



2023/2524

24.11.2023

COMMISSION DECISION (EU) 2023/2524

of 10 August 2023

on the State aid SA.34001 (2017/C) implemented by the Kingdom of Spain for Telecom Castilla La Mancha SA

(notified under document C(2023) 5414)

(Only the Spanish version is authentic)

(Text with EEA relevance)

THE EUROPEAN COMMISSION,

Having regard to the Treaty on the Functioning of the European Union, and in particular Article 108(2), first subparagraph, thereof,

Having regard to the Agreement on the European Economic Area, and in particular Article 62(1), point (a), thereof,

Having regard to Article 9(3) of Council Regulation (EU) 2015/1589 laying down detailed rules for the application of Article 108 of the Treaty on the Functioning of the European Union ⁽¹⁾,

Having called on interested parties to submit their comments pursuant to those provisions ⁽²⁾ and having regard to their comments,

Whereas:

1. PROCEDURE

- (1) In December 2011, the Commission received a complaint alleging that the government of the Autonomous Region of Castilla-La Mancha (JCCM) had granted State aid to the company Telecom Castilla La Mancha SA (Telecom CLM), an electronic communications operator active in the region of Castilla-La Mancha, through the award of a contract for the construction and operation of a wireless basic broadband network (the measure).
- (2) The Commission requested the Kingdom of Spain to comment on the above-mentioned complaint on 16 January 2012. The Kingdom of Spain sent information to the Commission on 12 March 2012. The Commission asked further questions on 21 June 2012 to which the Kingdom of Spain replied on 25 July 2012. The Kingdom of Spain sent further information on 3 April 2013, 24 June 2014, 4 July 2016 and 18 July 2016. The Commission asked further questions on 17 January 2017, to which the Kingdom of Spain replied on 3 February 2017.
- (3) By letter dated 19 July 2017, the Commission informed the Kingdom of Spain that it had decided to initiate the procedure laid down in Article 108(2) of the Treaty on the Functioning of the European Union (TFEU) in respect of the alleged aid (the opening decision).
- (4) The opening decision was published in the Official Journal of the European Union ⁽³⁾. The Commission called on interested parties to submit their comments.
- (5) The Kingdom of Spain submitted comments on the opening decision by letter dated 22 September 2017.
- (6) The Commission received comments from one interested party, Telecom CLM, on 6 November 2017. The Commission forwarded these comments to the Kingdom of Spain, which was given the opportunity to submit observations. The Kingdom of Spain informed the Commission that it had no comments by letter dated 15 January 2018.

⁽¹⁾ OJ L 248, 24.9.2015, p. 9.

⁽²⁾ State aid — Spain — State aid SA.34001 (2017/C) — Alleged aid for Telecom Castilla-La Mancha — Invitation to submit comments pursuant to Article 108(2) of the Treaty on the Functioning of the European Union (OJ C 336, 6.10.2017, p. 20).

⁽³⁾ Cf. footnote 2.

- (7) By letter dated 21 December 2018, the Commission asked the Kingdom of Spain further questions. The Kingdom of Spain replied to these questions by letter received on 11 February 2019.

2. DETAILED DESCRIPTION OF THE MEASURE

2.1. The context

- (8) The region of Castilla-La Mancha was characterised by a broadband infrastructure penetration rate per inhabitant below the Spanish average ⁽⁴⁾. With the exception of the region's agglomerations Toledo, Ciudad Real, Albacete, Cuenca and Guadalajara, the region's broadband penetration rate (mobile and fixed) was considerably lower than in the rest of the country ⁽⁵⁾.
- (9) Therefore, in the years before the measure, the JCCM attempted to develop the region's broadband infrastructure and improve broadband access conditions in the entire region, including in remote and scattered settlements, by participating in different national infrastructure development programmes. Despite JCCM's participation in these programmes, the region continued to lack full coverage of basic broadband in 2010. In view of this, the JCCM declared the provision of such broadband access to all residents of the region as a priority and designed a project for that purpose.

2.2. The objective of the measure

- (10) The objective of the measure was to ensure basic broadband coverage (at least two megabits per second (Mbps) download speed for end-users) for all inhabited areas in the region of Castilla-La Mancha where no broadband infrastructure existed or was unlikely to be developed in the near term, i.e., which would qualify as 'white' areas within the meaning of the 2009 Broadband Guidelines applicable at the time ⁽⁶⁾. To this end, the project foresaw that a third-party operator (designated pursuant to an open tender procedure) would develop a basic broadband network and operate it for the duration of the project, while the JCCM would acquire ownership of the network. It was explicitly intended that the winning bidder would, in addition to the development and operation of the network, also provide retail services to end-users (internet access services and IP telephony/voice over IP). The operation of the network was to be ensured at the risk of the successful bidder, who had to ensure the maintenance of the network and cover all operating costs. The JCCM would not receive any revenues from the operation of the network but would also not have to bear any costs in this regard.

2.3. The project and the budget

- (11) On 13 May 2010, the JCCM organised an open tender procedure and published an invitation to tender in the Official Gazette of Castilla-La Mancha for the provision of a basic broadband network, including the development and operation of the required infrastructure in, initially, 478 target areas that were reduced to 461 target areas following the market analysis (see recital (12) below). All companies registered as telecommunications operators with the Spanish Telecommunications Market Commission (CMT) were eligible to submit an offer. All 461 target areas constituted rural districts of municipalities in the region of Castilla-La Mancha with an average population of 35 inhabitants ⁽⁷⁾. Hence, the project covered an overall population of around 16 000 inhabitants. The bids were to be assessed by a 'Mesa de Contratación' at the Regional Ministry for Industry, Energy, and the Environment ⁽⁸⁾.

⁽⁴⁾ 17,1 % in the region of Castilla-La Mancha compared to 20,7 % in Spain overall, see report of the *Comisión del Mercado de las Telecomunicaciones* of 23 June 2011, MTZ 2010/2249, on page 6, available at: https://www.cnmcc.es/sites/default/files/1505025_7.pdf.

⁽⁵⁾ Cf. report of the *Comisión del Mercado de las Telecomunicaciones* of 23 June 2011, MTZ 2010/2249, page 7, available at: https://www.cnmcc.es/sites/default/files/1505025_7.pdf.

⁽⁶⁾ Communication from the Commission – Community Guidelines for the application of State aid rules in relation to rapid deployment of broadband networks (OJ C 235, 30.09.2009, p. 7) (2009 Broadband Guidelines).

⁽⁷⁾ See further, recitals (15)–(20) below for a description of the award criteria applied as part of the tender process.

⁽⁸⁾ Composition of the 'Mesa de Contratación': President, the Director-General in the department for Information Society and Telecommunications within the Ministry; four members: one representative of the General Audit Office, one representative of the Legal Service of the Regional Ministry, two representatives of the department for Information Society and Telecommunications.

- (12) To identify the target areas, the JCCM had carried out a market analysis that identified the areas covered by existing broadband networks in the region of Castilla-La Mancha and those areas without any broadband networks. The market analysis was based on information received in bilateral consultations with all broadband operators that were known to the JCCM as being active in the region ⁽⁹⁾. This information allowed the mapping of the existing infrastructure and disclosed deployment plans of broadband operators in a relevant horizon of 3 to 4 years. Moreover, the JCCM analysed all annual Territorial Deployment Plans that had been submitted in previous years by network operators registered with the CMT ⁽¹⁰⁾. The market analysis concluded that there were no existing basic broadband networks in the target areas and that no investments in broadband development were planned in these areas in the next 3 to 4 years following the consultations.
- (13) The JCCM had previously carried out three studies on the estimated costs for the deployment of a basic broadband network ensuring coverage of the entire region, the reports of which were submitted to the JCCM in November 2008, October 2009 and February 2010. The studies showed that a wireless broadband solution would be the cheapest option with an estimated cost of between EUR 17 million and EUR 20 million. Since the maximum budget available for the project was EUR 16 million, the 461 target areas were divided into 311 mandatory coverage areas and 150 additional optional areas. The division of target areas into mandatory and optional areas was done according to population size. The 311 mandatory target areas had at least 12 inhabitants, all optional target areas had less than 12 inhabitants.
- (14) The funds were provided in equal parts by the Ministry of the Environment and Rural and Marine Affairs (MARM) and the JCCM, each providing EUR 8 million from their budgets, national and regional, respectively. The funds had been earmarked for the implementation of this project in a collaboration agreement between the MARM and the JCCM on a sustainable rural development programme signed on 12 November 2009.
- (15) The award criteria used by the JCCM were contained and explained in detail in the 'Special Administrative Specifications' and the 'Special Technical Specifications' established before the invitation to tender was published. The award criteria provided for a scoring system of up to 100 points. 64 points in total could be achieved by meeting 'objective criteria', such as the amount of additional households covered by the new network, the quality of the retail services offered, the amount of funds needed, etc. 36 points in total could be achieved via 'subjective criteria', where the JCCM assessed: (i) the proposed technological solution, (ii) the proposed infrastructure and problem management, (iii) the proposed degree of assistance and support by the bidder in the process of returning the network to the JCCM following the expiry of the contract, (iv) a potential binding offer to buy the network from the JCCM following the expiry of the contract, and (v) the level of detail provided by the bidder in its network return plan.
- (16) The weightings given to each award criterion were indicated in the 'Special Administrative Specifications', specifying the maximum number of points that could be achieved for each award criterion and sub-criterion.
- (17) As regards the technical specifications of the basic broadband network, the JCCM required in the tender documents for all mandatory coverage areas a minimum transmission rate of 2 Mbps download speed, upgradeable to at least 4 Mbps, and 512 Kbps upload speed. It set the maximum latency at 150 ms and the maximum jitter at 30 ms. The network had to guarantee at least 20 % of the contracted nominal speed at peak times ⁽¹¹⁾. The duration of these peaks with lower transmission speeds per end-user must not exceed 2 hours per day. Data volumes available to end customers had to be unlimited.

⁽⁹⁾ Consulted operators included Abertis Telecom S.A., Telefónica España S.A., Telecom CLM, IberBand S.A., Radio Banda Ancha, Ensınca Networks S.L. and mobile network operators Orgedor, Yoigo, Vodafone España S.A.U. and Telefónica Móviles S.A.

⁽¹⁰⁾ All broadband operators in the region of Castilla-La Mancha were legally obliged to submit to the JCCM annually a Territorial Network Deployment Plan together with a report detailing the location of their existing installations and containing a schedule for all planned new installations.

⁽¹¹⁾ Under the Technical Tender Specifications: 'It must be ensured at times that there are maximum competition for users (peak times) a minimum rate per user of 20 % of the nominal speed that has been contracted and in no case shall the traffic volume sent or unloaded by the user be limited.'

- (18) In addition, the JCCM required the successful bidder to offer IP telephony/voice over IP ⁽¹²⁾ and provide a network interconnection point at which third operators would obtain wholesale access to the network. In clause 4.2 of the 'Special Technical Specifications', the JCCM obliged bidders to offer wholesale access services and to ensure that other electronic communications operators would be able to provide end-users in the target areas at retail level with basic broadband services of the same quality, reliability, and availability as was required in the 'Special Technical Specifications'. The successful bidder had to complete deployment of the basic broadband network within 1 year from the signature of the contract.
- (19) The technical specifications of the tender documents distinguished two different components of the basic broadband network to be deployed: (i) the 'access network' and (ii) the 'transport network'. The access network was defined as the part of the broadband network between the access node and the end-user. The transport network was defined as the part of the broadband network between the operator's core nodes and the access equipment. The access network could be wired or wireless and the successful bidder had to provide all necessary equipment, except for end-user equipment. The transport network had to be a multiservice network that could be used also for the provision of electronic communications services other than basic broadband services.
- (20) Furthermore, the technical specifications of the tender documents allowed for existing infrastructure to be re-used, including the infrastructure used for the transition from analogue terrestrial television to digital terrestrial television in the region of Castilla-La Mancha (DTT infrastructure).
- (21) According to the Spanish authorities, the invitation to tender in the Official Gazette of Castilla-La Mancha contained a link to a JCCM website ⁽¹³⁾, which provided the 'Special Administrative Specifications' and the 'Special Technical Specifications' and included a 'Frequently Asked Questions' page. According to the Spanish authorities, this website listed questions and answers in relation to the open tender procedure and included a list of the infrastructures that had been used for the implementation of the Transition Plan to Digital Terrestrial Television (DTT), as well as the contact information of their owners, who had been contractually obliged to grant access to this infrastructure to all bidders for the purposes of establishing a basic broadband network ⁽¹⁴⁾.
- (22) The JCCM received five bids. Two bids, from Telecom CLM and Telefónica España S.A. (Telefónica), met all the technical requirements and were examined in the selection procedure.
- (23) Telecom CLM's bid offered a wireless solution based on the WIMAX technology for 100 % of the mandatory target areas and about 56 % of the additional optional target areas. For the remaining optional areas, Telecom CLM proposed a satellite solution. The combination offered basic broadband coverage for all target areas (mandatory and optional) that were specified in the tender documents. Telecom CLM offered to establish and operate the network for EUR 15,85 million and received 1,76/10 points for the price criterion in the selection procedure.
- (24) Whilst the satellite solution offered by Telecom CLM for about 44 % of the optional target areas did not meet the technical requirements regarding maximum latency and jitter, Telecom CLM's bid was admissible because such technical requirements were only applicable to the mandatory target areas (see recital (17) above) and, for the mandatory target areas, Telecom CLM's bid was based on WIMAX technology, which ensured that those requirements were met.

