Subject: State aid N 270/2006 - Italy
Subsidies to digital decoders with open API

I. Procedure

1. By letter of 24 April, 2006 (ref. A/33101) Italy notified, for reasons of legal certainty, Article 1, Comma 572 of Law n. 266 of 23 December, 2005 (“Finance Law 2006” thereafter). By letters of September 20, 2005 (ref. A/37498) and November 16, 2005 (ref. A/39413) – sent in the frame of the procedure concerning case C 52/20051 – the Italian Authorities had already informed the Commission of their intention to adopt the measure in object.


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3. By letter of 30 May 2006 (ref. A/34209), Italy submitted further information. On 12 July 2006 the Commission requested an extension of the deadline of Article 4(5) of the Procedural Regulation\(^2\) (ref. D/55811) in order to be able to take into account of the comments provided by Italy on the submission of third parties on case C52/2005, which is strictly connected to the present case. Italy accepted on 24 July 2006 (ref. A/36078).

II. DESCRIPTION OF THE AID

II.A. Description of the aid

4. The subject-matter of the decision is Article 1, Comma 572 of Finance Law 2006, which grants to users in Sardegna and Valle d’Aosta who purchase or rent a set up box (hereafter “decoder”), a subsidy of €90 for each decoder purchased between 1 and 31 December 2005 and of €70 for each decoder purchased as of 1 January 2006.

5. More precisely the text of the law is as follows: “… the subsidy is provided if it is ensured a direct and non restricted reception of non-encrypted digital content and services and if are provided interactive services, …. through program interfaces (API) which are open and known as such, in accordance with the norms published in the Official Journal of the European Communities in line with article 18 of directive 2002/21/CE of the European Parliament and of the Council of 7 March 2002…”

6. The overall budget of the measure is €10 million.

7. The measure was preceded by two similar measure in 2004 and 2005, namely Article 4 of the Finance Law for 2004 and Article 1, Comma 211 of the Finance Law for 2005 ("the 2004/2005 measure" thereafter) providing for a public grant of €150 and of €70 respectively to be awarded to users who purchase or rent decoder capable of receiving programmes broadcast using digital terrestrial technology and correlative interactive services, and earmarking a total budget of €220 million for the purpose\(^3\). The scheme in this form ceased to apply in December 2005. The Commission by letter of 21 December 2005 informed Italy that it had decided to initiate the formal investigation procedure laid down in Article 88(2) of the EC Treaty\(^4\) concerning the 2004/2005.

8. Compared to the 2004/2005 measure, the Finance Law 2006 directly links the subsidies to interoperability of decoders without excluding a priori non-terrestrial decoders.

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\(^3\) "each user of the broadcasting service who has fulfilled his obligations regarding payment of the relevant subscription fee for the year in progress and who purchases or rents a set top box allowing the reception, free-to-air and without any cost for the user or for the content provider, of television signals transmitted using digital terrestrial technology (T-DVB/C-DVB) and the resulting interactivity shall be entitled to a public grant of €150. Award of the grant shall be made within the spending limit of €110 million”.

II.B. Background

9. The measure is to be viewed against the background of the digitisation of broadcasting, which is affecting all the currently available transmission platforms, i.e. cable, satellite and terrestrial\textsuperscript{5}. The prime benefit of digitisation is the increased transmission capacity on all platforms achieved by a more efficient use of the frequency spectrum\textsuperscript{6}, as compared to analogue broadcasting. This is particularly relevant for terrestrial TV in view of the limited availability of frequency spectrum. Between 2002 and 2005 the Commission actively expressed its support to the digitisation of broadcasting\textsuperscript{7}. In these documents the Commission has also supported the diffusion of so-called “open standard” digital technologies, i.e. technologies allowing interactivity with final consumers and “interoperability through program interfaces (API) which are open”, i.e. the possibility for different producers and consumers to be connected via a unique technology which can be freely used by every operator in the market.

10. The viewing of digital programmes through the most commonly used television sets requires the use of a decoder (although some of the more modern TV sets have an integrated decoder). There are various types of digital decoders on the market, which can be broadly classified according to the features they allow: mere decoding of digital programmes, in either the terrestrial or satellite platform; interactivity (the possibility to send information to the broadcasters); conditional access (the possibility to decode pay-TV services); interoperability (the possibility to use the same decoders to receive programmes of different broadcasters in the same platform). Regarding interoperability, this can be easily achieved through the adoption of open standards by broadcasters and through the use of the corresponding open interfaces in decoders (‘openness’); alternatively, interoperability would require the owners of non-open proprietary technologies to agree to make available the necessary technical specifications. In principle, decoders could embody various combinations of the above features, however, in practice, the most widespread categories of decoders are: the ‘zappers’ (mere decoding); the proprietary decoders of Sky (interactive, with conditional access, but not open) and the subsidised decoders (interactive, with conditional access and open).

11. There are in Italy four TV broadcasting platforms: (i) satellite, on which the main free to air channels are available plus the channels of Sky Italia whose programs can be accessed via subscription or pay-per-view agreements; (ii) terrestrial hertzian TV\textsuperscript{8}, on which in December 2005 operated 6 national broadcasters i.e. RAI (free to air), Mediaset\textsuperscript{9} (free to air and pay-per-view), Telecom Italia

\textsuperscript{5} Therein DVB-T stands for digital video broadcasting over a terrestrial network. Other forms of digital video broadcasting are DVB-S (by satellite) and DVB-C (by cable).

