument

- (151) The State aid measure proposed must be an appropriate policy instrument to address the problem of absence of market delivery due to the identified market failure.
- (152) The Measure is applicable in areas of Spain where there is no fixed terrestrial network providing a download speed of at least 50 Mbps under peak time conditions and where the limited available retail broadband services at a fixed location that provide a download speed of at least 100 Mbps under peak time conditions are not affordable for end users. The Spanish authorities will verify the correct identification of target areas on a yearly basis via mapping and public consultation exercises (see section 2.11).
- (153) The Commission agrees with the Spanish authorities that the Measure ensures a step change, since it provides a significant improvement in the availability of affordable performant broadband connectivity in the target areas, as described in section 2.13. Based on the information provided by the Spanish authorities, as an effect of the Measure, in the target areas the download speeds of broadband services available will double and in most cases they will more than triple (see recital (81)).
- (154) By financing the provision of the relevant wholesale services that will in turn foster the provision of the relevant retail services under affordable conditions, to the benefit of end users, the Measure will help ensure that performant online services and applications are provided in the target areas. The Measure is an appropriate means to pursue the objective of encouraging the take-up of more performant services by end users in rural and remote areas of Spain and is expected to play an important role in increasing the take-up of the relevant retail services in the target areas in Spain.
- (155) The Commission agrees with the Spanish authorities that regulatory measures, such as establishing obligations on significant market power operators in the wholesale access market for passive and active services or adopting regulatory measures that facilitate the deployment of networks by eliminating permits and authorisations and/or granting aids for the deployment of networks, are not sufficient to overcome obstacles to the provision of the relevant retail services under affordable conditions for end users in the target areas, particularly because of inherent low profitability and low take-up of such services in those areas. The Commission also agrees with the Spanish authorities that the objectives that the Measure seeks to address cannot be addressed by less distortive measures such as a purely demand-side vouchers measure and that the hybrid structure of the Measure makes it more cost-effective than a pure take up measure such as broadband vouchers, in light of the detailed analysis carried out by the Spanish authorities and validated by the NERA Report (see section 2.2).
- (156) In particular, the Commission notes that the Spanish Authorities have also contrasted the Measure with a purely demand-side voucher scheme that would subsidise the difference between the average market retail price of the largest two satellite operators accounting for decreasing retail prices over time and the reference retail price from urban areas. As in the hybrid measure, the End users' Access Costs for all served users are subsidised to ensure the same take-up. The Spanish Authorities have deemed the Measure more cost-effective than a

potential voucher scheme. The assumptions made by the Spanish Authorities have been validated by the NERA Report based on publicly available data sources. The Commission agrees with the Spanish authorities that the hybrid measure may have advantages compared to a voucher approach in this framework. The NERA Report has convincingly tested the assumptions of the economic model submitted by Spain on which the Measure is based with publicly available data collected either from official government sources or official company websites. Moreover, the arguments brought forward in the NERA Report make significant deviations from the underlying assumptions highly unlikely. Based on the economic model by the Spanish authorities, the cost of the voucher scheme would exceed the costs of the hybrid measure by around EUR 50 million (see section 2.2).

- (157) The Commission has undertaken a sensitivity analysis of the economic model provided by the Spanish authorities that has shown that only a substantially lower take-up rate or much higher initial investment costs would result in a clear preference of the voucher scheme over the hybrid measure. Specifically, the assumptions made in this context appear realistic.
- First, the Commission considers the assumed take-up rate of 6.3% rather low compared to the number of households without coverage and thus conservative. Relatedly, the assumed S-shaped adoption curve over the intervention period is in line with the extension of FTTH and other networks' coverage to the target area.
 - Second, the assumed reasonable profit is comparable to regulated WACCs in the electronic communications industry in Spain with similar characteristics⁶⁵.
 - The Commission has also analysed whether the winning bidders as well as the corresponding retail broadband services providers are incentivised to serve and advertise to as many end users as possible in rural areas. In light of the revenue/cost structure and the obligations to offer wholesale access services and retail services, the Commission has concluded that the providers will have such incentive for the number of end users targeted by this scheme.
- (158) Therefore, the Commission considers the overall design of the measure cost-effective.
- (159) Hence, the Measure is an appropriate policy instrument for addressing the identified market failures and developing the economic activities in the target areas.