⁽¹²⁾ IP telephony/voice over IP is a method for the delivery of voice communications and multimedia sessions over Internet Protocol networks, such as the internet. The term thus refers to the provisioning of communications services over the internet, rather than via the public switched telephone network.

⁽¹³⁾ www.jccm.es/contratacion: the website was no longer accessible at the time of the formal investigation and its content could therefore not be verified.

⁽¹⁴⁾ This obligation was contained already in Cooperation Agreements between the JCCM and local authorities owning most of the relevant passive infrastructure. These agreements were concluded for the transition from analogue terrestrial television to DTT and foresaw the requirement of municipalities to grant access to that infrastructure for any future broadband network deployment. The other owners of the relevant passive infrastructure were Telecom CLM and Abertis Telecom S.A., both beneficiaries of DTT aid, which had the same obligations in their DTT aid award contracts.

- (25) Telecom CLM's offer provided for the establishment of an interconnection point in Toledo and contained the terms and conditions for granting access to the network to third party network operators. Telecom CLM received altogether 76,13/100 points (44,93 points for the 'objective criteria' and 31,2 points for the 'subjective criteria'). This included 0/7 points for the award criterion of wholesale access price because Telecom CLM's offered wholesale access prices were higher than those offered by Telefónica.
- (26) Telefónica's bid offered a mixed technological solution proposing to cover all 311 mandatory target areas by using the WIMAX technology (for 218 target areas), the xDSL technology (for 58 target areas) and the 3G mobile technology (for 35 target areas). Telefónica offered to cover approximately one third of the optional areas, using the WIMAX technology, while approximately two thirds of these areas would not be covered at all. Telefónica, relying largely on its own existing infrastructure for mobile networks, offered to establish and operate the network for EUR 16 million and received altogether 46,22/100 points (26,07 points for the 'objective criteria' and 20,15 points for the 'subjective criteria'). This included 0/10 points for the price criterion and 2/7 points for the award criterion of wholesale access price.
- (27) On 17 August 2010, following the selection procedure, the JCCM awarded the contract to Telecom CLM for EUR 15,85 million. On 13 September 2010, the JCCM and Telecom CLM, signed the contract. Telecom CLM started operating the network on 19 September 2012.
- (28) Telecom CLM received the amount of EUR 15,85 million in five instalments between 20 April 2012 and 26 November 2012.
- (29) On two occasions, Telecom CLM voluntarily improved the performance of the basic broadband network that it had provided under the contract. A first upgrade took effect on 28 April 2016, improving the minimum download speed to 5 Mbps. A second upgrade took effect on 4 May 2018, improving the minimum download speed to 10 Mbps.
- (30) The measure was not notified to the Commission.

2.4. Duration

- (31) The contract was concluded for 5 years, with a two-year renewal option, during which the operation of the network had to be ensured by the successful bidder. The contract was renewed twice, first in 2017 for 1 year until September 2018, and in 2018 until September 2019.

2.5. Beneficiary

- (32) The alleged beneficiary is Telecom CLM, a private company headquartered in Toledo, Spain, active in the provision of electronic communications services (television, radio, and broadband). It is controlled by Equitix Investment Management Limited, an investment company. The JCCM holds approximately 45 % of Telecom CLM's shares.
- (33) In 2008, Telecom CLM was the owner of 138 analogue terrestrial television centres that formed part of the region of Castilla-La Mancha's terrestrial television network consisting of approximately 500 transmission centres. In the framework of the DTT transition, during 2008–2009, Telecom CLM received public support in the amount of (i) EUR 13,2 million to digitise its own transmission centres through the installation of DTT equipment, (ii) EUR 6,4 million to operate and maintain the network of the region of Castilla-La Mancha and (iii) EUR 2,26 million to build 20 new DTT transmission centres ⁽¹⁵⁾.

⁽¹⁵⁾ Telecom CLM became the owner of six such centres and re-used one centre for the basic broadband network.

- (34) On 1 October 2014, the Commission adopted Decision C(2014) 6846 final in which it found that this public support received by Telecom CLM constituted State aid that was incompatible with the internal market and ordered recovery ⁽¹⁶⁾.
- (35) In 2018, the Court of Justice in its judgments of 26 April 2018 in joined cases C-91/17 P and C-92/17 P, *Cellnex Telecom v Commission*, and of 20 September 2018 in case C-114/17 P, *Spain v Commission*, upheld the Commission's recovery decision ⁽¹⁷⁾. By 18 August 2022, Telecom CLM had repaid all the aid principal and recovery interest subject to the recovery procedure for DTT rollout in the region of Castilla-La Mancha (SA.27408).

2.6. Investigation by the Spanish Telecommunications Market Commission (CMT)

- (36) On 20 December 2010, the CMT initiated an ex officio administrative procedure to examine the conditions for operation of the basic broadband network as agreed between the JCCM and Telecom CLM in the contract signed on 13 September 2010, and any potential anti-competitive effects thereof.
- (37) The CMT concluded in its decision of 23 June 2011 ⁽¹⁸⁾ that the wholesale bitstream access price offered by Telecom CLM to third parties had been too high and, in fact, too close to the market retail prices for basic broadband services in the region. According to the CMT, the wholesale bitstream access price offered by Telecom CLM would not have allowed a sufficient margin to third party retail service providers to achieve an appropriate profit when using wholesale access services provided by Telecom CLM for providing retail broadband services to end-users. Moreover, the CMT found that neither the tender documents nor the contract concluded between the JCCM and Telecom CLM in September 2010 contained a claw-back clause ensuring that the selected bidder would not be overcompensated if demand for broadband services in the area was to grow above the projected levels by requiring it to repay excess profits.
- (38) In its decision of 23 June 2011, the CMT ordered (i) Telecom CLM to lower the access price to be paid by third parties for wholesale bitstream access and (ii) the JCCM to introduce a claw-back clause into the contract signed with Telecom CLM in September 2010 that would require Telecom CLM to repay the percentage of any excess profits equivalent to the share represented by the EUR 15,85 million in the total costs of the project.

2.7. Amended wholesale access prices and claw-back mechanism

- (39) Telecom CLM offered wholesale bitstream access to the network to allow third party operators to provide retail broadband services to end-users in the target areas that meet the quality, reliability, and availability requirements for retail services as laid down in the tender specifications. Following the CMT's decision that the wholesale price initially offered by Telecom CLM (EUR 34,50) was too close to its own offered retail prices to end-users (EUR 37,50) and also higher than other wholesale bitstream access prices in the sector, Telecom CLM reconsidered its wholesale bitstream access offer, amended it and reduced its price with effect of 15 July 2011, submitted to the CMT and to the JCCM, who approved it, on 29 July 2011.
- (40) The re-submitted wholesale bitstream access price was reduced to EUR 23,70 from originally EUR 34,50, which represented a reduction by 31,3% and resulted in the application of wholesale access prices 36,8% lower than Telecom CLM's retail prices.

⁽¹⁶⁾ Commission Decision C(2014) 6846 final of 1 October 2014 on state aid SA.27408 (C 24/2010) (ex NN 37/2010, ex CP 19/2009) implemented by the authorities of Castile-La Mancha for the deployment of digital terrestrial television in remote and less urbanised areas in Castile-La Mancha (DTT roll out in Castilla-La Mancha; SA.27408, 1.10.2014), available at http://ec.europa.eu/competition/state_aid/cases/237771/237771_1657032_272_4.pdf.

⁽¹⁷⁾ Judgments of the Court of 26 April 2018 in joined cases C-91/17 P and C-92/17 P, *Cellnex Telecom v Commission*, EU:C:2018:284, and of 20 September 2018 in case C-114/17 P, *Spain v Commission*, EU:C:2018:753.

⁽¹⁸⁾ Resolución relativa al procedimiento de imposición de condiciones para la explotación de una red de banda ancha en zonas rurales de la Comunidad Autónoma de Castilla-La Mancha (MTZ 2010/2249), of 23 June 2011, available at: <https://www.cnmc.es/sites/default/files/1505025.pdf>.

- (41) The tender documents did not include initially the requirement of a claw-back mechanism because it was considered redundant since the maximum aid amount of EUR 16 million was found to be likely not sufficient for the deployment of the network and the project for the beneficiary therefore unlikely to be profitable. However, the CMT decided that the JCCM should impose on Telecom CLM a claw-back mechanism so that, in the event of an increase in demand or a change in the business figures resulting in a change of profits from the operation of the network that would go beyond the average profits achieved in the sector, a percentage of the excess profit equivalent to that represented by the aid received in relation to the total investment should be returned to the JCCM.
- (42) Therefore, the JCCM submitted the following claw back mechanism to the CMT:

'The business plan included in the offer on the basis of which this contract was awarded considered a take-up rate of the broadband service of 10 % of the target population. On the basis of this, annual turnover is expected to be 6,3 % of the contract award budget (EUR 15 845 301,84).

During the first quarter of each calendar year corresponding to the period of operation of the network, the take-up rate of the broadband service offered to the target population of the contract will be reviewed. By virtue of this review, the following claw-back criteria will be applied:

- (1) If the take-up rate of the service is equal to or less than 12 % of the target population, no claw-back will be applied.
- (2) If the take-up rate of the service is greater than 12 % and equal to or less than 15 % of the target population, the following claw-back rule will apply:

$$\text{Return (\% of award budget)} = 0,28 \times (\text{take-up rate (\%)} - 12 \%)$$

- (3) If the take-up rate of the service is greater than 15 % of the target population, the following claw-back rule will apply:

$$\text{Return (\% of award budget)} = 0,28 \times \text{take-up rate (\%)} - 2,8 \%$$

- (43) The CMT approved the proposed changes. Telecom CLM and the JCCM implemented the measures ordered by the CMT through addenda to the contract signed in September 2010. The new claw-back mechanism became effective on 1 June 2012.

2.8. The complainant

- (44) The complainant, Difusión Herciana S.L., is a private company providing support for broadcasting and television services, based in Madrid, Spain.
- (45) The complainant alleged that the award of the contract to Telecom CLM constituted incompatible State aid in favour of Telecom CLM. It alleged that the tender procedure had not guaranteed that the most economically advantageous tender was chosen and that the JCCM's intervention had not been sufficiently validated through an appropriate public consultation and mapping exercise. According to the complainant, most of the project's target areas had in fact been 'grey' areas within the meaning of the 2009 Broadband Guidelines and not 'white' areas. Furthermore, the complainant alleged that the project had not been technologically neutral because it had foreseen the use of the existing DTT infrastructure. Finally, the complainant argued that Telecom CLM's wholesale access prices to the established basic broadband network had been anti-competitive and criticised that the contract signed between the JCCM and Telecom CLM in September 2010 had not contained a claw-back clause.

2.9. Grounds for initiating the procedure

- (46) In the opening decision, the Commission considered that the award of the contract to Telecom CLM had constituted State aid within the meaning of Article 107(1) TFEU and that this aid had been granted in breach of the notification and stand-still obligations established in Article 108(3) TFEU. In particular, the Commission considered that the award of the contract to Telecom CLM had conferred an economic advantage on Telecom CLM even though the contract had been awarded as a result of an open tender procedure.
- (47) Furthermore, the Commission expressed doubts as to whether the award of the contract to Telecom CLM had been compatible with the 2009 Broadband Guidelines.

- (48) First, it appeared to the Commission that the JCCM had not publicly consulted stakeholders in relation to this specific public investment to identify existing or future private investment plans in the target areas but had only conducted a market analysis to identify existing broadband networks by using already available data (see recital (30) of the opening decision). Second, the Commission was concerned that the tender process conducted by the JCCM had not been in line with the provisions of the 2009 Broadband Guidelines for transparency and for the most economically advantageous tender (see recital (31) of the opening decision). Third, the Commission was concerned that the measure did not fulfil the condition of the 2009 Broadband Guidelines concerning technological neutrality (see recital (32) of the opening decision). Fourth, the Commission was concerned that the measure did not comply with the requirements of the 2009 Broadband Guidelines concerning wholesale access and a claw-back mechanism to avoid overcompensation (see recital (33) of the opening decision). Finally, the Commission considered that, in line with the principle established in the *Deggendorf* case ⁽¹⁹⁾, the fact that Telecom CLM had not yet repaid the aid declared incompatible with the internal market by the Commission in case SA.27408 ⁽²⁰⁾ had to be taken into consideration in the compatibility assessment of the measure (see recital (37) of the opening decision).
- (49) Hence, the Commission could not exclude that the award of the contract to Telecom CLM in September 2010 was incompatible with the internal market.