\textsuperscript{6} The digital technique uses up around one fifth of the frequency needed in analogue mode for transmission of the same data, depending on the quality of the broadcasting and on the use of interactivity.


\textsuperscript{8} For simplicity only the term “terrestrial” will be used henceforth.

\textsuperscript{9} RTI manages the infrastructures. But RTI is owned by Mediaset.
Media/La 7 (free to air and pay-per-view), Holland Coordinator & Service Company Italia (HCSC) that owns Prima TV/DFree, Gruppo l’Espresso and Television Broadcasting Systems (free to air)\(^\text{10}\). Moreover there are almost 500 local operators on analogue terrestrial and 78\(^\text{11}\) local operators on digital television; (iii) cable, on which operates Fastweb (free to air and payment services); and (iv) X-DSL, on which operate Fastweb and Telecom Italia’s Rosso Alice (free to air and payment services).

12. Sky Italia, who complained about the measure, is a satellite pay-TV which is owned by News Corporation and has a quasi-monopolistic position in the Italian market for pay-TV broadcasting. It was formed as the result of News Corporation’s acquisition of control of Telepiù S.p.A and Stream S.p.A in 2003, a merger which was approved subject to commitments\(^\text{12}\). As a result of the commitments Sky Italia was requested to dismiss its terrestrial business and cannot operate in Italy as terrestrial network operator or terrestrial pay-TV operator.

13. Cable hardly exists in Italy, although Fastweb – owner of a cable network and a pay-TV operator present in some Italian cities – had acquired around 140,000 TV customers by March 2004 using a fibre and DSL infrastructure.

14. Terrestrial remains largely the major means of television viewing in Italy, with a penetration of roughly 19 millions households over a total of 22 millions. The main players are the public service broadcaster (RAI) with three channels and commercial broadcaster Mediaset also offering three channels. The two organisations account for approximately 85% of the TV audience in Italy. In a decision of 11 March 2005, the Italian Autorità per le garanzie nelle comunicazioni (“AGCOM” thereafter) analysed the television market on the basis of law 112/2004 and concluded that the two operators held a collective dominance position in this market\(^\text{13}\) and imposed obligations on the two operators\(^\text{14}\) in order to preserve pluralism in the market. Furthermore on 27 June 2006 AGCOM notified to the Commission the definition of relevant markets in the terrestrial analogue television market and its assessment of significant market power (SMP), where it concluded that RAI and Mediaset held a collective dominance position in this market. AGCOM did not notify remedies. On 27 July 2006 the Commission sent AGCOM its comments pursuant to Article 7(3) of Directive 2002/21/EC, in which the Commission broadly agreed with the conclusions of AGCOM, but asked for deeper analysis and invited AGCOM to

\(^\text{10}\) At the end of December 2005, Mediaset acquired by Holland Italia the analogue frequencies of EuropaTV and planned to create a DVB-H channel for mobile TV. According to the submission of the Italian authorities in case C52/2005 of 13 May 2005 (ref. A/33952) in 2005 were present RAI, RTI, TI and Prima TV.

\(^\text{11}\) This data is taken from the submission of the Italian authorities in case C52/2005 of 13 May 2005 (ref. A/33952).

\(^\text{12}\) Case n. COMP/M.2876 NewsCorp/Telepiù

\(^\text{13}\) Delibera 136/05/CNS recante “interventi a tutela del pluralismo ai sensi della legge 3 maggio 2004, n.112”, GU della Repubblica Italiana of 11.3.2005, n.35 by AGCOM

\(^\text{14}\) The more relevant obligations concerning the two operators are: (i) accelerating the digitalization process of the network; (ii) RTI must change “concessionaria di pubblicità” from Publitalia ’80 for digital programs and Publitalia ’80 must introduce separate accounting between revenues from DTT and analogue TV; (iii) RAI must create a new program for the general public in digital technology
notify remedies as soon as possible\textsuperscript{15}. Finally, the Commission is currently treating a complaint alleging that the Italian Law 112/04, regulating the switch-over from the analogue to the digital terrestrial broadcasting technology raise barriers to entry for newcomers on the markets for TV advertising and broadcasting transmission services. After a request to Italy to submit its observations on the complaint and a request of information both to Italy and to the undertakings affected by the measures, a letter of formal notice concerning the infringement of Directives 2002/21/EC, 2002/20/EC and 2002/77/EC has been sent to Italy on 19 July 2006. Italy replied on 15 September 2006. Following such reply, the Commission has received from the Italian State a copy of the draft bill reforming the Italian TV legislation aiming at addressing the issues raised by the letter of formal notice and is currently analysing it.

15. In June 2005 overall digital TV penetration rate was 34.5\% of households, with around 7.3 millions of viewers in total. This comprised digital terrestrial, satellite and cable/ADSL viewers. 10\% of the households were digital terrestrial TV viewers and more than one third of them (0.8 million) were also viewers of pay-per-view TV content\textsuperscript{16}. However, at the time of this decision the two digital TV offers – terrestrial and satellite – are expected to have reached a number of viewers of similar magnitude (5 million viewers for the satellite and 4 million viewers for digital terrestrial).

16. Penetration of satellite TV is limited – around 16\% of households (4.8 millions) had a parabolic antenna in June 2005. Around 4/5\textsuperscript{th} of these households subscribe to the DTH platform (satellite) Sky Italia which reported about 3.3 million customers in June 2005 and was estimated to have 3.9 millions subscribers at the end of 2005. Sky Italia thus represents the third television operator in Italy\textsuperscript{17}.