3.3.2.4. Proportionality of the Measure

- (160) Member States must demonstrate that the aid is proportionate to the problem tackled, essentially showing that the same change in behaviour (as per the incentive effect) would not be obtained with less aid and fewer distortions. Aid is considered proportionate if its amount is limited to the minimum necessary and the potential distortions of competition are minimised. In this respect, the following elements in the design of the Measure are of relevance.

⁶⁵ Notably the regulated WACC of electronic communication providers in 2021 was slightly below 5%. In light of the increasing interest rates this assumption seems reasonable, if not conservative.

- (161) **Mapping and public consultation.** The mapping exercise is based on the map of broadband coverage in Spain for 2022 that each year the Ministry of Economic Affairs and Digital Transformation produces by requesting operators to provide information on existing and envisaged broadband coverage, in terms of technology and speed, as described in section 2.11. The Spanish authorities will carry out a mapping and public consultation exercises to identify and publish the final list of target areas, corresponding to those areas without any fixed terrestrial network providing broadband services with a download speed of at least 50 Mbps under peak time conditions and where the limited available retail fixed broadband services that provide a download speed of at least 100 Mbps under peak time conditions are not affordable for end users. The map of target areas will be annually reviewed based on the annual mapping exercise of the networks providing 50 Mbps under peak time conditions and 100 Mbps under peak time conditions (see recitals (69) and (70))⁶⁶.
- (162) Areas with credibly planned terrestrial fixed networks that will provide broadband services with a download speed of at least 50 Mbps under peak time conditions are temporarily eligible under the Measure until such credibly planned networks are deployed, at which point they will be excluded from the Measure, based on the annual mapping and public consultation exercises. In this regard, account must also be taken of the fact that the Measure is designed as a temporary solution to facilitate and accelerate access to performant fixed broadband services at affordable prices in certain remote and rural areas in Spain. Accordingly, given the objective of the Measure as well as its temporary nature, credibly planned networks are not relevant for identifying target areas until they have been rolled out and relevant services have already started being provided (see recital (49)). This justifies the deviation from the standard mapping. The mapping is performed on the basis of premises passed. These are end users' premises to which, upon request from end users, an operator can provide broadband electronic communication services (see footnote 356). The main characteristics of the Measure and the methodology for identifying the target areas have been made public in the public consultation (see section 2.11). This ensures that all target areas are clearly identified and continuously updated in an open and transparent manner through the annual mapping and the public consultation exercises, thereby ensuring that the Measure covers only areas where the intervention is necessary. Moreover, if between the annual mapping exercises, an operator starts marketing its connectivity services at a speed of at least 100 Mbps under peak time conditions via terrestrial networks in any of the target areas, the mechanisms explained in recital (17) ensures that the support in that target area is not provided for longer than necessary to ensure the transition of the end users to the new available services.

⁶⁶ Based on these mappings, premises passed with networks providing 100 Mbps under peak time conditions will automatically be excluded from the list of target areas. On the contrary, premises passed with networks providing 50 Mbps under peak time conditions will be excluded from the list of target areas unless they have already subscribed to the relevant retail services.