3. COMMENTS FROM THE KINGDOM OF SPAIN

3.1. General remarks

- (50) In its response to the opening decision, the Kingdom of Spain submitted comments by the JCCM, arguing, first, that no economic advantage has been conferred to Telecom CLM and, second, that, if it were considered nonetheless that State aid had been granted, the aid was compatible with the internal market, as it was in line with the 2009 Broadband Guidelines. Furthermore, the Kingdom of Spain has argued that the alleged aid must be considered compatible with the internal market under the GBER ⁽²¹⁾.

3.2. Absence of economic advantage

- (51) According to the Kingdom of Spain, the opening decision does not identify the specific advantage Telecom CLM allegedly has obtained and only explains why the existence of an advantage could not be ruled out. The Kingdom of Spain points to the fact that the new infrastructure has been acquired directly and exclusively by the JCCM and not by Telecom CLM, and that operation of the basic broadband network by Telecom CLM over the period of 5 years has been unprofitable.
- (52) The Kingdom of Spain states that an advantage could have existed only if the compensation paid to Telecom CLM for its services had exceeded the market price. However, an open tender procedure had guaranteed that the amount of State funds granted has been limited to the minimum necessary for the implementation of the project.
- (53) The Kingdom of Spain is of the opinion that the existence of an advantage must be assessed by comparing the financial situation of the beneficiary following the measure and its hypothetical financial situation if the measure had not been taken. The Kingdom of Spain claims that the sums paid to Telecom CLM under the awarded contract did not exceed its costs for deploying the basic broadband network under the contract and that Telecom CLM therefore has not benefitted from a better financial situation after the award of the contract in September 2010.

⁽¹⁹⁾ Judgment of the Court of 15 May 1997 in case C-355/95 P *Textilwerke Deggendorf GmbH (TWD) v Commission of the European Communities and Federal Republic of Germany*, ECLI:EU:C:1997:241.

⁽²⁰⁾ Cf. footnote 16 above.

⁽²¹⁾ 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) (GBER).

- (54) Finally, the Kingdom of Spain acknowledges that the financial support given to Telecom CLM enabled it to enter a new market. However, it argues that facilitation of market entry could not be considered State aid if that market has been unprofitable ⁽²²⁾.

3.3. Compatibility of the measure under the 2009 Broadband Guidelines

- (55) The Kingdom of Spain contests the Commission's analysis in the opening decision, arguing that the Commission analysed the compatibility of the measure at the point in time of the contract award to Telecom CLM. The Kingdom of Spain suggests that, in order to assess the project's impact on competition, the correct point in time for the analysis would be the start of operation of the deployed basic broadband network in September 2012, i.e., after the implementation by the JCCM and Telecom CLM of the changes ordered by the CMT.

3.3.1. Stakeholder consultation

- (56) As regards the consultation of stakeholders, the Kingdom of Spain claims that the JCCM has conducted a thorough consultation of all parties affected by the measure, in line with the 2009 Broadband Guidelines. It points out that the 2009 Broadband Guidelines, unlike the 2013 Broadband Guidelines ⁽²³⁾, did not require a public consultation of stakeholders but rather a "thorough consultation" of stakeholders. According to the Kingdom of Spain, the JCCM held numerous bilateral consultations with all operators that were deploying broadband services in the region at the time. First contacts are reported to have taken place between May and October 2009. The relevant operators were known to the JCCM due to the statutory requirement for broadband operators to annually submit Territorial Deployment Plans. The Kingdom of Spain considers that the approach taken by the JCCM has been accepted by the Commission in other cases as thorough consultation within the meaning of the 2009 Broadband Guidelines.
- (57) In relation to the lack of consultation with the complainant, the Kingdom of Spain points out that the complainant was not registered as a broadband operator with the CMT. The Kingdom of Spain suggests, referring to statements allegedly made by the complainant's legal representative in a meeting with the JCCM in May 2016, that the complainant never provided broadband services in the past and had no interest of doing so in the future.

3.3.2. Mapping of target areas

- (58) In view of the Commission's doubts about the JCCM's categorisation of the 461 target areas as 'white' within the meaning of the 2009 Broadband Guidelines, which were based on the CMT's findings in its decision of 23 June 2011, the Kingdom of Spain reaffirms that all 461 target areas were 'white' areas within the meaning of the 2009 Broadband Guidelines. The Kingdom of Spain explains the divergent assessment of the CMT by the fact that the CMT undertook the mapping at municipal level only and has categorised as 'grey' target areas municipalities with broadband coverage of 50 % of their population or higher. Instead, the JCCM analysed the project's target areas at a more granular level by subdividing the region's municipalities into numerous districts and by identifying 'white' target areas on this basis.

⁽²²⁾ In the preliminary investigation, the Kingdom of Spain had argued that, while the JCCM has not entrusted the project to Telecom CLM as a Service of General Economic Interest (SGEI), it could take measures, in line with Directive 2002/22/EC of the European Parliament and of the Council of 7 March 2002 on universal service and users' rights relating to electronic communications networks and services (OJ L 108, 24.4.2002, p. 51) (Universal Service Directive) to ensure the supply of services other than those covered by the universal service concept, such as broadband services (see recital (11) of the opening decision). The Commission addressed and rejected this argument in the opening decision (see recital (20) of the opening decision). The Kingdom of Spain did not comment on this point in its comments on the opening decision and no longer claims that the project was entrusted to Telecom CLM in line with the Universal Service Directive.

⁽²³⁾ 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) (2013 Broadband Guidelines).

3.3.3. Selection procedure

- (59) In response to the Commission's doubts whether the tender procedure conducted by the JCCM was in line with the provisions of the 2009 Broadband Guidelines for transparency and for the most economically advantageous tender, the Kingdom of Spain contests that the 'subjective' award criteria (36/100) were arbitrary solely because they were not allocated based on mathematical formulae. The Kingdom of Spain refers to earlier Commission decisions ⁽²⁴⁾ where it considers that such qualitative award criteria were not considered arbitrary and considers that the 'subjective' award criteria used by the JCCM in the tender procedure were in line with the rules established in the case-law of the Court of Justice. ⁽²⁵⁾ Furthermore, the JCCM has specified in the tender documents the relative weight it would give to each of the qualitative criteria. As regards the Commission's criticism of the low weight that was given to the price criterion within the award criteria (10/100), the Kingdom of Spain points out that the alleged beneficiary submitted the lowest price bid of those bids that were not excluded from the final selection procedure on the grounds that they did not meet the technical requirements for the basic broadband network and submits that the Commission has accepted a low weight for the price criterion in other cases ⁽²⁶⁾. The Kingdom of Spain further notes that the CMT did not identify any issues in this regard in its decision of 23 June 2011 and refers to earlier Commission decisions where low weight on the price criterion has not been considered problematic ⁽²⁷⁾.

3.3.4. Technological neutrality

- (60) Regarding the technological neutrality of the tendered project, the Kingdom of Spain considers that the design of the measure has not favoured any particular technology or network platform. It refers to the technical specifications in the tender documents to point out that the JCCM has not required the bidders to deploy a specific technological solution. Rather, it has invited them to propose the solution that they deem most suitable for each territorial area. The Kingdom of Spain claims that the tendered contract allowed for any technological solution as long as that solution met the technical requirements for the network. By way of example, the Kingdom of Spain refers to the different technological solutions and combinations of technologies offered by the two qualifying bidders in the tender procedure.
- (61) The Kingdom of Spain justifies the reference in the tender documents to the possibility of re-using existing DTT infrastructure by the need to comply with the 2009 Broadband Guidelines. The Kingdom of Spain points out that under the 2009 Broadband Guidelines the authorities should consider the re-use of existing infrastructure to the extent possible. The Kingdom of Spain stresses that the option to re-use existing infrastructure has been offered to all interested bidders and that all but one of the bids received have contained offers relying on this existing infrastructure.

3.3.5. Wholesale access and claw-back clause

- (62) Regarding the Commission's doubts concerning the compatibility of the wholesale access conditions offered by Telecom CLM and the lack of a contractual claw-back mechanism, the Kingdom of Spain limits its comments to pointing out that these issues were resolved by 29 July 2011. In response to the CMT's decision of 23 June 2011, Telecom CLM significantly lowered its wholesale access prices for third parties and a claw-back clause was introduced in the contract between the JCCM and Telecom CLM.

⁽²⁴⁾ Such as the decision in issue in Case T-169/00 *Esedra v Commission*, EU:T:2002:40.

⁽²⁵⁾ The Kingdom of Spain refers to Case C-513/99 *Concordia Bus Finland*, EU:C:2002:495.

⁽²⁶⁾ The Kingdom of Spain explained in the preliminary investigation that the reason for the low weight of the price criterion was on the one hand that the JCCM would acquire the network and was therefore interested in other qualitative criteria and that the available aid of EUR 16 million was considered not enough for the deployment of the network, which is why it was expected that the price criterion would play an insignificant role (expecting that all bidders would need the full amount of EUR 16 million for the deployment of the network) and that against this background a too high emphasis on the price criterion would give a significant advantage to operators with existing infrastructure in the region. The Kingdom of Spain further refers to case N323/2009, cf. footnote 27 below.

⁽²⁷⁾ The Kingdom of Spain refers to Commission Decision C (2009)10259 final of 14 December 2009 in case N323/2009 (SA.28665), Broadband in rural areas of Asturias, where the Commission declared compatible aid granted via a tender procedure in which the price factor, together with the project's financial viability, was given a weight of maximum 15 points out of a total of 90. The decision is accessible at: https://ec.europa.eu/competition/state_aid/cases/231480/231480_1087482_29_1.pdf.

3.3.6. GBER

- (63) The Kingdom of Spain also takes the view that the contract award, insofar as it constitutes State aid within the meaning of Article 107(1) TFEU, falls within the scope of the GBER and is compatible with the internal market considering the provisions set out therein. The Kingdom of Spain submits that pursuant to Article 58, the GBER applies retroactively to unlawful individual aid and that on 1 July 2014, the date of entry into force of the GBER, all conditions of Article 52 GBER, applicable to broadband measures, had been met.

3.3.7. Deggendorf-case principle

- (64) The Kingdom of Spain submits that the principle established in the *Deggendorf* ⁽²⁸⁾ case cannot be applied in the compatibility assessment of an aid measure. Therefore, the fact that Telecom CLM had not repaid the aid declared incompatible with the internal market by the Commission decision in case SA.27408 ⁽²⁹⁾ should be considered irrelevant for the compatibility assessment of the measure.

4. COMMENTS FROM INTERESTED PARTIES

- (65) The Commission received comments on the opening decision from one interested party, the alleged aid beneficiary, Telecom CLM.

4.1. General remarks

- (66) Telecom CLM focuses its arguments largely on the same points as the Kingdom of Spain. First, Telecom CLM argues that Telecom CLM did not receive any economic advantage. Second, Telecom CLM considers that the measure has not been selective and has not affected trade between Member States. Third, Telecom CLM submits that, even if the contract award had to be considered as State aid, it would be compatible with the internal market under Article 106(2) TFEU and Commission Decision 2005/842/EC (the 2005 SGEI Decision) ⁽³⁰⁾, under Article 107(3), point (c), TFEU and the 2009 Broadband Guidelines, as well as under the GBER.

4.2. Absence of aid within the meaning of Article 107(1) TFEU

4.2.1. Economic advantage

- (67) Telecom CLM argues that the contract awarded to Telecom CLM in August 2010 and signed by Telecom CLM and the JCCM in September 2010 constituted an entrustment act by which the JCCM entrusted Telecom CLM with the provision of an SGEI. Based on that finding, Telecom CLM submits that the principles established by the Court of Justice in its *Altmark* judgment ⁽³¹⁾ have been applicable to the compensation paid by the JCCM to Telecom CLM in

⁽²⁸⁾ Cf. footnote 19 above.

⁽²⁹⁾ Cf. footnote 16 above.

⁽³⁰⁾ Commission Decision 2005/842/EC of 28 November 2005 on the application of Article 86(2) of the EC Treaty to State aid in the form of public service compensation granted to certain undertakings entrusted with the operation of services of general economic interest (OJ L 312, 29.11.2005, p. 67) (2005 SGEI Decision).

⁽³¹⁾ Judgment of the Court of 24 July 2003 in case C-280/00 *Altmark Trans GmbH and Regierungspräsidium Magdeburg v Nahverkehrs-gesellschaft Altmark GmbH*, ECLI:EU:C:2003:415.

consideration for the provision of the agreed SGEI. Telecom CLM further argues that all four conditions ⁽³²⁾ established by the Court of Justice in *Altmark* have been fulfilled, which is why the award of the contract did not constitute an economic advantage for Telecom CLM and thus did not constitute State aid within the meaning of Article 107(1) TFEU.