17. In order to fight piracy, since the end of 2004 Sky started codifying its message with the so-called proprietary technology NDS. The owner of this technology for the Italian market is a subsidiary of the group Newscorp, i.e. the parent company of Sky. This type of technology is a proprietary, closed technology because access to NDS decoders needs provision of access to technology or to certain components of the decoders contrary to open common interface decoders. Using this closed technology Sky lends decoders for use to its subscribers. When changing technology to NDS Sky substituted all decoders in possession of its subscribers.

18. Digital terrestrial broadcasters, on the contrary, use today a so-called open technology, i.e. technology using open standards for interactivity. Such a technology is currently the only technology which allows at the same time the vision of all DTT channels with only one decoder – thereby replicating the current situation in the analogue mode – plus interactivity and the conditional access properties that support the use of prepaid pay-per-view cards.

19. The aid in question is for decoders allowing the reception of digital transmission


\textsuperscript{16} Provvedimento 15389 by Autorità Garante della Concorrenza e del Mercato (AGCM) C12 Presidente del Consiglio dei Ministri – Contributi decoder TV of 10 May 2006

\textsuperscript{17} Relazione Annuale of AGCOM of 30.6.2006
where interactive services are provided. Digital mode can accommodate more television channels than analogue mode within the same frequency. The advantages of using open interfaces are explained in points 71 and 72 below.

20. Italy started the digitisation process with Law n. 66/2001 of 20 March 2001, which stated that the switch over to the digital mode should be completed and the transmission in analogue mode should be switched off as from December 2006. As from the end of 2003 digital mode transmissions (T-DVB) were broadcast along with those in analogue mode (so called ‘simulcast phase’). Law n.273/2005 of 22 December 2005 postponed the deadline for the switch off to 2008 and provided for the definition of “all digital” areas in which the switch over process would have been accelerated. Valle d’Aosta and Sardegna had the following suitable characteristics to be chosen as "all digital" areas: (i) the best confinement of frequencies - i.e. the possibility of separating the frequencies and of protection from interferences - from the bordering regions, due to their geographical position and characteristics; (ii) difficulties in the reception of the analogue television; and (iii) a favourable network plants-to-population ratio. On 30 August 2006, the Minister of Telecommunication, Mr. Gentiloni, declared that the date for the switch off will be further postponed to 30 November 2012.18

21. In the meantime, according to the Gasparri Law, regulating the sector in Italy, only broadcasters already transmitting with the analogue technology are permitted to apply for experimental digital authorisations and/or digital licences. There is no formal obligation for analogue operators to release the frequencies – which were never subject of a regulated sale or allocation process by the Italian authorities – used for transmissions in analogue format after the switch-off. New entrants can only access the market via the acquisition of frequencies from operators already in the market. 7 multiplexes (frequencies’ blocks including one or more programmes) for digital terrestrial have been licensed in Italy by December 2005. RAI and Mediaset have two multiplexes, Telecom Italia/TV International, D-Free and Gruppo l’Espresso have one multiplex each. Under the Italian regulatory regime, network operators holding more than one digital licence must give access to 40% of their bandwidth to unrelated content providers. In 2006 Telecom Italia and the mobile operator H3G acquired facilities and licenses from existing regional and local analogue operators and entered into the digital terrestrial market starting the creation of two new multiplexes with the digitalization of the acquired networks.

22. The distinction between broadcasters and network operators is not so relevant for the major Italian broadcasters in terrestrial television because RAI, Mediaset, La7 and D-Free all have their own subsidiary for terrestrial transmission. It has to be noted that television market in Italy is characterised by a strong vertical integration between network operators and broadcasters. The mandatory legal separation between the first two types of companies was only introduced by AGCOM with decision 435/01/CONS of 2001 and only concerns digital television. On the contrary, the network operators in the satellite are not integrated with the broadcasters.

18  Website of the Ministry of Telecommunication, section news.
23. As regards coverage of T-DVB – according to AGCOM\(^\text{19}\) – in 2004 more than 50% of the population was effectively covered by at least 2 multiplexes and 60% is potentially covered by 3 multiplexes. The market trend suggests that coverage should increase considerably. According to the Italian authorities, 85% of existing households could potentially be covered by at least 2 multiplexes after the switch off to digital terrestrial. On the other hand, satellite broadcast could cover virtually 100% of the population.

24. Concerning programs, according to the submission of the Italian authorities, in June 2005 23 national channels and roughly 250 local programs were broadcast free to air on digital terrestrial frequencies. 10 of the national channels were broadcast in simulcast with analogue terrestrial television (contemporaneous broadcast in analogue and digital mode). 4 channels had been created on purpose for the digital broadcasting; the remaining channels were broadcast in simulcast with satellite transmissions.

25. As said, the TV market was once characterised by mass viewing of free-to-air TV in analogue terrestrial mode and by pay-TV offer on satellite. The introduction of digital terrestrial TV and the development of cable and Internet are modifying this pattern. Indeed, as from January 2005 Mediaset and Telecom Italia (through LA7) have launched on T-DVB a pay-TV service for premier league soccer matches based on prepaid cards. At the same time, TF1 – 49% partner in the D-Free broadcaster – has indicated that it may be interested in launching pay channels on its T-DVB multiplex. The pay-TV services are allowed, in the prepaid card form, by the digital interactive technology embodied in the decoders which are subsidised with the measure.