(163) **Competitive selection procedure.** As a rule, in order to ensure that aid is proportionate and limited to the minimum amount necessary, an open, transparent and non-discriminatory competitive selection procedure should be organised in line with the principles of public procurement and in a manner capable of attracting a sufficient number of participants to guarantee an adequate degree of competition and an efficient outcome. Moreover, the Member State must ensure that the most economically advantageous solution is selected. For this purpose, the Member State must establish objective, transparent and non-discriminatory qualitative award criteria and specify the relative weighting of each criterion in advance. Based on the information provided by the Spanish authorities (see section 2.10), the Measure complies with these requirements:

- The successful tenderers are selected through an open and non-discriminatory competitive selection procedure, in line with the principles of public procurement, in order to ensure the efficient use of public resources. The tender will ensure equal treatment of the interested parties, regardless of their legal status, as well as effective competition among them;
- The tender is designed in a way to foster wide participation, and aims to maximize competition for the market, by envisaging a mechanism under which the available capacity is divided into four equal lots (0-25%, 25-50%, 50-75%, 75-100%) and interested wholesale operators are allowed to bid for certain lots or for the whole capacity. For each lot, the corresponding aid budget will allow the beneficiary to acquire the capacity needed to provide the relevant wholesale services for the end users that will take advantage of the retail offers based on the measure. The number of these end users is calculated in the economic model elaborated by Spain on which the Measure is based. The model has been revised by the NERA Report. This tender design ensures the following:
 - a. The participation in the tender is made as attractive as possible also for operators that face some capacity constraints, or a significant increase in their cost structure for larger capacities or more generally for smaller operators. The possibility for such players to bid for a limited number of lots has the potential to increase competition for the market. Also, in case several operators are selected, this could, to some extent, also improve competition in the market, e.g. in terms of quality or price (the latter is less likely due to regulated wholesale price comparable to urban areas).
 - b. At the same time, the tender design allows operators to benefit from economies of scale and submit bids for more than one lot. Since both wholesale and retail prices are fixed, the tender includes minimum quality requirements, and the total number of potential end users that can be reached under the Measure remains small in comparison to the overall market, the exercise of market power in the case of a single winning bidder is extremely limited.
 - c. As a further safeguard that the measure is proportionate, the actual eligible costs will be verified via the claw back mechanism.

- the aid beneficiaries must provide wholesale access as explained in this decision (see section 2.14);
 - groupings of horizontal or vertical undertakings, consortia or other groupings may participate in the competitive selection procedure, in accordance with the principles of public procurement;
 - the Spanish authorities will ensure compliance with transparency obligations (see section 2.17); and
 - the award criteria are defined in advance and are based on objective, transparent and non-discriminatory factors (see section 2.9).
- (164) On the basis of the above considerations, the Commission is satisfied that the requirements with regard to the competitive selection procedure and the selection of the most economically advantageous offer are fulfilled. This is due to the fact that as mentioned above (see recital (54)), aid for the provision of the relevant wholesale services through the configuration of the network resources platform(s) is awarded to the best priced bids and one of the requirements and objective criteria against which applicants will be assessed is the reduction of the overall maximum amount of aid (see recital (64)i).
- (165) **Technological neutrality.** Public intervention must not favour or exclude any particular technology, both in the selection of wholesale access operators and in the provision of wholesale access. As different technological solutions exist, the tender must not favour or exclude any particular technology or network platform. Bidders should be entitled to propose the provision of the required electronic communication access services using or combining whatever technology they deem most suitable. This is without prejudice to the possibility for the Member States to determine the desired performance.
- (166) The Measure is technologically neutral, it does not exclude any potential technology or any specific provider, as the technical requirements set forth by the Draft Order can be met by all technologies. Accordingly, any undertaking (or group of undertakings) capable of providing the relevant wholesale services in the target areas, is eligible under the Measure regardless of the technology used (see section 2.9). The Measure allows the presentation of hybrid proposals combining different suppliers and types of technologies, e.g. consortia can participate in the competitive selection procedure (see section 2.10). Also any undertaking capable of providing the relevant retail services in the target areas will be able to seek access under the Measure under open, transparent and non-discriminatory terms (see section 2.14). In addition, the Measure is a temporary, last resort solution applicable only where no alternative fixed terrestrial connectivity solutions are available (see recital (12)).
- (167) **Wholesale access.** The aided networks must offer effective wholesale access under fair and non-discriminatory conditions to all operators who request it, since wholesale access helps to develop competition in the target areas in the longer term, providing customers at the retail level with more and better services and prices. The provision of effective wholesale access amplifies the positive effects of aid measures and contributes to the aid being less distortive. Based on the

information provided by the Spanish authorities (see section 2.14), the Measure complies with these requirements:

- The wholesale access operators must provide bitstream wholesale access to the network platform(s), to all service providers on open, transparent, fair and non-discriminatory basis, in accordance with the conditions detailed in this Decision. The fact that bitstream is the only available wholesale product is justified because the existing fixed networks providing the relevant performances (in principle satellite networks) are not compatible with passive wholesale access products nor with other active wholesale access products. Imposing additional or different access obligation would therefore result in the exclusion of such networks from the application of the Measure thus making it not applicable in practice. The limited wholesale access requirements are therefore acceptable considering the hybrid nature of the Measure and its specificities;
- Effective wholesale access will be available for all access seekers irrespective of the technology used. The wholesale access conditions open to all service providers, also ensure that negative effects on competition and on trade in the markets for the granting of wholesale access to such networks are limited. Where a wholesale operator also provides retail services, adequate safeguards will be put in place to prevent any conflict of interest, undue discrimination towards access seekers or content providers and any other hidden indirect advantages.
- The bids will contain all the conditions for the provision of the wholesale access, including the prices. The Granting Authority will clearly define the wholesale access conditions and ensure that the wholesale access obligations and related conditions will be outlined in a transparent manner in the procurement documents and clearly mentioned in future contracts.
- The bidders are encouraged to provide additional access products and improved wholesale access conditions as part of their bid in the competitive selection procedure.
- The same access conditions must apply on the entirety of the subsidised network, including on the parts of such network where existing infrastructures have been used.
- Effective access must be provided for a period of at least five years or at most for the duration of the Measure; this limited duration is acceptable considering the temporary nature of the Measure as well as the fact that it is not applicable once an equally performant terrestrial fixed network is rolled out.
- The aid beneficiaries have to design the network in order to ensure sufficient capacity, as described in section 2.14.
- A wholesaler can start providing retail services only after one month from the entry into service of the network platform. Other retail broadband services providers can start providing services as of the start service of the network platform (the start of wholesale services). All wholesale access operators must provide the wholesale service within one month from the termination of the competitive selection procedure.
- The wholesale access obligations must be enforced irrespective of any change in ownership, management or operation of the Infrastructures.