- (68) In the alternative, Telecom CLM submits that it has not received any economic advantage because (i) the deployed broadband infrastructure was directly acquired by the JCCM, (ii) there was an open tender procedure for selecting the beneficiary that was conducted in accordance with the applicable rules, (iii) Telecom CLM's financial situation after the contract award was not better than it would have been without the contract award and (iv) the market to which Telecom CLM received easier access has been unprofitable. Telecom CLM finally argues that, even if there has been an economic advantage, the Commission has failed to identify it.

4.2.2. *Selectivity, distortion of competition and effect on trade between Member States*

- (69) As concerns the remaining requirements of Article 107(1) TFEU, Telecom CLM contests that the contract award has been selective, that it has distorted or threatened to distort competition and that it has affected trade between Member States, on the basis that the Commission failed adequately to demonstrate or explain why those conditions had been fulfilled.

4.3. **Compatibility of the alleged aid**

- (70) Telecom CLM is of the opinion that the alleged aid has been compatible with the internal market.

4.3.1. *Article 106(2) TFEU and the 2005 SGEI Decision*

- (71) Telecom CLM submits that even if the Commission were to consider that the contract award to Telecom CLM has not fulfilled all four *Altmark* conditions, it has been compatible with the internal market under Article 106(2) TFEU and the 2005 SGEI Decision. Telecom CLM argues that the JCCM entrusted it with the provision of an SGEI by signing the contract in September 2010 and that the EUR 15,85 million of compensation paid to Telecom CLM did not exceed the costs incurred by Telecom CLM in discharging the public service obligations taken on in the contract. According to Telecom CLM, the contract award fell within the scope of the 2005 SGEI Decision because Telecom CLM's average annual turnover before tax in the 2 years preceding the contract award had been below the EUR 100 million threshold and the amount of compensation received by Telecom CLM was below the EUR 30 million threshold laid down in the 2005 SGEI Decision.

4.3.2. *Article 107(3), point (c), TFEU and the 2009 Broadband Guidelines*

- (72) Telecom CLM's observations regarding the compatibility of the contract award under Article 107(3), point (c), TFEU and the 2009 Broadband Guidelines largely reproduce the arguments submitted by the Kingdom of Spain in its response to the opening decision.

⁽³²⁾ The four *Altmark* conditions are:

The recipient undertaking must actually have public service obligations to discharge, and the obligations must be clearly defined; The parameters on the basis of which the compensation is calculated must be established in advance in an objective and transparent manner, to avoid it conferring an economic advantage which may favour the recipient undertaking over competing undertakings; The compensation cannot exceed what is necessary to cover all or part of the costs incurred in the discharge of public service obligations, taking into account the relevant receipts and a reasonable profit; and Where the undertaking which is to discharge public service obligations, in a specific case, is not chosen pursuant to a public procurement procedure which would allow for the selection of the tenderer capable of providing those services at the least cost to the community, the level of compensation needed must be determined on the basis of an analysis of the costs which a typical undertaking, well run and adequately provided with means of transport so as to be able to meet the necessary public service requirements, would have incurred in discharging those obligations, taking into account the relevant receipts and a reasonable profit for discharging the obligations.

- (73) Telecom CLM's comments on the JCCM's mapping of target areas and stakeholder consultations are substantially identical with the Kingdom of Spain's submissions summarised in sections 3.3.1 and 3.3.2 above.
- (74) Regarding the open tender procedure conducted by the JCCM, Telecom CLM submits that the use of *qualitative* award criteria by the JCCM was in line with public procurement rules and with Directive 2004/18/EC of the European Parliament and of the Council ⁽³³⁾ in particular as well as with the 2009 Broadband Guidelines. Telecom CLM submits that the Commission misinterprets the concept of *most economically advantageous offer* by equating it with the meaning of *lowest price*. All further arguments in this regard are substantially identical to the Kingdom of Spain's submission summarised in section 3.3.3 above.
- (75) Telecom CLM's observations on the technological neutrality of the tender, the wholesale access obligation and claw-back clause are also substantially identical to the Kingdom of Spain's submissions as summarised in sections 3.3.4 and 3.3.5 above.

4.3.3. GBER

- (76) Telecom CLM further submits that the measure was subject to the retroactive application of the GBER and that all GBER requirements were met at the date of entry into force of the GBER on 1 July 2014. Telecom CLM takes the view that the application of the GBER to Telecom CLM was not excluded because of the outstanding recovery of the illegal aid granted to it in case SA.27408 ⁽³⁴⁾. Telecom CLM submits in this regard that Article 1(4), point (a), GBER only applies to aid schemes whereas the measure was an individual measure. Furthermore, on 1 July 2014, the time of entry into force of the GBER and hence at the time of its application to the measure, a recovery order concerning illegal State aid in case SA.27408 did not yet exist because the final decision with recovery order in case SA.27408 was adopted only on 1 October 2014.

4.3.4. Degendorf case-law principle

- (77) Telecom CLM submits that the aid it received in case SA.27408 and its non-repayment had no relevance for the compatibility of the measure. Telecom CLM also takes the view that any repayment of the illegal aid received in case SA.27408 was no longer necessary because Telecom CLM had transferred all DTT broadcasting equipment owned by it to the JCCM by May 2013.

5. ASSESSMENT OF THE MEASURE

5.1. Existence of State aid within the meaning of Article 107(1) TFEU

- (78) 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'.
- (79) 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 to the undertaking, (iv) the economic advantage has to be selective, (v) and the measure has an effect on trade and competition.

5.1.1. Undertaking

- (80) 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 ⁽³⁵⁾.

⁽³³⁾ Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts (OJ L 134, 30.4.2004, p. 114).

⁽³⁴⁾ Cf. footnote 16 above.

⁽³⁵⁾ Judgment of the Court of Justice of 10 January 2006 in case C-222/04 *Cassa di Risparmio di Firenze SpA and Others*, EU:C:2006:8, paragraph 107.

- (81) The direct beneficiary of the measure is Telecom CLM.
- (82) On 17 August 2010, Telecom CLM was awarded a contract for the establishment and operation of a basic broadband network in unserved rural districts of municipalities of the region of Castilla-La Mancha for EUR 15,85 million. Telecom CLM had to develop and establish the infrastructure of a basic broadband network for the JCCM and was given the right to operate this network for initially 5 years. This right to operate the network was later extended twice by 1 year until September 2019.
- (83) Telecom CLM made direct use of the infrastructure to provide wholesale services to access seekers and retail broadband services, including IP telephony/voice over IP, to end-users in the target areas. This constitutes an economic activity. Telecom CLM is therefore considered an undertaking within the meaning of Article 107(1) TFEU.

5.1.2. State resources and imputability

- (84) State resources include all resources of the public sector ⁽³⁶⁾, including resources of intra-State entities (decentralised, federated, regional or other) ⁽³⁷⁾ and, under certain circumstances, resources of private bodies. In cases where a public authority grants an advantage to a beneficiary, the measure is imputable to the State, even if the authority in question enjoys legal autonomy from other public authorities.
- (85) In the case at hand, the measure was financed in equal parts by the Spanish national government and the JCCM, an intra-State entity and public authority at regional level and was granted through a tender organised by the JCCM. The Commission therefore concludes that the measure was granted through State resources and was imputable to the Kingdom of Spain.

5.1.3. Economic advantage

- (86) 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, in the absence of State intervention ⁽³⁸⁾.

5.1.3.1. No entrustment of Telecom CLM with the provision of an SGEI

- (87) According to the *Altmark* case-law ⁽³⁹⁾, State funding for the provision of an SGEI within the meaning of Article 106(2) TFEU does not constitute an advantage for the purposes of Article 107(1) TFEU, provided that four main conditions ⁽⁴⁰⁾ are met.
- (88) The four *Altmark* conditions are:
- (1) The recipient undertaking must actually have public service obligations to discharge, and the obligations must be clearly defined;
 - (2) The parameters on the basis of which the compensation is calculated must be established in advance in an objective and transparent manner, to avoid it conferring an economic advantage which may favour the recipient undertaking over competing undertakings;
 - (3) The compensation cannot exceed what is necessary to cover all or part of the costs incurred in the discharge of public service obligations, taking into account the relevant receipts and a reasonable profit; and
 - (4) Where the undertaking which is to discharge public service obligations, in a specific case, is not chosen pursuant to a public procurement procedure which would allow for the selection of the tenderer capable of providing those services at the least cost to the community, the level of compensation needed must be determined on the basis of an analysis of the costs which a typical undertaking, well run and adequately equipped to meet the necessary public service requirements, would have incurred in discharging those obligations, taking into account the relevant receipts and a reasonable profit for discharging the obligations.

⁽³⁶⁾ Judgment of the Court of First Instance of 12 December 1996 in case T-358/94, *Air France v Commission*, ECLI:EU:T:1996:194, paragraph 56

⁽³⁷⁾ Judgment of the Court of First Instance of 6 March 2002 in joined cases T-92/00 and 103/00, *Territorio Histórico de Álava and Others v Commission*, ECLI:EU:T:2002:61, paragraph 57.

⁽³⁸⁾ Judgment of the Court of 29 April 1999 in case C-342/96, *Spain v Commission*, ECLI:EU:C:1999:210, paragraph 41.

⁽³⁹⁾ Cf. footnote 31 above.

⁽⁴⁰⁾ Cf. footnote 32 above.

- (89) The first condition requires that the beneficiary of a State funding mechanism for an SGEI must have been formally entrusted with the provision and discharge of an SGEI, the obligations of which must have been clearly defined.
- (90) The Kingdom of Spain, however, does not consider that an SGEI has been awarded (see section 3.2 above). Telecom CLM argues that the contract awarded to it constituted an entrustment act by which the JCCM entrusted Telecom CLM with the provision of an SGEI (see recital (67) above).
- (91) The existence of an entrustment act pursuant to the first *Altmark* condition mentioned above requires that a public service task be assigned by way of an act, which may take the form of a contract. However, this act must at least specify, amongst other things, the parameters for calculating, controlling, and reviewing the compensation and the arrangements for avoiding and recovering any overcompensation ⁽⁴¹⁾.
- (92) The contract between the JCCM and Telecom CLM did not contain a claw-back clause and thus no arrangements for avoiding and recovering any overcompensation. A claw-back mechanism was incorporated in the contract only in July 2011 in reaction to the intervention of the CMT, i.e., almost 1 year after the award and signature of the contract in August and September 2010, respectively.
- (93) Furthermore, the contract awarded to Telecom CLM does not refer to the assignment of an SGEI or other public service obligations to Telecom CLM nor does it set the parameters for calculating, controlling, and reviewing the compensation to be paid to Telecom CLM for the operation of an SGEI. This also indicates that the JCCM did not intend to assign an SGEI or other public service obligations to Telecom CLM when awarding the contract. It therefore cannot be considered that the JCCM entrusted Telecom CLM with the discharge of public service obligations when awarding and signing the tendered contract.
- (94) Due to the cumulative nature of the four *Altmark* criteria, if any of these criteria are not fulfilled, the compensation will be deemed to constitute an advantage within the meaning of Article 107(1) of the TFEU. Since at least one of the four *Altmark* criteria is not fulfilled in the present case, the Commission concludes that the argument that the JCCM assigned the provision of an SGEI to Telecom CLM through the awarded contract must therefore be rejected.

5.1.3.2. The award of the contract as an economic advantage

- (95) The JCCM awarded Telecom CLM a contract for the establishment of a basic broadband network to be acquired directly by the JCCM and for its operation at Telecom CLM's own economic risk for 5 years with the possibility of extending that period for an additional 2 years. Telecom CLM was awarded EUR 15,85 million, paid in five instalments between 20 April 2012 and 26 November 2012, following the completion of the establishment of the basic broadband infrastructure.
- (96) Therefore, in addition to the amount granted for the deployment of the basic broadband network, which was acquired by the JCCM, Telecom CLM acquired the right to operate the network for at least 5 years and thus had the right to enjoy the economic benefits from exploiting that network both for the provision of wholesale services and retail services.
- (97) The Commission considers that, based on the invoices issued by Telecom CLM to the JCCM in the process of the deployment of the basic broadband network, in light of the cost studies for the deployment of a basic broadband network in the target areas that had been carried out by the JCCM (see recital (13) above), and in light of the submissions by the Kingdom of Spain and Telecom CLM, the price of EUR 15,85 million for which the contract was awarded covered in principle the costs for the establishment of the basic broadband network. However, Telecom CLM not only deployed the network, but also could enjoy the economic benefits of the basic broadband network, i.e., the commercial provision of wholesale access services to electronic communications operators as well as basic broadband retail services to end-users, including IP telephony/voice over IP services, for at least 5 years.

⁽⁴¹⁾ See Communication from the Commission on the application of the European Union State aid rules to compensation granted for the provision of services of general economic interest (OJ C 8, 11.1.2012, p. 4), at paragraph 52.