26. The total resources collected in the television market in 2005 were EUR 6851 millions, of which roughly 57% (EUR 3885 millions) from advertising, 21% from “canone” (the tax on television whose revenues are given to RAI) and Pay offers (EUR 1483 and EUR1437 millions respectively). Pay-TV resources were represented by EUR 1199 millions by subscription fees (up by 26.4% from 2004) and by EUR 238 millions from pay-per-view (up by 65% from 2004, with a sizeable contribution of EUR 45 millions from the new services in DTT).

III. ASSESSMENT

III.A State aid in the sense of Article 87(1) of the EC Treaty

27. The Commission has examined whether the measure can be characterised as state aid within the meaning of Article 87(1) EC. Article 87(1) of the Treaty lays down the following conditions for presence of state aid. First, there must be an intervention by the State or through State resources. Second, it must confer a selective economic advantage on the recipient. Third, it must distort or threaten to distort competition. Fourth, the intervention must be liable to affect trade between Member States.

III.A.1 State resources and imputability

28. The measure is clearly imputable to the State and involves the use of State resources. Indeed, it is contained in the finance Law for 2006 approved by the Parliament.

III.A.2 Existence of an economic advantage

29. First, the Commission considers that the direct beneficiaries of the grant are final consumers, thus not undertakings falling in the scope of Article 87(1). However, the measure aims at promoting sales of decoders with open API, which allow the reception of digital television and thus may benefit indirectly television broadcasters and pay-TV operators using so-called open technologies. The first question to be analysed is therefore whether a possible indirect advantage may fall within article 87(1).

III.A.2.1 Indirect advantage: it can constitute aid

30. First, it must be noted that Article 87 does not require the advantage to be direct. In particular, measures which, in various forms, mitigate the charges which are normally included in the budget of an undertaking and which, without therefore being subsidies in the strict meaning of the word, are similar in character and have the same effect are considered to constitute aid according to established jurisprudence. Second, the Court jurisprudence – followed by the Commission practice – leaves little doubt that an indirect advantage may constitute a State aid.

31. In its judgment of 13 June 2002 on case C 382/99 the Court made it clear that advantages granted indirectly to undertakings constitute state aid within the meaning of Article 87 of the EC Treaty. Similarly, in its judgement of 19 September 2000 on case C 156/98 the Court held that a tax relief granted to individuals who invested in companies situated in Berlin or in the new German Länder constituted aid in favour of the companies.

32. Having established that an indirect advantage may fall within article 87 (1) below the Commission investigates if the measure entails a selective advantage in favour of certain undertakings, namely terrestrial and cable pay-TV operators.

III.A.2.2 Indirect advantage: beneficiaries

33. The measure has the effect of making the decoders targeted by the subsidy cheaper for consumers, given the State shouldering of the expense. The aid scheme in question has therefore been designed in order to and has as main effect to provide a selective advantage to broadcasters using techniques requiring digital decoders with open API and which compete with operators using proprietary decoders, such as for example Sky Italia.

34. Indeed, by favouring the diffusion of the technologies necessary for the reception of the beneficiaries’ signal, the measure helps those broadcasters in creating and developing their audience at a faster pace than without the measure. The development of an audience constitutes a crucial part of the business for a pay-TV operator or for a broadcaster which desires to develop pay-TV offerings: in order to set affordable prices for the pay-per-view offers it is essential to achieve a certain ‘critical mass’ of customers. In order to do so, it is not uncommon for pay-TV operators to subsidise the purchase of the necessary equipment, as it is shown by the experience of satellite operators at the launch of their business and, later, at the time of switchover to digital technology. For example the complainant Sky Italia indicates that it has provided for free to its subscribers a decoder and an antenna.

35. Accordingly, the measure allows the concerned broadcasters and pay-TV operators to avoid the costs of an initiative that facilitates the development of their digital audience. C-DVB operators are advantaged by the measure as far as they commercialise directly to the public the provision of TV services.

36. In this line, the Italian Autorità per le garanzie nelle comunicazioni in its Relazione concludes that the public contribution to the purchase of decoders is playing a decisive role in developing the audience of broadcasters using open decoders in T-DVB.

37. An indirect support to the relevance of this argument comes from the Global Equity Division by Deutsche Bank. In a paper aimed at proposing to investors the profit opportunities from buying Mediaset shares, the research division of Deutsche Bank shows that, thanks to its peculiar position, favourable market conditions, its market strategy and to subsidies to consumers, Mediaset “can develop DTT as a low risk/low cost way of entering the pay-TV market”.

38. A further advantage concerns the incumbent terrestrial operators using open technologies, since the measure allows them to consolidate in terms of image branding and customer retention their early presence in the digital terrestrial platform. This is referred to the new services – in particular pay-TV services – that are offered on the digital platform. The measure can therefore reinforce the effects of the existing legislation in which the main broadcasters control network operators and in which a digital licence can only be obtained in connection with an existing analogue licence. Incumbents can easily transform their analogue licenses into digital ones, whereas entrants need to purchase analogue licences in the market before being able to transmit digitally. The time disadvantage of new entrants can be further enhanced by measures, as the one in question, which develop the audience of incumbents.