- Wholesale access under the Measure must not be granted or used to meet any legal obligations.
 - The maximum wholesale price is set at EUR 16,68 a month per each wholesale service purchased by access seekers, i.e. the Aided Wholesale Price. The Aided Wholesale Price is based on the wholesale prices that the CNMC has set for regulated FTT services available in more densely populated, urban areas, for the provision of similar services; this is acceptable considering the hybrid nature of the Measure and its specificities.
 - In the event of a disagreement regarding wholesale access products, conditions or pricing, each party will be able to call on the Granting Authority, who will act as the dispute settlement body, in order to avoid unjustified refusals to deal or the imposition of unreasonable conditions. The Spanish authorities may consult the CNMC where necessary.
- (168) The Commission concludes that, based on the information provided by the Spanish authorities, the Measure contains adequate requirements concerning wholesale access products, prices and conditions, taking into account the hybrid nature of the Measure and its specificities. The same applies also for retail services providers as both the Aided Wholesale Prices at which they can purchase the relevant capacity and the Maximum Retail Price are predefined, as described in recitals (14) and (16). Accordingly there is no risk of extraordinary profits for these operators (see recital (84)).
- (169) **Claw-back.** To limit risks of overcompensation and distortions of competition, it is important that Member States closely monitor the implementation of a measure during its entire duration and foresee a claw-back mechanism making it possible to properly take into account information that the aid beneficiary may not have taken into account when applying for State aid. The claw-back mechanism should be designed in a way to take into account and balance two objectives: (i) it should allow the Member State to recuperate amounts that exceed a reasonable profit; and (ii) it should not endanger the incentives for operators to participate in a tender and to strive for cost efficiencies when rolling out the network. To achieve a suitable balance between the two objectives, Member States should introduce incentive criteria related to gains in productive efficiency. Based on the information provided by the Spanish authorities, the Measure contains an adequate claw-back mechanism. Thus, as described in section 2.16, the Spanish authorities will review the conditions for the granting of the aid on the basis of the information provided by the beneficiaries and will clawback any amount exceeding a reasonable profit. The Spanish authorities a reasonable profit is exceeded if the total sum of aid received by a wholesaler under the Measure added to revenues generated from the operation of the wholesale platform are 7% higher than the costs incurred in the setting up of the wholesale platform. In order to allow the authorities to perform the checks, the wholesale access operators must ensure accounting separation. The Spanish authorities will monitor the existence of possible extra-profits on a yearly basis, for the entire duration of the Measure. At the same time, the Commission agrees that a specific clawback mechanism as concerns End users' Access Costs is not necessary, as overcompensation will be excluded by ensuring that in any event, the amount of the aid to cover the costs related to end users' access will only be determined and paid by wholesale access operators following the submission of an invoice by the retail broadband services providers. The Commission concludes that, based on the

information provided by the Spanish authorities, the Measure contains an adequate claw-back mechanism, taking into account the hybrid nature of the Measure and its specificities.

- (170) **Progressive exclusion of target areas.** When connectivity services at a speed of at least 100 Mbps under peak time conditions via terrestrial networks are available in any of the target areas, the retail broadband services providers are informed about the new services and they must amend or terminate the retail contracts benefitting from the Measure within one month after receiving such information (recitals (17) and (69)).
- (171) The exclusion of target areas will therefore derive either (i) from the information provided to the Granting Authority by the operator having deployed terrestrial networks providing connectivity services at a speed of at least 100 Mbps under peak time conditions or, (ii) from the annual mapping of target areas based on the thresholds of 50 Mbps under peak time conditions⁶⁷ and 100 Mbps under peak time conditions (see recitals (69) and (70)).
- (172) Users will have one month to decide which commercial offer they choose in order to amend or to terminate their contracts, without any hindrance, penalty or compensation.
- (173) **Accounting separation.** To ensure that the aid granted under the Measure remains proportionate and does not lead to overcompensation or cross-subsidisation of non-aided activities, all direct beneficiaries must ensure accounting separation. As indicated in section 2.14, the wholesale access operators will ensure accounting separation that identifies all costs and revenues related to the Measure. As explained in section 2.15, the Measure does not provide for a similar mechanism for retail broadband services providers considering that (i) these operators will receive the End Users' Access Costs exclusively on the basis of an invoice issued and received by the end user, and (ii) the Aided Wholesale Prices and the Maximum Retail Price are predefined, as described in recitals (14) and (16). There is therefore no risk of double financing for the same eligible costs, cumulation of aid or overcompensation. Furthermore, if a beneficiary under other State aid measures will be among the direct beneficiaries of the Measure, the Spanish authorities will check that there will be no undue transfer between the funds allocated to the Measure and the funds allocated to other measures and there is no cumulation of aid for the same eligible costs.
- (174) **Conclusion on proportionality.** In light of the above considerations, the Commission considers that the State aid involved and the potential distortions of competition to which it could give rise are limited to the minimum necessary under the Measure.

⁶⁷ In this case, the exclusion will not regard premises passed that have already subscribed to the relevant retail services. These premises will be excluded from the application of the Measure only when performant terrestrial networks have been deployed to provide broadband services at a fixed location with a download speed of at least 100 Mbps in the target area.