- (98) Operators who make use of aided infrastructure to provide services to end-users receive an advantage if the use of the infrastructure provides them with an economic benefit that they would not have obtained under normal market conditions ⁽⁴²⁾. In the case of broadband infrastructure, there is an advantage for the operators who make use of the publicly funded infrastructure to provide services to end-users if what they pay for the right to exploit the infrastructure is less than what they would pay for a comparable infrastructure under normal market conditions ⁽⁴³⁾.
- (99) Through the award of the contract, Telecom CLM deployed the network on the expense of the JCCM and acquired the right to operate and exploit the JCCM's basic broadband network for at least 5 years without remuneration. Under normal market conditions, operators/owners of broadband infrastructure gain revenues by making available their network to other operators or by providing retail services to end-users. Moreover, access seekers pay wholesale access prices for the right to use the broadband infrastructure to the operators/owners of that network. Therefore, the JCCM could have gained revenues by making available the deployed network to access seekers and providing services to end-users. That was the case also for Telecom CLM, which sold broadband retail services to end-users, including IP telephony/voice over IP, and wholesale services to third parties for its own economic benefit.
- (100) The Kingdom of Spain and Telecom CLM argue that Telecom CLM has not received an economic advantage within the meaning of Article 107(1) TFEU because the JCCM directly acquired the infrastructure to be developed by Telecom CLM, the open tender procedure guaranteed that the amount of funds granted to Telecom CLM was limited to the minimum necessary, Telecom CLM's financial situation was not better after the award of the contract than before and the basic broadband network operated by Telecom CLM was unprofitable (see recitals (51)–(54) and (68) above).
- (101) As described above (see recitals (95)–(99)), whilst the deployed new basic broadband network has been acquired directly by the JCCM and not by Telecom CLM, Telecom CLM was granted the exclusive right of operation for 5 years, which is why Telecom CLM has received an economic advantage due to the awarded contract.
- (102) As regards the argument that the basic broadband network operated by Telecom CLM over the period of 5 plus 2 years has been unprofitable, the Kingdom of Spain and Telecom CLM did not substantiate that claim with supporting evidence. In any event, this argument is irrelevant for the purposes of determining the existence of an economic advantage for Telecom CLM at the moment of the award of the contract. The decisive element is whether the public bodies acted as a market economy operator would have done in a similar situation. However, a market economy operator in a similar situation as the JCCM would not have granted the operator of the yet to be established basic broadband network the right to exploit that infrastructure for 5 plus 2 years for its own economic benefit without remuneration at market price level. A market economy operator in a similar situation as the JCCM would have sought to maximise its own economic benefit. However, the Kingdom of Spain failed to provide any evidence that a market operator would have granted the right to exploit the broadband infrastructure without any remuneration. Rather, the available documentation shows that under the contract awarded Telecom CLM could operate the infrastructure and provide its services, including IP telephony/voice over IP, against payment to wholesale access seekers and end-users at its own economic risk and for its own economic benefit, without paying consideration to the JCCM, the owner, at market price level.
- (103) The Commission further notes that a competitive, transparent, non-discriminatory, and unconditional tender procedure could eliminate aid under certain conditions in the case of concession to operate the infrastructure, among others if the right is assigned for a positive price. However, the tender does not negate the existence of an economic advantage for Telecom CLM, since there was no positive price in that tender for the operation of the infrastructure to be paid by the beneficiary to the owner of the infrastructure. The awarded contract enabled Telecom CLM to conduct a commercial activity, i.e., the operation and exploitation of the infrastructure for its own economic benefit for 5 plus 2 years, on conditions that are not otherwise available on the market.

⁽⁴²⁾ See Commission Notice on the notion of State aid as referred to in Article 107(1) of the Treaty on the Functioning of the European Union (OJ C 262, 19.7.2016, p. 1) (Notice on the notion of State aid), at paragraph 223.

⁽⁴³⁾ See Notice on the notion of State aid (footnote 42 above), paragraph 223.

- (104) Finally, as regards the financial situation of the beneficiary following the measure and its hypothetical financial situation if the measure had not been taken, the Commission considers that the consideration of this general principle does not change the outcome of the analysis of the existence of an economic advantage for Telecom CLM. The Kingdom of Spain and Telecom CLM claim that the compensation paid to Telecom CLM did not exceed its costs and that Telecom CLM therefore has not benefitted from a better financial situation after the award of the contract in September 2010. This view does not consider, however, that Telecom CLM was also granted the right of operation and exploitation of the basic broadband infrastructure for its own economic benefit for 5 plus 2 years and without paying a remuneration to the JCCM, the owner, at market price level.
- (105) The Commission therefore concludes that through the award of the contract, JCCM granted Telecom CLM an advantage, which would not have been available under normal market conditions.

5.1.4. *Selectivity*

- (106) To fall within the scope of Article 107(1) TFEU, a State measure must favour ‘certain undertakings or the production of certain goods’. The measure favours Telecom CLM as the only recipient.
- (107) The measure targets one single undertaking active in the electronic communications sector to the exclusion of all other undertakings active in this sector. Furthermore, the measure is limited to the use by basic broadband network operators and does not concern the operation of a general infrastructure, which would be open to anyone on a non-discriminatory basis.
- (108) Given that the present case concerns an individual aid measure, the identification of the economic advantage (see recitals (95)–(105) above) is sufficient to support the presumption that the measure is selective ⁽⁴⁴⁾. In any event, it does not appear that other undertakings in the same or other sectors in a comparable factual and legal situation benefit from the same advantage.
- (109) The Commission therefore concludes that the measure was selective.

5.1.5. *Effect on trade and competition*

- (110) Public support to undertakings only constitutes State aid under Article 107(1) TFEU if it ‘distorts or threatens to distort competition’ and only insofar as it ‘affects 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’ ⁽⁴⁵⁾.
- (111) The broadband sector in Spain has access to significant private financing for the development and operation of basic broadband networks all over the country. An effect on trade and a distortion of competition is therefore not excluded.
- (112) The development and operation of infrastructure for basic broadband networks constitutes a service in a liberalised sector where usually there is, or could be, competition. Telecom CLM is active in this sector and has been granted a financial advantage by the JCCM, which is liable to improve its competitive position compared to other undertakings active in this sector.

⁽⁴⁴⁾ See cases C-15/14 P, *Commission v MOL*, EU:C:2015:362, paragraph 60; C-270/15 P *Belgium v Commission*, EU:C:2016:489, paragraph 49; T-314/15 *Greece v Commission*, EU:T:2017:903, paragraph 79.

⁽⁴⁵⁾ Judgment of the Court of First Instance of 4 April 2001 in case T-288/97, *Regione Friuli Venezia Giulia v Commission*, ECLI:EU:T:2001:115, paragraph 41.

- (113) The intervention of the JCCM in the development and operation of a basic broadband network in 461 rural and unserved districts of municipalities in the region has altered existing market conditions. Because of the measure, natural persons and undertakings established in these areas could choose to subscribe to the basic broadband services provided by Telecom CLM, including IP telephony/voice over IP, instead of other, possibly more expensive alternative market-based solutions, such as satellite connections.
- (114) Undertakings active in the development and operation of infrastructure for basic broadband networks and the provision of retail broadband services can compete in intra-Union trade as many of them are active in more than one Member State. The markets for electronic communications services (including the wholesale and the retail broadband markets) are open to competition between operators and service providers. Other undertakings active in these markets and in more than one Member State may therefore be considered affected by the financial advantage for Telecom CLM.
- (115) The Commission therefore concludes that the measure was capable of distorting competition and liable to affect trade between Member States.

5.1.6. Conclusion

- (116) The Commission concludes that the measure constituted State aid within the meaning of Article 107(1) TFEU.

5.2. Lawfulness of the aid

- (117) The Kingdom of Spain did not notify the measure to the Commission pursuant to Article 108(3) TFEU (see recital (30) above). The Commission therefore concludes that the aid was unlawful.

5.3. Compatibility of the aid

- (118) The Commission has assessed the compatibility of the aid according to Article 107(3), point (c), TFEU and based on the 2009 Broadband Guidelines and not under Article 106(2) TFEU or the GBER ⁽⁴⁶⁾.
- (119) Article 106(2) TFEU provides the legal basis for assessing the compatibility of State aid for SGEIs. It states that undertakings entrusted with the operation of SGEIs or having the character of a revenue-producing monopoly are subject to the rules on competition. However, the Commission concluded that Telecom CLM has not been entrusted with an SGEI when the JCCM awarded the contract to it in August 2010. Furthermore, the Commission established that no other public service obligations were entrusted to Telecom CLM when awarding the contract and the contract neither included a compensation mechanism nor the parameters for calculating, monitoring and reviewing the compensation (see recitals (87)–(94) above).
- (120) Pursuant to Article 58(1) GBER ⁽⁴⁷⁾, the GBER applies to individual aid granted before its entry into force, if the aid fulfils all the conditions laid down in the GBER, with the exception of Article 9. Pursuant to Article 52(1) GBER in force at the time, investment aid for broadband network development shall be compatible with the internal market pursuant to Article 107(3) TFEU and shall be exempted from the notification requirement of Article 108(3) TFEU, provided that the conditions laid down in Article 52 GBER and Chapter I GBER are fulfilled. Pursuant to Article 52(2) GBER, only investment costs are eligible. However, Telecom CLM did not become the owner of the deployed basic broadband network (see recital (10) above), which is why the Commission considers that Telecom CLM did not have any investment costs. Moreover, Article 52(3) GBER requires that an open public consultation was carried out to verify that the target areas were indeed ‘white’ areas for basic broadband. As the JCCM had carried out only bilateral consultations with all broadband operators that were known to it as being active in the region (see recital (12) above), this requirement of the GBER was not met either. Therefore, the measure does not fall in the scope of the GBER.

⁽⁴⁶⁾ Cf. footnote 21 above.

⁽⁴⁷⁾ Cf. footnote 21 above.

- (121) According to Article 107(3), point (c), TFEU, ‘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 to be compatible with the internal market. Moreover, the 2009 Broadband Guidelines ⁽⁴⁸⁾ are the standard for assessment for State aid for the rollout of basic broadband networks granted between 1 October 2009 and 26 January 2013.
- (122) To be declared compatible, two conditions have to be met: first, the aid must be intended to facilitate the development of certain economic activities or of certain economic areas and, second, the aid must not adversely affect trading conditions to an extent contrary to the common interest ⁽⁴⁹⁾.
- (123) Under the first condition, the Commission examines:
- (a) the economic activity being facilitated by the aid;
 - (b) the incentive effect of the aid, 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 aid or would carry out in a restricted or different manner or location;
 - (c) the existence of a breach of any provision of Union law in relation to the aid.
- (124) Under the second condition, the Commission assesses the positive effects of the aid for the development of the activities that it intends to support and the negative effects that the measure may have on the internal market, in terms of distortions of competition and adverse effects on trade caused by the measure. In this regard, the Commission assesses:
- (a) the positive effects of the aid;
 - (b) 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;
 - (c) whether the aid is an appropriate policy instrument to meet its objective;
 - (d) whether the aid is proportionate and limited to the minimum necessary to attain its objective and stimulate additional investment or activity in the area concerned;
 - (e) the negative effects of the aid on competition and trade between Member States.
- (125) As a final step, the Commission balances the identified negative effects of the aid on the internal market with the positive effects of the aid on the supported economic activities.

First condition

5.3.1. Facilitation of the development of an economic activity

- (126) The measure supported the development of the economic activities of deployment, operation of a basic broadband network and provision of retail broadband services in districts of municipalities in the region of Castilla-La Mancha where broadband was not available and where the rollout of a broadband network was neither expected nor planned (see recital (12) above). The measure explicitly intended that the beneficiary also provide broadband services to end-users at the retail level (see recital (10) above) and ensure the availability for end-users in such areas of broadband services at speeds of at least 2 Mbps download and 512 Kbps upload (see recital (17) above). The beneficiary was also required to offer IP telephony/voice over IP and to provide for a network interconnection point at which third operators would be given wholesale access to the network (see recital (18) above). The measure therefore addressed a market situation which prevented consumers and businesses in the target areas from having access to electronic communications services, thereby increasing the economic competitiveness of the target areas.

⁽⁴⁸⁾ Cf. footnote 6 above.

⁽⁴⁹⁾ Judgment of the Court of 22 September 2020 in case C-594/18 P, *Austria v Commission*, ECLI:EU:C:2020:742, para. 19.

- (127) The Commission acknowledges that by supporting the availability of basic broadband network and services in these target areas and by imposing the obligation on the beneficiary to ensure (i) the provision of broadband services to end-users at speeds of at least 2 Mbps download and 512 Kbps upload, including IP telephony/voice over IP, (ii) wholesale access to the basic broadband network via a network interconnection point, the measure contributed to the development of these economic activities.