39. The above arguments do not apply to services already provided on the analogue platform, which are known to consumers. Moreover, an anticipated transition to the digital platform is unlikely to have increased in any significant proportion the

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23 This is not the case only in Italy. By analogy, the Office of Fair Trading in point 371 of its investigation on BSkyB N. CA98/20/2002 describes the relevance of customer acquisition for BSkyB.

24 See paragraph 88 (d) of Relazione ai sensi della legge 24 febbraio 2004, N. 43.

total (analogue plus digital) number of viewers for those programmes/services. It
might also be added that the main effect of the measure was to reduce the price of
decoders allowing interactivity, bringing it more in line with that of so-called
“zappers”. The type of decoders which is subsidised allows consumers to profit
from the standard free-to-air supply of channels currently available in the
analogue mode and from the offer of pay-TV and of interactive services by
multiple broadcasters and content providers. Interactive services can include e-
government services accessible through a ‘smart card’\(^{26}\). Therefore, the subsidy
allows consumers to avail themselves of a much richer offer at the same price at
which previously they could only buy a much simpler decoder giving access to a
reduced number of services.

40. Thus, the measure has created an incentive for consumers to switch from the
analogue to the digital terrestrial mode. This has profited broadcasters, with
particular reference to the services that were not available in the analogue mode.
The government subsidy, in other words, has allowed the T-DVB broadcasters to
avoid the cost of a business practice (the subsidisation of decoders) which is
common in the market and helpful in developing an audience.

41. The possible argument that some beneficiaries would not have subsidised the
acquisition of decoders by consumers without state contribution does not establish
the absence of advantage. On the contrary, it shows that the subsidy has allowed
certain developments that would have not taking place otherwise: namely a larger
sale of interactive decoders instead of, possibly, cheaper models with less
advanced features and not allowing interactivity. This has ultimately favoured
broadcasters which can profit from the ability of offering additional services to
viewers.

42. In particular, the subsidy has been granted also for interactive decoders with
conditional access capability, which is the feature that allows the offer of pay-TV
services. This was precisely at a time in which certain digital terrestrial
broadcasters have launched pay-TV offers: it is reasonable to assume that
particularly those broadcasters that relied on the more advanced features of the
subsidised decoders to provide additional services have received an advantage
from the measure.

43. The fact that what is relevant to determine the existence of an advantage are the
effects of the measure is constant jurisprudence and, in the case of indirect
beneficiaries is confirmed by the Court in its judgement on case C-156/98 quoted
above. In that case the indirect beneficiaries were the companies invested in by
investors receiving a fiscal advantage. As the Court makes clear in points 25 to 28
of its judgement, constitute aid measures where the origin of the advantage
indirectly conferred on undertakings is the renunciation by the Member State of
tax revenue which it would normally have received, inasmuch as it is this
renunciation which has enabled investors to take up holdings in those
undertakings on conditions which are in tax terms more advantageous. The fact
that investors then take independent decisions does not mean that the connection
between the tax concession and the advantage given to the undertakings in
question has been eliminated since, in economic terms, the alteration of the

\(^{26}\) The ‘smart-card’ here referred to is a device which allows the identification of the user and the
possibility to make transactions on-line.
market conditions which gives rise to the advantage is the consequence of the public authorities' loss of tax revenue.

Moreover, operators like the ‘triple play’ cable operator Fastweb are, strictly speaking, network operators who do not simply sell transmission services to broadcasters, but commercialise directly to the public the provision of TV services. Indeed, Fastweb is, inter alia, a pay-TV provider. In this case, the cable operator enjoys an advantage similar to that described in the previous points referring to broadcasters. In the following these beneficiaries will be termed cable pay-TV operators.

Finally there is an indirect advantage in favour of decoders’ producers, which consists in the possibility of selling an increased amount of decoders compared to the quantity that could have been sold without the measure. Indeed, the subsidy has the effect of making the decoders targeted by the measure cheaper for consumers. This allows the producers to either increase their sales without lowering their price or increasing their price without loosing customers.

III.A.3 Selectivity

The advantage that the measure provides to terrestrial broadcasters and cable pay–TV operators is selective. Indeed, not all broadcasters can profit indirectly from the measure like, for example, Sky Italia which uses closed technologies.

The advantage will also accrue selectively to the decoders’ manufacturing sector.

III.A.4 Distortion of competition

Broadcasters and cable pay-TV operators transmitting in digital mode rely on decoders that use either an open standard or a proprietary technology. The former option was chosen by broadcasters and pay-TV operators in the terrestrial platform and in cable, while the latter was chosen by Sky Italia, the main pay-TV operator. Accordingly, the advantage granted to operators using open technologies is selective and goes to the detriment of broadcasters using different technologies.

Indeed, digital terrestrial broadcasters, who use open technologies, do not only compete with other free-to-air analogue offers but also with pay-TV. The aid allows the T-DVB broadcaster to enter the markets related to the pay-TV at a low cost and compete with existing operators (such as Sky Italia) which do not use open technologies. There is also a distortion with respect to future entrants.

The possible argument that terrestrial operators do not compete on the same pay-TV market with Sky Italia and that the cost of the decoder has only a marginal impact on the choice of the consumer between the two different offers are disputable and the implication that the measure does not distort competition has to be rejected.