3.3.2.5. Transparency of the Measure

- (175) As described in section 2.17, the Spanish authorities committed to comply with applicable transparency requirements. In particular, the aid granted must be publicised in accordance with Article 34(2) of the RRF Regulation. The invitation to tender will also be published in the Official State Gazette. The tender notice will also be published on the website of the Ministry of Economic Affairs and Digital Transformation as well as the acts of the procedure (see recital (55)).
- (176) Moreover, for the entire duration of the Measure, all of the relevant information about the Measure will be published on the official website of the Ministry of Economy and Digital Transformation, where both operators and end users will have easy and unrestricted access to all relevant acts and information regarding the Measure and its implementation. In particular, the Spanish authorities will publish the information listed in recital (90) after the approval of the Measure and ensure its availability for the following ten years.
- (177) The Spanish authorities will report to the Commission about the application and the progress of the Measure every two years. The report will contain, besides the information listed in recital (90), the additional key data mentioned in recital (94).
- (178) The Spanish authorities also commit to submit to the Commission the annual reports required under Article 26 of Council Regulation (EU) 2015/1589.
- (179) The Commission considers that the present Measure requires an evaluation in order to verify (i) whether the assumptions and conditions which led to the compatibility decision have been realised; (ii) the effectiveness of the aid measure in light of its predefined objectives; (iii) its impact on markets and competition and that no undue distortive effects arise under the duration of the aid scheme that is contrary to the interests of the Union. Spain has committed to submit to the Commission special reporting, whose main elements are described in section 2.18. The Commission considers that, taking into account the hybrid nature of the Measure and its specificities, the proposed special reporting is sufficient to ensure an evaluation of the implementation and effectiveness of the scheme. The Commission notes the commitment made by Spain to submit an interim report by 31 December 2025 and a final report by 31 December 2027 and to publish the interim report and the final report on the relevant website. The Commission notes that the notified measure must be suspended if the final report were not submitted in good time and sufficient quality.

3.3.2.6. Negative effects on competition and trade

- (180) Aid for the provision of wholesale services and of retail services may have negative effects in terms of market distortions and impact on trade between Member States. The Commission has carefully assessed the significance of the distortion of competition and effect on trade of the Measure in terms of effects on competitors.
- (181) In this regard, it cannot be excluded that the Measure may have negative effects as it cannot be excluded that some private market actors may see the profitability of their prior investments decreased because of the notified Measure. Moreover, the notified measure may encourage local retail service providers to have recourse to the supported network platform(s) rather than to seek other market solutions. In

this regard, also taking into account that selected wholesale access operators will be allowed to provide retail services in the target areas, the Spanish authorities will require that in order to participate in the competitive selection procedure the wholesale access operators must demonstrate that sufficient competition safeguards will be put in place. Such safeguards must demonstrate that potential conflicts of interest will be prevented, that there will be no undue discrimination towards access seekers and that any other hidden indirect advantages are avoided, effectively preventing any anti-competitive behaviour towards other retail service providers (see recital (37)).