5.3.2. *Incentive effect*

- (128) The Commission examined whether the provision of a basic broadband network including the provision of retail broadband services including IP telephony/voice over IP to end-users for 5 plus 2 years would have been undertaken within the same timeframe without any State aid ⁽⁵⁰⁾.
- (129) Market analysis and consultations of all affected stakeholders carried out by the JCCM prior to the launch of the tender procedure have shown that there was no existing broadband infrastructure in the target areas and that no investments in broadband development were planned in these areas in the 3 to 4 years following the consultations (see recital (12) above). This ensured that the measure covered only districts of municipalities in the region of Castilla-La Mancha that were without broadband coverage at the time of the start of the operation of the supported basic broadband network in September 2012. Therefore, in the absence of the measure, no retail broadband services including IP telephony/voice over IP would have been available to end-users in the target areas.
- (130) Moreover, the Kingdom of Spain as well as the beneficiary claim that the operation of the basic broadband network in the target areas was not profitable (see recitals (51) and (68) above). The Commission therefore considers that the operation of the basic broadband network including the provision of broadband services to end-users in the target areas, including IP telephony/voice over IP, would not have been undertaken within the same timeframe without the aid, and that the aid therefore has produced a change in the investment decisions of the bidding operators, including Telecom CLM.
- (131) Hence, the Commission concludes that the measure had an incentive effect.

5.3.3. *Compliance with other provisions of Union law*

- (132) If a State aid measure, the conditions attached to it, or the activity it financed entailed a violation of a provision or general principles of Union law, the aid cannot be declared compatible with the internal market.
- (133) The Commission is not aware of any possible breach of Union law that would prevent the measure from being declared compatible with the internal market.

Second condition

5.3.4. *Positive effects of the aid*

- (134) All 461 target areas of the measure constituted rural districts of municipalities in the region of Castilla-La Mancha with an average population of only 35 inhabitants. The JCCM awarded aid to Telecom CLM only for the deployment and operation, which were inextricably linked due to the fact that the tendered contract covered both, without any option for partition, of a basic broadband network in these areas, where end-users did not yet have access to retail broadband services, and where the rollout of a broadband network was neither expected nor planned by the time the supported basic broadband network started operation in September 2012 (see recital (12) above). In these areas, the measure ensured that end-users had access to basic broadband services at the speed of at least 2 Mbps download and 512 Kbps upload, including to IP telephony/voice over IP, as from the start of the operation of the network in September 2012 (see recital (17) above). Telecom CLM improved the performance of the network twice, first to at least 5 Mbps download on 28 April 2014 and then to at least 10 Mbps download on 4 May 2018 (see recital (29) above).

⁽⁵⁰⁾ 2009 Broadband Guidelines (footnote 6 above), paragraph 50.

- (135) Widespread and affordable access to broadband networks and services has been of key importance for broadband technology's contribution to growth and innovation in all sectors of the economy and to social and territorial cohesion already in 2010.
- (136) The Commission, at the time, consistently made a distinction between areas where no broadband infrastructure existed or was unlikely to be developed in the near term (white areas), areas where only one broadband network operator was present (grey areas) and areas where at least two or more broadband network providers were present (black areas) ⁽⁵¹⁾. As a matter of policy, the Commission has always considered support for broadband network deployment in rural and underserved 'white' areas to be in line with existing Union policies, since it promotes territorial, social and economic cohesion and addresses market failures ⁽⁵²⁾.
- (137) By providing financial support for the provision of broadband services in areas where broadband was not available and where there were no plans by private investors to roll out such an infrastructure in the near future, which was generally understood as referring to a period of 3 years ⁽⁵³⁾, Member States pursue genuine cohesion and economic development objectives. Thus, the Kingdom of Spain's intervention was in line with the common interest.
- (138) Furthermore, in its Europe 2020 strategy ⁽⁵⁴⁾ the Commission presented in March 2010 its Flagship Initiative 'A Digital Agenda for Europe', which aimed 'to deliver sustainable economic and social benefits from a Digital Single Market based on fast and ultra fast internet and interoperable applications, with broadband access for all by 2013, access for all to much higher internet speeds (30 Mbps or above) by 2020, and 50 % or more of European households subscribing to internet connections above 100 Mbps' ⁽⁵⁵⁾ (emphasis added). This aim was reinforced by the Commission's commitment '[t]o promote internet access and take-up by all European citizens, especially through actions in support of digital literacy and accessibility' ⁽⁵⁶⁾.
- (139) The aid granted by the JCCM therefore promoted and pursued territorial, social, and economic cohesion. It moreover contributed to the achievement of the Digital Agenda's objective to provide broadband access for all by 2013.
- (140) The Commission therefore concludes that the aid had positive effects in the target areas.

5.3.5. *Necessity of the aid: absence of market delivery due to market failure*

- (141) State aid may be deemed necessary where it can bring about a material improvement that the market alone does not deliver. State aid measures can, under certain conditions, correct market failures, thereby improving the efficient functioning of markets and enhancing competitiveness.
- (142) 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.
- (143) The measure's target areas were districts of municipalities in the region of Castilla-La Mancha where end-users did not have access to basic broadband services and where the rollout of a broadband network was neither expected nor planned by the time the supported basic broadband network started operation in September 2012 (see recital (12) above).
- (144) In this respect, the JCCM has ensured the availability of the basic broadband network and of retail broadband services in the target areas, including IP telephony/voice over IP, that would not have been provided without support under the measure. The achievable revenue from the exploitation of the network and the provisions of retail services, including IP telephony/voice over IP, was much more limited in the measure's target areas than elsewhere in Spain due to the very low population size in the measure's target areas of only 35 inhabitants on average and 16 000 inhabitants in total. Since the maximum budget available for the project was EUR 16 million, the 461 target areas were divided into 311 mandatory coverage areas and 150 additional optional areas (see recital (13) above).

⁽⁵¹⁾ 2009 Broadband Guidelines (footnote 6 above), paragraphs 37 and 40.

⁽⁵²⁾ 2009 Broadband Guidelines (footnote 6 above), paragraph 41.

⁽⁵³⁾ 2009 Broadband Guidelines (footnote 6 above), paragraph 42.

⁽⁵⁴⁾ Communication from the Commission – Europe 2020: A strategy for smart, sustainable and inclusive growth, 3.3.2010, COM(2010) 2020 final (Communication 'Europe 2020').

⁽⁵⁵⁾ Communication 'Europe 2020', page 14.

⁽⁵⁶⁾ Ibid.

- (145) Considering the situation of end-users in the measure's target areas having had no broadband access at all in 2010, the measure contributed to the goal of broadband access for all by 2013. This was necessary to deliver on a Digital Single Market and ensure that all residents can participate in and benefit from it. Moreover, as mentioned in recital (136) above, the Commission has considered that support for broadband network deployment in rural and underserved 'white' areas promotes territorial, social, and economic cohesion and addresses market failures.
- (146) Concerning JCCM's conclusion that all the 461 target areas were 'white' areas within the meaning of the 2009 Broadband Guidelines, the Commission considers that the Kingdom of Spain has demonstrated that the JCCM was justified in coming to that conclusion. According to the Kingdom of Spain, the findings of the CMT decision and the mapping results of the JCCM were not contradictory (see recital (58) above). The Kingdom of Spain explained that the JCCM had defined all 461 target areas at the level of districts of municipalities. While some of those districts formed part of wider areas, certain parts of which were already served by basic broadband networks, this was not the case for the specific districts making up the 461 target areas. In contrast, the CMT's decision is based on an analysis at the municipality level and categorised an area as 'grey' if the municipality had existing broadband coverage of 50 % of the population or higher (even if certain districts within that municipality exhibited lower coverage).
- (147) The Commission therefore concludes that the aid was necessary to support the development of the economic activities at issue and brought about a material improvement in rural and underserved 'white' areas within the meaning of the 2009 Broadband Guidelines that the market alone would not have delivered. The measure therefore addressed a market failure in the target areas.

5.3.6. Appropriateness of State aid as a policy instrument

- (148) The aid must have been an appropriate policy instrument to address the problem of absence of market delivery due to market failure.
- (149) As was confirmed by the market analysis and the consultations of affected stakeholders carried out by the JCCM prior to the tender, the problem of all the 461 target areas concerned was that they did not have any broadband coverage and that market players were not planning to provide basic broadband services in these areas in the 3 to 4 years to come after the consultations.
- (150) According to the Kingdom of Spain *ex ante* regulation has not led to sufficient investments for narrowing the 'digital divide' in these target areas of the region.
- (151) Whilst *ex ante* regulation can facilitate effective competition, in particular in product and geographic markets where an undertaking has been designated as having significant market power, it would not have been a sufficient instrument to enable the supply of broadband services in the project's target areas. These areas were characterised by the absence of broadband networks and commercial investment plans and lack of availability of retail broadband services, since the inherent profitability of investment in these areas was projected to be particularly low due to the very scattered locations of the many target areas and their very small population size of only 35 inhabitants on average.
- (152) Likewise, demand-side measures in favour of broadband services (such as vouchers for end-users) can contribute positively to broadband penetration and should be encouraged as an alternative or a complement to other public measures. However, in the case at hand, they could not have solved the lack of broadband provision because the infrastructure still had to be deployed and the population size of the target areas was so small that demand-side measures could not have attracted private investment in basic broadband infrastructure in the 461 target areas.
- (153) Since the profitability of the deployment and operation of a basic broadband network in the target areas was considered to be negative, the JCCM did not see any alternative to granting public funding to ensure the provision of retail services in the target areas.
- (154) The Commission therefore concludes that State aid was the appropriate policy instrument to address the market failure in these areas.

5.3.7. Proportionality: Aid limited to the minimum necessary

- (155) Aid is considered proportionate if its amount is limited to the minimum necessary and the potential distortions of competition are minimised. When assessing the proportional character of measures in 'white' areas under the 2009 Broadband Guidelines, several necessary conditions had to be met in order to minimise the State aid involved and the potential distortions of competition:

5.3.7.1. Detailed mapping and coverage analysis

- (156) Member States should clearly identify which geographic areas will be covered by the support measure in question ⁽⁵⁷⁾. By conducting in parallel an analysis of the competitive conditions and structure prevailing in the given area and consulting with all stakeholders affected by the relevant measure, Member States minimise distortions of competition with existing providers and with those who already have investment plans for the near future and enable these investors to plan their activities.
- (157) The Commission expressed doubts regarding the mapping exercise undertaken by the JCCM in the opening decision of 19 July 2017. The doubts related to: (i) the correctness of the consultation of stakeholders undertaken by the JCCM prior to the launch of the measure, including the fact that the complainant had not been consulted; and (ii) the correctness of the categorisation of the measure's 461 target areas as 'white' within the meaning of the 2009 Broadband Guidelines, considering the findings of the CMT in its decision of 23 June 2011 (see recital (48) above and recital (30) of the opening decision). Following its in-depth investigation, however, the Commission considers that the serious doubts that it preliminarily raised have been allayed.
- (158) With respect to the consultation of relevant stakeholders, the Commission considers that the JCCM conducted a market analysis concerning the existing broadband networks in the region of Castilla-La Mancha and clearly identified those areas without any broadband networks and broadband retail services in a manner that complied with the 2009 Broadband Guidelines (see recital (12) above).
- (159) First, the JCCM's market analysis took into consideration information received in bilateral consultations from all broadband operators that were known to the JCCM as being active in the region. The information received in these bilateral consultations allowed the mapping of existing infrastructure and informed about infrastructure deployment plans of broadband operators in the following 3 to 4 years.
- (160) Second, the JCCM analysed all annual Territorial Deployment Plans that had been submitted in the years before by network operators registered with the CMT. This analysis revealed that there were no existing providers in the target areas and that no provider already had investment plans for the near future in these areas. The relevant target areas were then specified in the tender notice and its annexes ⁽⁵⁸⁾.
- (161) Whilst the exact requirements for a thorough consultation of all stakeholders affected by the measure were not defined in the 2009 Broadband Guidelines, it was an established practice in the sector at the time, and accepted by the Commission, to hold direct and individual consultations with known operators on their existing infrastructure and future deployment plans. This approach has been considered sufficient in other Commission decisions not to raise objections ⁽⁵⁹⁾. The JCCM had contacted all electronic communications operators that were known to it as being active in the region (i.e., companies registered with the CMT as electronic communications operators and having provided regular deployment reports). A public consultation as required by the later 2013 Broadband Guidelines ⁽⁶⁰⁾ was not required under the 2009 Broadband Guidelines for a measure to be declared compatible with the internal market.

⁽⁵⁷⁾ 2009 Broadband Guidelines (footnote 6 above), paragraph 51(a).

⁽⁵⁸⁾ Following the publication of the list of target areas for the tender procedure, some operators submitted to the JCCM that certain areas would be covered with broadband networks in the near future and as a result were excluded from the target areas.

⁽⁵⁹⁾ See, for instance, Commission decision C (2010)9171 final of 10 December 2010, on State aid case N336/2010 – *Austrian federal broadband scheme*, accessible at: http://ec.europa.eu/competition/state_aid/cases/237158/237158_1182946_31_3.pdf.

⁽⁶⁰⁾ Cf. footnote 23 above.