‘Triple play’ is a marketing term for the joint provisioning of high-speed Internet, telephone and television services over a broadband connection.
51. For the application of article 87(1) it is sufficient that aid threatens to distort competition by granting a selective advantage. Even if the pay-TV digital terrestrial offer is for the moment not comparable with the pay-TV offer available on Satellite, neither in terms of type of service (pay-per-view vs. monthly subscriptions) nor in terms of economic size (satellite collected almost 95% of revenues from subscribers in 2005) there is a certain degree of substitution between the two. Once the digital terrestrial platform has successfully launched and established pay-TV services – also thanks to the subsidies to decoders – it will be able to compete with similar services provided on alternative platforms.

52. This is confirmed by developments in other Member States. For example, in the UK, in the investigation on BskyB quoted above, OFT came to the conclusion that live Football Association Premier League games where one relevant good or market. It is therefore clear that competition between players using different technologies for the acquisition of live football rights is influenced by (and influences) consumers' behaviour.

53. Moreover, the subsidies come at a critical point in time in which many viewers of analogue terrestrial TV have to face the transition to digital TV and have the choice between investing in the equipment for receiving satellite or terrestrial transmissions. By lowering the cost of the investment in the equipment for receiving certain broadcasters (the decoder), the subsidies have a clear impact on such choice. In view of the costs to switch between platforms once the choice is made, the subsidies might also have a rather prolonged distortive effect.

54. Indirect confirmation that acceding to the pay-TV market at the reduced cost is distorting competition are found in the above quoted research by Deutsche Bank, where financial scenarios for Mediaset arising from the development of the soccer pay-per-view are analysed as a function of the customer which that would not be acquired by Sky Italia affecting the growth rates of the DTH pay-TV. On the other hand also the figures provided by Sky Italia – aimed at showing that the growth rate of Sky Italia subscribers is influenced by the sale of subsidised decoders – tend to support the view that there is some competition within the pay-TV market.

55. The same reasoning holds in the case of cable operators, who, even though present a triple-play offer which is substantially different from the terrestrial and satellite operators, are also offering pay-per-view services and therefore compete with other pay-per-view operators.

56. It can finally be mentioned that, with decision N. 15389 of 11.5.2006, the Italian competition authority, AGCM, rejected a complaint on Article 1, Comma 572 of Finance Law 2006. The procedure was based on the law on the conflict of interest involving members of Government. The AGCM – in order to decide whether the subsidy to decoders in object implied a conflict of interest in favour of companies owned by the Prime Minister – did not stress market separation between terrestrial and satellite television, but considered the market of pay-TV and concluded, at point 52 of the decision, that Mediaset, Telecom Italia, Sky and Fastweb can be considered to be competitors on the pay-TV market, despite the different type of pay offer.

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III.A.5 Effect on trade

57. The broadcasting and network services markets are open to international competition. By selectively favouring certain broadcasters or network operators, competition is distorted to the disadvantage of economic operators that might well originate from other Member States. The examples of satellite operators, or of the complainant Sky TV, are very clear in this respect. Thus the measure favours certain companies with respect to competitors in the common market.

58. Therefore the Commission concludes that the measure affects trade among Member States.

III.A.6 Conclusion

59. In summary, although the main beneficiaries receive an advantage which is only indirect, the Commission considers that the measure constitutes a State aid in favour of pay-TV operators using open technologies for free to air TV – in the specific case T-DVB/C-DVB operators – mainly allowing them to create a customer base and thus providing new services and enter the pay-TV market at a low cost.

60. The Commission deems that the measure in question constitutes indirect aid because the aid scheme has been designed in order to and has had as main effect to provide an advantage to those indirect beneficiaries, despite the fact that the beneficiaries did not have a direct link with the companies producing the subsidised good.

61. The presence of state aid in the present case is not called into question by the possible application of the Altmark ruling in relation to a possible compensation for public service costs.\(^{29}\) None of the four criteria (definition and assignment of the service of general economic interest, \textit{ex ante} determination of parameters for compensation, no overcompensation and choice of efficient provider via tender or estimate of the net additional costs of the average well run company) is met.

62. Therefore the objection that the measure does not constitute aid in favour of RAI because the latter was obliged to make specific investments in the digital television in view of its public service mandate cannot be accepted.

63. Finally, as regards the producers of decoders, the Commission doubted in its opening decision in case C 52/2005 that a similar measure constituted aid in their favour, since the subsidy is granted to decoders that incorporate the MHP standard, i.e. an open API that is freely available to any manufacturer. The aid is directed at consumers which have the choice among decoders of all manufacturers; it therefore seems that the aid does not selectively advantage any type of producer of decoders on the basis of place of production. Nor does it seem that there are manufacturers which are specialised in the production of the subsidised decoders and that could be favoured over producers of other models. Furthermore, it does not appear that manufacturers of decoders compete with

operators in other sectors that could not benefit from the measure. Finally, it does not seem that the measure in question seeks, through its object or general structure, to create an advantage for decoders’ manufacturers.

64. On the other hand, the Commission notes that the producers of decoders benefit from a sectoral advantage that cannot be enjoyed by other sectors of the economy and which creates a distortion in the allocation of resources in the economy. Therefore, the Commission considers that the existence of a distortion of competition at their level cannot be entirely excluded.

65. However, the Commission also considers that, in this particular case, determining whether or not the measure provides an aid in the meaning of article 87(1) EC to the producers of decoders is not necessary. The indirect effect of the measure, in terms of an increase in sale of decoders, is inherent in whatever initiative the public authorities may take in favour of the development of digital television, even the most technologically neutral. As further explained in section II.B.2 below, if an aid to producers of decoders were present, the Commission would consider it compatible under Article 87(3)(c) EC.