3.3.2.7. Weighing the positive effects of the aid against the negative effects on competition and trade

- (182) A carefully designed State aid scheme should ensure that the overall balance of the effects of the measure is positive in terms of avoiding adversely affecting trading conditions to an extent contrary to the common interest.
- (183) Based on the information provided by the Spanish authorities, the Commission is of the view that the positive effects of the Measure outweigh its negative effects for the following reasons:
- The Spanish authorities proved that the Measure contributes to the development of the supported economic activities, in particular the provision of the relevant wholesale services and of the relevant retail services under affordable conditions for end users, compared with what would have happened in the absence of the aid in the target areas. The Measure has various positive effects for end users but also for competition in the target areas. Indeed, as mentioned above the Measure will ensure availability of the relevant retail services to end users and will satisfy their current and evolving needs, under affordable conditions that would not have been available under normal market conditions. It will thereby provide, with immediate effect, better choice for consumers, higher quality services and help reduce inequalities and digital divide in the intervention areas. Moreover, the Measure is in line with the connectivity objectives set at the EU level (see section 3.3.2.1);
 - The Measure addresses a market failure in the target areas, identified in terms of both the availability of performant retail fixed broadband services and in terms of their affordability by ensuring that the end users have access to the relevant retail services at affordable prices in these remote, dispersed and sparsely populated rural areas where there is no current terrestrial fixed network providing retail fixed broadband services with a download speed of at least 100 Mbps under peak time conditions (see section 3.3.2.2);
 - The Measure is also appropriate and proportional (see sections 3.3.2.3. and 3.3.2.4). Financial support under the Measure will be awarded through a competitive selection procedure, in line with the principles of public procurement, designed in a way to allow all communications service providers to participate, regardless of the technology used. Wholesale access will be ensured to all access seekers on an open, transparent, fair and non-discriminatory basis, which will foster competition in the target areas. The Measure features an adequate claw-back mechanism. The design of the Measure foresees that it will cover the costs related to the creation and

operation of the network platform(s) for the provision of the relevant wholesale access services, including the acquisition of transmission capacity, interconnection, invoicing and the management of clients (see recital (29)). The wholesale access operators will provide the relevant wholesale services at the Aided Wholesale Price and in turn the retail broadband services providers will provide the relevant retail services at the Maximum Retail Price. The Measure also covers the End users' Access Costs. This ensures that the aid is limited to the minimum necessary. Further, the Spanish Authorities have demonstrated, through a thorough comparison of the Measure with a purely demand-side voucher scheme, that the Measure is cost-effective and proportionate to the objective pursued;

- The Spanish authorities proved that the negative effects on competition and on trade in the markets for the provision of wholesale access services and for the provision of retail fixed broadband services are limited to the minimum necessary. The Measure targets those areas without any current fixed terrestrial network providing broadband services with a download speed of at least 50 Mbps under peak time conditions and where the limited available retail fixed broadband services that provide a download speed of at least 100 Mbps under peak time conditions are not affordable for end users. Areas with credibly planned terrestrial fixed networks that will provide broadband services with a download speed of at least 100 Mbps under peak time conditions are temporarily eligible under the Measure until such credibly planned networks are deployed, at which point they will be excluded from the Measure, based on the annual mapping and public consultation exercises;
 - All stakeholders, including potentially affected private operators have been publicly consulted before the start of the implementation of the Measure on its design, its legal bases, the methodology for identifying and updating the target areas during the duration of the Measure and their comments have been taken into account in the final design of the Measure. Furthermore, the Spanish authorities will further continue to carry out annual mapping and public consultation exercises;
 - The Measure ensures that transparency, monitoring and reporting obligations, including special reporting, will be complied with (see section 3.3.2.5);
- (184) In light of the above, the positive impact of the Measure in developing the economic activities at issue outweighs any potential negative effects on competition and trade. On balance, the Measure is in line with the objectives of Article 107(3)(c) TFEU as it facilitates the provision of performant wholesale services and retail fixed broadband services in the target areas under affordable conditions. Moreover, such aid does not adversely affect competition to an extent contrary to the common interest. The overall impact on competition is deemed to be positive. The negative effects on competition, if any, would be very limited.

4. CONCLUSION

The Commission has accordingly decided not to raise objections to the aid on the grounds that it is compatible with the internal market pursuant to Article 107(3)(c) of the Treaty on the Functioning of the European Union.

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 electronically to the following address:

European Commission,
Directorate-General Competition
State Aid Greffe
B-1049 Brussels
Stateaidgreffe@ec.europa.eu

Yours faithfully,

For the Commission

Margrethe VESTAGER
Executive Vice-President