(162) Third, the complainant did not have to be consulted as a stakeholder by the JCCM prior to the publication of the tender notice. The complainant was known to the JCCM, but only as a provider of support for broadcasting and television services. The complainant was not registered with the CMT as an electronic communications operator and has never been active as such an operator (see section 2.8 above). There was thus no reason for the JCCM to consult the complainant on the project in question.

(163) The Commission therefore concludes that the initial doubts expressed in the opening decision have been dispelled and that the detailed mapping and coverage analysis undertaken by the JCCM is compatible with the 2009 Broadband Guidelines.

5.3.7.2. Open tender process

(164) An open-tender approach ensures that there is transparency for all investors wishing to bid for the realisation of the subsidised project ⁽⁶¹⁾. Equal and non-discriminatory treatment of all bidders is an indispensable condition for an open tender.

(165) In the opening decision, the Commission expressed doubts that the tender procedure had been in line with the provisions of the 2009 Broadband Guidelines as regards transparency. It considered that the award criteria used by the JCCM had relied to a significant extent on subjective evaluation criteria (see recital (48) above and recital (31) of the opening decision).

(166) Following the formal investigation procedure, the Commission determined that an invitation to tender was published in the Official Gazette of Castilla-La Mancha on 13 May 2010 and all undertakings registered as electronic communications operators with the CMT were eligible to submit an offer (see recital (11) above).

(167) The award criteria used by the JCCM were contained and explained in detail in the 'Special Administrative Specifications' and the 'Special Technical Specifications' and had thus been established in advance, i.e., before the invitation to tender was published. The JCCM had chosen the method of the 'Most Economically Advantageous Tender' over the lowest price method, which is standard practice for more complicated and larger projects. The award criteria provided for a scoring system of up to 100 points. 64 points in total could be achieved by meeting 'objective criteria', such as the amount of additional households covered by the new network, the quality of the retail services offered, the amount of funds needed, etc. 36 points in total could be achieved via 'subjective criteria', where the JCCM assessed (i) the proposed technological solution, (ii) the proposed infrastructure and problem management, (iii) the proposed degree of assistance and support by the bidder in the process of returning the network to the JCCM following the expiry of the contract, (iv) a potential binding offer to buy the network from the JCCM following the expiry of the contract and, (v) the level of detail provided by the bidder in its network return plan (see recital (15) above).

(168) The weightings given to each award criterion were clearly indicated in the 'Special Administrative Specifications', indicating for each award criterion and sub-criterion the maximum number of points that could be achieved (see recital (16) above).

(169) The Commission observes that the 'subjective criteria' are in fact qualitative criteria, which are linked to the subject-matter of the procedure and pertain to technical and functional characteristics of the future network, maintenance, management etc. The use of such criteria is allowed under public procurement rules if the weighting of each criterion is established in advance and made transparent, as in the present case.

(170) In addition, all criteria, including the 'subjective criteria', were connected to the subject matter of the tender, and listed in the tender documents. The 'subjective criteria' do not appear inappropriate given that the JCCM was to become the owner of the to-be-established basic broadband infrastructure and was likely to have to take over the operation of the network following the expiry of the awarded contract.

(171) Therefore, the 'subjective criteria' used by the JCCM are deemed to have been sufficiently transparent to be applied in an objective, concrete, and uniform manner by the JCCM.

⁽⁶¹⁾ 2009 Broadband Guidelines (footnote 6 above), paragraph 51(b).

- (172) The Commission concludes therefore that the JCCM has chosen the beneficiary in an open tender procedure, in line with the provisions of the 2009 Broadband Guidelines on transparency.

5.3.7.3. Most economically advantageous offer

- (173) In an open tender procedure, to reduce the amount of aid to be granted, at similar if not identical quality conditions, the bidder with the lowest amount of aid requested should in principle receive more priority points within the overall assessment of its bid ⁽⁶²⁾. However, as part of the most economically advantageous tender, several criteria are taken into consideration, not only the lowest bid. For the purposes of determining the most economically advantageous offer, the awarding authority should specify in advance the relative weighting which it will give to each of the criteria chosen.
- (174) In the opening decision the Commission expressed doubts that the tender procedure had been in line with the provisions of the 2009 Broadband Guidelines regarding the requirements for the most economically advantageous offer, arguing that the award criterion of the amount of aid requested by the bidder had been given too little weight (only 10/100 points, i.e. only 10 % of the overall award criteria) and would thus not allow for offers to match the market value (see recital (48) above and recital (31) of the opening decision).
- (175) The JCCM had specified and communicated in advance the award criteria and the relative weighting which it was to give to each of them (see recitals (15) and (16) above).
- (176) Two out of the five bids submitted in the open tender procedure met the technical requirements specified in the tender documents and were considered by the JCCM in the selection procedure (Telecom CLM and Telefónica S.A.; see recital (22) above). Telecom CLM's offer altogether received 76,13/100 points (44,93 points for the 'objective criteria' and 31,2 points for the 'subjective criteria') while Telefónica's offer received altogether 46,22/100 points (26,07 points for the 'objective criteria' and 20,15 points for the 'subjective criteria') (see recitals (25) and (26) above). Telecom CLM's offer requested a lower amount of aid than Telefónica's offer and thus received more points for this criterion (1,76/10 compared to 0,00/10) (see recitals (23) and (26) above).
- (177) According to the studies carried out by the JCCM in advance of the launch of the project, it was unlikely that the available aid budget in the amount of EUR 16 million would be sufficient to cover all of the mandatory and optional target areas (see recital (13) above). It was therefore unlikely that the award criterion of the requested amount of aid would become an important or decisive factor for the assessment of the most economically advantageous offer since it was expected that most, if not all, bidders would request the full amount of aid available.
- (178) The JCCM eventually awarded the contract to that bidder whose offer had requested the lowest amount of aid. The JCCM also had given this bidder the highest number of points for the award criterion of amount of aid requested (1,76/10 compared to 0/10). Any higher weight on this award criterion would have only been to the advantage of the beneficiary.
- (179) The Commission therefore does no longer consider that the relatively low weight given to the award criterion of the amount of aid requested has caused unequal or discriminatory treatment in the measure or has increased the amount of aid eventually granted. The Commission concludes that the JCCM's assessment of the most economically advantageous offer was, therefore, in line with the 2009 Broadband Guidelines.

5.3.7.4. Technological neutrality

- (180) Given that broadband services can be delivered on a variety of network infrastructures based on wired, wireless, satellite and mobile technologies, Member States should not favour any particular technology or network platform unless they can show that there is an objective justification for this ⁽⁶³⁾. Bidders should be entitled to propose the provision of the required broadband services using or combining whatever technology they deem most suitable.

⁽⁶²⁾ 2009 Broadband Guidelines (footnote 6 above), paragraph 51(c).

⁽⁶³⁾ 2009 Broadband Guidelines (footnote 6 above), paragraph 51(d).

(181) In the opening decision the Commission expressed doubts about the project fulfilling the conditions of the 2009 Broadband Guidelines concerning technological neutrality, arguing that it appeared that the JCCM had focused the project on a specific wireless technology since it had calculated the budget on the basis of the deployment costs for a wireless network and had indirectly encouraged the use of existing infrastructure of a specific technology (see recital (48) above and recital (32) of the opening decision). The Commission established during the formal investigation the following:

- (a) The 'Special Technical Specifications' contained no limitations regarding the network architecture or the technology to be used for the realisation of this project. Eligibility of bids was not conditional on the deployment of a specific technological solution. Bidders only had to ensure compliance with the speeds, the quality and the conditions laid down in the 'Special Technical Specifications' (see recitals (17)–(20) above).
- (b) The technological neutrality of the tender is also confirmed by Telefónica's bid, which was found eligible and met the technical requirements laid down in the 'Special Technical Specifications'. This bid proposed a basic broadband network solution that was based on three different technologies (WIMAX, xDSL and 3G), including a wired technology (xDSL) (see recital (26) above). The beneficiary did not rely only on the WIMAX solution either but proposed a solution that was based partially on satellite technology (see recital (23) above).
- (c) As regards the possible re-use of the existing DTT infrastructure, the 'Special Technical Specifications' only allowed the use of the passive infrastructure that had been deployed and was used for the implementation of the plan for the transition to DTT in the region of Castilla-La Mancha. Bidders were not obliged to rely on this infrastructure.
- (d) Telefónica based its proposed solution largely on its own existing passive infrastructure for mobile networks without having recourse to the existing DTT network (see recital (26) above). Moreover, all owners of passive infrastructure components of the DTT network were contractually obliged to grant access to that infrastructure to third parties for the purposes of establishing a basic broadband network (see recital (21) above). Access to the passive infrastructure of the DTT network was thus available to all potential bidders, not only to Telecom CLM as one of the owners of DTT infrastructure components. This confirms that the open tender as published in May 2010 (see recitals (17)–(20) above) was technologically neutral and offered the possibility to use the existing DTT passive infrastructure to all bidders, without requiring its use.
- (e) Furthermore, the possibility to use the infrastructure of an existing DTT network cannot be understood as limiting the technological solutions for the deployment of a basic broadband network. This is because the active DTT infrastructure cannot be used for a basic broadband network⁽⁶⁴⁾. As a result, any future technological solution for a basic broadband network could only have used the passive infrastructure of the DTT network, i.e., the transmission centres. The passive infrastructure would have permitted the installation of a variety of active equipment capable of establishing a basic broadband network.
- (f) As regards the claim that the JCCM had calculated the budget for the project based on the deployment costs for a wireless network, the budget of EUR 16 million had been agreed in a collaboration agreement between the MARM and the JCCM on a sustainable rural development programme that was signed on 12 November 2009. The Spanish authorities explained that this was the maximum budget available for this project, regardless of the technological solution used.
- (g) Since November 2008, the JCCM had carried out studies on the feasibility and costs of the deployment of a basic broadband network that would cover all 'white' spots in the region of Castilla-La Mancha and that had focused on a solution based on the wireless WIMAX technology. The results of the studies indicated that a basic broadband network based on the WIMAX solution that would cover all 'white' spots in the region would cost significantly more than EUR 16 million (see recital (13) above). The JCCM's analysis indicated that it was possible to implement the project by covering most of the target areas with the available budget using at least one of the potential types of technology. The fact that the studies had been conducted using WIMAX as the relevant technology was not, however, intended to limit (and did not in fact limit) the technological solutions proposed by the bidders (including Telecom CLM).

⁽⁶⁴⁾ This was confirmed by the beneficiary's external legal counsel in his e-mail to the Commission of 20 May 2019.

- (182) The Commission therefore concludes, considering the information obtained during the formal investigation procedure, that the tender documents were technologically neutral, so that the project fulfilled the conditions of the 2009 Broadband Guidelines concerning the requirement of technological neutrality.

5.3.7.5. Use of existing infrastructure

- (183) According to the 2009 Broadband Guidelines, where possible, Member States should encourage bidders to have recourse to any available existing infrastructure so as to avoid unnecessary and wasteful duplication of resources ⁽⁶⁵⁾. In order to try and limit the economic impact on existing network operators, the latter should be given the possibility to make their infrastructure available to a notified project.
- (184) The JCCM offered to all bidders the possibility to have recourse to the existing DTT infrastructure to submit their offers. At the same time, they were not required to use the DTT infrastructure. Network operators were free to use their own existing infrastructure. For example, Telefónica placed a bid with an offer largely relying on its own existing infrastructure. Telefónica's offer was found to be eligible and was admitted to the selection procedure.
- (185) The possibility to have recourse to the existing DTT infrastructure did not favour Telecom CLM as one of the owners of parts of that infrastructure because all of the different owners of the DTT infrastructure (i.e., numerous different municipalities, Telecom CLM and private company Abertis Telecom S.A.) were obliged to grant access to that infrastructure to a network provider for the purposes of the future deployment of a basic broadband network. Neither did the fact that Telecom CLM was operating the region's entire DTT network provide an advantage to Telecom CLM because only the passive infrastructure that was used by the DTT network could be reused for a basic broadband network and not the DTT equipment itself that had been supported by earlier aid and that was installed on that passive infrastructure and operated by Telecom CLM (see also recital (217) below).
- (186) The Commission concludes that the project met the conditions of the 2009 Broadband Guidelines regarding the requirement of considering the use of existing infrastructure.

5.3.7.6. Effective wholesale access

- (187) Mandating third parties effective wholesale access to a subsidised broadband infrastructure is a necessary component of any State measure funding the construction of a new broadband infrastructure ⁽⁶⁶⁾.
- (188) In the opening decision, the Commission expressed doubts that the project fulfilled the conditions of the 2009 Broadband Guidelines concerning wholesale access and wholesale access pricing, arguing that the measure had not been properly designed *ex ante* because the CMT subsequently found that, after the contract had been awarded to Telecom CLM, the wholesale access prices offered by Telecom CLM were too high (see recital (48) above and recital (33) of the opening decision).
- (189) The tender documents obliged the successful bidder to provide at least one interconnection point so that third party network operators could use the network to provide basic broadband services to end-users at retail level. In clause 4.2 of the 'Special Technical Specifications', the JCCM obliged bidders to offer wholesale access services and to ensure that other electronic communications operators would be able to provide end-users in the target areas at retail level with basic broadband services of the same quality, reliability and availability as was required in the 'Special Technical Specifications' (see recital (18) above). The tender documents thus mandated third parties' effective wholesale access to the infrastructure.