III.B. Compatibility assessment

66. The Commission assesses the compatibility of the aid in question with the common market on the basis of the derogation provided in Article 87(3)(c) aid for the development of a certain economic activity. In this case the activity consists in the digital transmission of television signals that can be received via open and interactive decoders.

67. In order to be compatible under article 87(3)(c) an aid must pursue an objective of common interest in a necessary and proportionate way. In particular, the measure should be assessed with respect to the following questions:

(1) Is the aid measure aimed at a well-defined objective of common interest?

(2) Is the aid well designed to deliver the objective of common interest i.e. does the proposed aid address a market failure or other objective? In particular:

(a) is the aid measure an appropriate instrument, i.e. are there other, better placed instruments?

(b) is there an incentive effect, i.e. does the aid change the behaviour of firms?

(c) is the aid measure proportional, i.e. could the same change in behaviour be obtained with less aid?

(3) Are the distortions of competition and effect on trade limited, so that the overall balance is positive?
III.B.1 Objective of common interest

68. With respect to the first question, the Commission recognises that digital switchover and the adoption of open standards are likely to bring about positive developments for consumers and for competition, which might not take place in the absence of some form of public intervention.

69. In particular, the switchover entails externalities due to the better use of frequency spectrum that broadcasters do not necessarily take into account in their investment decisions, i.e. the social benefit of more channels and services may exceed the private benefit of the incumbent broadcasters to switch since they risk, for example, being exposed to more competition for audience and advertising. This is in principle a possibility present in Italy where the incumbent broadcasters using T-DVB, vertically integrated with network operators, will be forced to leave the 40% of their transmission capacities to other broadcasters. In this situation, broadcasters may be reluctant to take part in the transition from analogue to digital broadcasting (‘digital switchover’), which has great advantages in terms of more efficient spectrum usage and increased transmission possibilities, leading to new and better quality services and to wider consumer choice.

70. For these reasons, the Commission actively supports digital switchover and has underlined these advantages in the Action Plan eEurope 2005 and in the two Communications relating to the digital switchover quoted above.\(^{30}\) In its Communication “\(i2010 – A\) European Information Society for growth and employment”\(^{31}\) the Commission has pointed out that the planned switching off of analogue terrestrial television by 2012 will improve access to spectrum in Europe. Regulation should neither impose nor discriminate in favour of the use of a particular digital platform such as cable, satellite, terrestrial or DSL TV thus adhering to the principle of ‘technological neutrality’. As stated in the Framework Directive, this does not preclude a Member State from taking proportionate steps to promote certain specific services where this is justified, for example digital television as a means for increasing spectrum efficiency.\(^{32}\) This means that each platform should in principle compete on its own strengths, but that intervention targeting in correcting market failures that are specific to one platform can be envisaged. In the end, the platforms should prevail which offer the greatest benefit to consumers.

71. In the communication on interoperability of digital interactive television services quoted above\(^{33}\) the Commission also stresses the relevance of “interactivity” and “interoperability”. It is there stated that “the Commission seeks to ensure that European citizens benefit from a growing range of interactive DTV services, available on an increasing number of transmission platforms”. Indeed, interactive TV adds another layer of functionality to digital television (DTV) beyond video which could be exploited in the future not only for commercial purposes but also


\(^{32}\) See Recital 18 of the Framework Directive 2002/21/EC.

\(^{33}\) See footnote 7.
to implement E-government functions also for the share of the population with most difficulties in relationship with informatics.

Moreover, the lack of interoperability (covering both technical interoperability and access issues) and possible constraints on consumer choice, could affect the free flow of information, media pluralism, and cultural diversity. These concerns could be summarised as follows. Consumers would be unable to buy a standardised, universal receiver able to receive all free-to-air and pay television interactive services and could be locked into using more costly receivers containing proprietary APIs. Broadcasters would face obstacles in developing and delivering interactive services because they would have to negotiate with vertically-integrated network operators, in control of proprietary API technologies. Open APIs facilitate interoperability, i.e portability of interactive content between delivery mechanisms with full functionality of the content intact. “MHP standard is currently the most advanced open API standard in Europe” and the Commission “takes measures to promote the voluntary adoption” of this standard. “One way of reducing the additional costs to consumers of equipment incorporating standard execution engines such as MHP is to subsidise purchases at the level of the consumer. Member States may therefore offer consumer subsidies”.

Finally, the Commission recognises that public intervention may also be justified by social considerations. Member States will want to make sure that all citizens have access to digital TV once analogue TV is switched off. Since the digital switchover entails some costs for consumers and requires a change in habits, Member States may want to assist in particular disadvantaged groups of society such as elderly people, low-income households or people living in peripheral regions. There is also a risk that reception of some regional and local programming may be lost in some areas: Member States may therefore also consider measures to ensure that all geographical areas continue to have appropriate TV coverage.

For all the above reason, the Commission considers that the transition from analogue to digital broadcasting and the diffusion of open standards for interactivity are to be considered objectives of common interest, which may justify, in principle, well targeted and proportional forms of public intervention.

III.B.2 Well designed aid

An aid measure is considered necessary and proportional when it constitutes an appropriate instrument to achieve the identified objective of common interest, when it has an incentive effect on the beneficiaries and when it does not introduce unnecessary distortions of competition.