⁽⁶⁵⁾ 2009 Broadband Guidelines (footnote 6 above), paragraph 51(e).

⁽⁶⁶⁾ 2009 Broadband Guidelines (footnote 6 above), paragraph 51(f).

- (190) Telecom CLM's offer provided for the establishment of an interconnection point in Toledo and contained the terms and conditions for granting bitstream access to the network to third party network operators (see recital (25) above). The wholesale access offered by Telecom CLM was not limited in time. It enabled third party operators to compete with Telecom CLM at retail level, strengthening choice and competition in the target areas while avoiding the creation of a local service monopoly for Telecom CLM.
- (191) To ensure effective wholesale access and to minimise potential distortion of competition, it is crucial to avoid excessive wholesale prices or, by contrast, predatory pricing or price squeezes by the selected bidder. Wholesale access prices should be based on the average published (regulated) wholesale prices that prevail in other comparable, more competitive areas of the country or the Union or, in the absence of such published prices, on prices already set or approved by the NRA for the markets and services concerned ⁽⁶⁷⁾.
- (192) Telecom CLM initially offered wholesale bitstream access to the network for EUR 34,50 while its offered own monthly retail prices to end-users were EUR 37,50 (see recital (39) above).
- (193) The CMT concluded in its decision of 23 June 2011 that Telecom CLM's offered wholesale access prices were too close to the prices Telecom CLM was planning to charge end-users at retail level for its basic broadband services. The CMT also concluded that these wholesale access prices were higher than other wholesale bitstream access prices in the sector (see recital (39) above). Moreover, the CMT found that it would be impossible for any third party network operator buying access to the basic broadband network from Telecom CLM at the wholesale level to make a profit from providing basic broadband services at the retail level to end-users in competition with Telecom CLM (see recital (37) above). The CMT therefore required Telecom CLM to lower its wholesale access prices. As a result, Telecom CLM lowered its offered wholesale access prices by more than 30 % by 29 July 2011 (see recitals (39) and (40) above). The CMT, considering that the new price was in line with the average bitstream access prices that prevail in Spain, approved the new wholesale access price of EUR 23,70 in the target areas (see recital (39) above).
- (194) The Commission observes that the shortcomings related to the wholesale access price were solved in the amended contract before they could produce any distortions of competition. First, Telecom CLM implemented the reduction by more than 30 % of its wholesale access prices in July 2011, i.e., more than 1 year before the start of the operation of the basic broadband network in September 2012. The initial high wholesale access prices did not therefore have any impact on competition. Third-party access to the network was only possible as from September 2012, when the reduced prices were already applicable.
- (195) The Commission concludes that the amended wholesale access price, as approved by the CMT, were in line with the average published wholesale prices that prevailed in other more competitive areas of the Kingdom of Spain. The new bitstream wholesale access price offered by Telecom CLM and approved by the CMT therefore served to replicate market conditions and ensured effective wholesale access, minimising potential distortion of competition.
- (196) The project, as amended, therefore met the conditions of the 2009 Broadband Guidelines regarding the requirement of granting effective wholesale access to third parties and as regards pricing.

5.3.7.7. Claw-back mechanism to avoid overcompensation

- (197) To ensure that the selected bidder is not overcompensated if demand for broadband in the target area grows beyond anticipated levels, Member States should include a reverse payment mechanism into the contract with the successful bidder ⁽⁶⁸⁾.

⁽⁶⁷⁾ 2009 Broadband Guidelines (footnote 6 above), paragraph 51(g).

⁽⁶⁸⁾ 2009 Broadband Guidelines (footnote 6 above), paragraph 51(h).

- (198) In the opening decision the Commission expressed doubts that the project fulfilled the conditions of the 2009 Broadband Guidelines concerning a claw-back mechanism to avoid overcompensation, arguing that the measure had not been properly designed *ex ante* because, initially, there had not been a claw-back mechanism in the contract awarded to Telecom CLM and such mechanism was only introduced by the JCCM following the intervention of the CMT (see recital (48) above and recital (33) of the opening decision.
- (199) The contract as awarded to Telecom CLM did not contain a claw-back mechanism. However, such mechanism was implemented in the contract between the JCCM and Telecom CLM after the CMT investigation and the CMT's approval of the claw-back mechanism with effect of 1 June 2012 (see recitals (41)–(43) above), i.e. before Telecom CLM started operating the basic broadband network (see recital (27) above). The Commission considers that the claw-back introduced in the contract ensured that the aid amount was minimised.
- (200) Therefore, the Commission concludes that the initially missing claw-back mechanism could not have had any impact on competition, because it was introduced into the contract long before Telecom CLM could make any profits from operating the basic broadband network.
- (201) The project, as amended, therefore also met the conditions of the 2009 Broadband Guidelines regarding the requirement of providing for a claw-back mechanism in the contract with the beneficiary.

5.3.7.8. Conclusion on proportionality

- (202) In light of the considerations at recitals (156)–(201) above, the Commission concludes that the State aid involved and the potential distortions of competition were limited to the minimum necessary under the measure.

5.3.8. Negative effects on competition and trade between Member States

- (203) Article 107(3), point (c), TFEU requires the assessment of any negative effects on competition and on trade in the relevant product markets, that is, in this case, the deployment and operation of a basic broadband network and the provision of broadband services, including IP telephony/voice over IP, at the retail level to end-users.
- (204) Given that the measure's target areas were 'white' areas within the meaning of the 2009 Broadband Guidelines, i.e., areas without broadband access, it is unlikely that the measure would result in significant negative effects on competition due to the deployment and operation of the supported basic broadband network in these areas. There were no existing broadband network operators in the target areas that could have been affected by the deployment and none were planning to enter on a near term time horizon.
- (205) In theory, it could have occurred that private market actors reduced their future investments in broadband networks in the target areas or decided not to enter the markets in the target areas because of the deployment and operation of the supported basic broadband network but the Commission has not received any indications to that effect.
- (206) On the effect on trade, none of the information in the Commission's possession indicates that the measure has had a significant negative spillover effect for other Member States.

5.3.9. Weighing the positive effects of the aid against any negative effects in terms of distortions of competition and adverse effects on trade

- (207) A carefully designed State aid measure 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.

- (208) The measure put in place by the JCCM contributed to the development of the economic activities of deployment and operation of a basic broadband network in the target areas and ensured the availability for end-users, who did not have broadband access before, of broadband services at speeds of at least 2 Mbps download and 512 Kbps upload (see recital (126) above). It further ensured that consumers and businesses were offered IP telephony/voice over IP (see recital (126) above) and the performance of the network was improved twice, first to at least 5 Mbps download on 28 April 2014 and then to at least 10 Mbps download on 4 May 2018 (see recital (134) above). Thus, the measure promoted and pursued territorial, social, and economic cohesion and contributed to the achievement of the Digital Agenda's objective to provide broadband access for all by 2013 (see recital (139) above).
- (209) In addition, considering the wholesale access obligation on the beneficiary, the measure not only had positive effects for end-users but also for competition in the target areas.
- (210) The measure furthermore addressed a market failure (see section 5.3.5 above) in that the deployment of a broadband network and the provision of retail broadband services to end-users in the target areas would not have taken place by the start of the operation of the supported basic broadband network in September 2012 without the aid.
- (211) The measure was also proportionate (see section 5.3.7 above). Its design ensured that it was limited to the minimum necessary and that its potential negative effects on competition and on trade in the markets for the construction and operation of basic broadband networks as well as for the provision of basic broadband services, including IP telephony/voice over IP, at the retail level to end-users were limited. The measure was designed to prevent crowding out of private investments and its effects were confined to the target areas, i.e., districts of municipalities in the region of Castilla-La Mancha with an average population of 35 inhabitants, where end-users had no broadband access and where private investors did not intend to invest without the aid.
- (212) The Commission is not aware of any negative effects of the measure that could have unduly affected trading conditions to an extent contrary to the common interest (see section 5.3.8 above).
- (213) The Commission concludes that the award of the contract to Telecom CLM was objectively justified to address the lack of availability of basic broadband services in the 461 target areas, i.e., remote districts of numerous different municipalities that were scattered all over the region of Castilla-La Mancha.
- (214) Considering the above and in view of the overall characteristics of the measure and of the safeguards applied, the positive impact of the aid on the development of the economic activities at issue outweighs any potential negative effects on competition and trade. On balance, the measure was in line with the objectives of Article 107(3), point (c), TFEU and did not adversely affect competition to an extent contrary to the common interest.

5.3.10. Re-use of DTT passive infrastructure

- (215) In the opening decision the Commission argued that, in line with the principle established in the *Deggendorf* case ⁽⁶⁹⁾, the fact that Telecom CLM had not yet repaid the aid declared incompatible with the internal market by Commission decision in case SA.27408 ⁽⁷⁰⁾ had to be taken into consideration in the compatibility assessment of the measure. The Commission was of the opinion that, given that Telecom CLM's winning bid had relied on the use of the existing DTT network, which had been deployed with illegal State aid, this illegal aid had likely also been determinant for the award of the contract to Telecom CLM in this case (see recital (48) above and recital (37) of the opening decision).

⁽⁶⁹⁾ Cf. footnote 19 above.

⁽⁷⁰⁾ Cf. footnote 16 above.

- (216) The Commission decision in case SA.27408 was upheld by the Court of Justice in 2018 ⁽⁷¹⁾. However, according to the information available to the Commission today, Telecom CLM had fully repaid by 18 August 2022 the aid declared incompatible with the internal market by the above-mentioned Commission decision.
- (217) In any event, the Commission also considers that the illegal State aid granted and paid out to Telecom CLM for the transition to DTT in the region of Castilla-La Mancha did not result in a decisive advantage for winning the award of the contract in the case at hand. The formal investigation has shown that Telecom CLM only used the passive infrastructure of the existing DTT network, i.e., the transmission centres, for the deployment of the wireless basic broadband network. However, this passive infrastructure for terrestrial television in the region of Castilla-La Mancha largely existed already before the transition from analogue to digital television. It consisted of about 500 transmission centres in total, of which Telecom CLM owned 138 (see recital (33) above). Telecom CLM built only 20 additional transmission centres with the illegal State aid from case SA.27408, became the owner of only six and re-used only one of these additional transmission centres for the basic broadband network in the case at hand (see recital (33) and footnote 15 above). To gain access to the rest of the passive DTT infrastructure, Telecom CLM had to follow the same procedure as any other interested third-party operator, namely, to gain access to that infrastructure from the owners of those transmission centres. Telecom CLM had used the illegal aid for the transition to digital terrestrial television mostly for equipping the existing passive infrastructure with the active DTT equipment (see recital (33) above). This active DTT equipment could however not be re-used for the provision of basic broadband services. Hence, the amount of illegal aid received by Telecom CLM under the DTT scheme subject to case SA.27408 with relevance for the measure has been limited to the costs of the construction of one additional transmission centre, owned by Telecom CLM and re-used for the basic broadband network subject to the case at hand.
- (218) Moreover, the entirety of the existing DTT infrastructure, including the additional transmission centres built with illegal aid, had been made available to all interested bidders, not only to Telecom CLM. In fact, four out of five bidders had relied on the use of the existing DTT network (see recital (21) above).
- (219) Considering the above, the Commission concludes that the illegal State aid covered by the decision in case SA.27408 and received by Telecom CLM did not give it a decisive advantage in the tender for the contract award in the measure. Therefore, the illegal aid from case SA.27408 did not render the tender procedure discriminatory.

6. CONCLUSION

- (220) The Commission concludes that the Kingdom of Spain has unlawfully implemented the measure in favour of Telecom CLM in breach of Article 108(3) TFEU. However, the formal investigation procedure has dispelled the doubts expressed in the opening decision of 19 July 2017 concerning the compatibility of the aid and established that the requirements of the 2009 Broadband Guidelines had been met. The contract award to Telecom CLM in August 2010, as amended, was therefore compatible with the internal market under Article 107(3), point (c), TFEU.

HAS ADOPTED THIS DECISION:

Article 1

The State aid that the Kingdom of Spain has implemented for Telecom CLM in the form of the award of a contract for the establishment and operation of a wireless basic broadband network in remote areas of the region of Castilla-La Mancha, as amended, is compatible with the internal market within the meaning of Article 107(3), point (c), of the Treaty on the Functioning of the European Union.

⁽⁷¹⁾ Cf. footnote 17 above.

Article 2

This Decision is addressed to the Kingdom of Spain.

Done at Brussels, 10 August 2023.

For the Commission
Margrethe VESTAGER
Member of the Commission