In the Berlin-Brandenburg decision the Commission has already indicated that Member States may consider forms of support – provided that the measures do not entail an unnecessary distortion between technologies or companies – such as the granting of:

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• subsidies to consumers for the purchase of digital decoders. Such subsidies should be technologically neutral as described above. In granting subsidies, the authorities may encourage the use of open standards for interactivity. Open standards enable consumers to benefit from interactive services offered by different operators. Examples of interactive services are electronic programme guides, news search, games or e-commerce.

• funding for the roll-out of a transmission network in areas where otherwise there would be insufficient TV coverage;

**Appropriate instrument**

77. In this case, the aid to consumers encourages and accelerates the transition of viewers from analogue to digital TV in the regions concerned because it stimulates the acquisition of open digital decoders by viewers who, without the subsidy, would choose to remain viewers of the analogue terrestrial TV thereby facilitating the switch-off of analogue transmission.

78. Moreover, by increasing the number of sales of decoders the aid can also allow to reap the economies of scale in production that would reduce the cost of the decoders in the coming years, as it happened as a consequence of the subsidies granted in 2004 and 2005 by the Italian government which are the object of the decision in case C 52/2005.

79. By supporting only decoders with open standards for interactivity the measure is effective in modifying the relative prices of the different types of equipment and in addressing consumers toward the subsidies decoders.

80. By benefiting consumers in the first place, the social objective of reducing the cost of transition for the viewers is also respected.

81. Accordingly – notwithstanding the fact that regulatory measures could also be envisaged as suitable means for the achievement of a prompt switch-over process and the diffusion of open standards – an aid to consumers appears to be an appropriate instrument to accompany the process, relieve households from part of the cost of the equipment following the compulsory switch over to digital technology and encourage the adoption of open standards by broadcasters.

**Incentive effect**

82. The Commission considers that the aid is capable of providing an indirect effect on broadcaster which is capable of modifying their behaviour by anticipating their investments aimed at the digitalisation of the network and increasing the production of new digital offers in their free to air activities.

83. Furthermore, as a result of the measure, a critical mass of viewers of digital TV can be earlier achieved, which is likely to anticipate the launch of new interactive or pay-TV services because, as already stated, the development of an audience constitutes a necessary step to the development of a pay-TV offer for a broadcaster which desires to do so.
Moreover, without the subsidy, consumers would have likely been oriented more likely towards cheaper decoders non supporting interactive services (zappers), something the measure has prevented by bringing the price of interactive decoders substantially in line with that of these more simple models.

The subsidisation of digital equipment with high interactive content is therefore an effective strategy to provide incentives to digital terrestrial operators and broadcasters to accelerate the switch over to an open digital terrestrial television.

**Avoiding unnecessary distortions**

The Commission notices that the measure, which aims at ensuring a smooth transition towards digital television and to spread open technologies, will allow the consumers to acquire any decoder providing interactive services through open API providing a subsidy which is independent from the technological platform that the consumer may be willing to use, be it terrestrial, cable or satellite. In that respect the measure respects the principle of technological neutrality and therefore the principles concerning the aid in favour of digital television as stated by the Commission in its decision in cases C 25/2004\(^{35}\) and N 111/2006\(^{36}\).

Finally, every operator willing to adopt an open technology and benefit from the related subsidies is now in a position to do so. It cannot thus be considered, as it is done by Sky in its submission, that the present measure merely prolongs the existing illegal aid\(^{37}\) since Sky does not adopt an open technology\(^{38}\).

Contrary to the subsidies granted in 2004 and 2005, which where specifically addressed at terrestrial and cable TV, the present measure does not exclude any platform. On the other hand, the discrimination against proprietary technologies is inherent in the objective of common interest of favouring open standards and cannot be considered as an undue distortion.

The same reasoning applies to the advantage provided to producers of decoders, because even in this case there is no unnecessary distortion of competition. Indeed, the measure promotes technological development in the form of more performing decoders with standards available to all producers. The advantage can accrue to any of the producers of decoders willing to engage in such a production, including producers located in other Member States. While being true that the measure will alter the normal allocation of resources in the market by stimulating the demand for decoders, this is an inherent and inevitable effect of any public policy in favour of digitisation – even the most technologically neutral. Therefore it cannot be said that the measure introduces unnecessary distortions to competition as far as producers of decoders are concerned.

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35 See previous footnote.
36 Aid to digital technologies in the regions without simulcast, France.
37 Case C52/2005.
38 By analogy, one could think again of an aid given to companies adopting environment-friendly technologies: only those companies willing to invest in the given technology will receive such an aid.
III.B.3 Overall balance of the measure

90. Apart from the selective favouring of open standards for interactivity, which is a form of discrimination inherent in the objective of the measure, no further distortion to competition is introduced because the measure can benefit every broadcasters present in Italy in every platform under the condition that it chooses to adopt open standards.

91. In this particular case, the aid is also of low amount and of limited geographical application, which is likely to imply relatively limited effects on trade and competition.

92. Overall, the Commission considers that positive effects of the measure outweigh the negative effects in terms of actual and potential distortion of competition.

III.C Conclusions on compatibility

93. Article 87(3)(c) requires that there is a balancing between positive developments allowed by a given measure and its negative effects on competition. In the present context, digital switchover and interoperability are objectives of common interest.

94. The presence of externalities and cohesion problems related to the obligation imposed on consumer to switch to digital television can in principle justify aid to broadcasters in the form of consumer subsidy.

95. The measure has no characteristics which introduce unnecessary distortions to competition.

96. Accordingly, the Commission concludes that the measure, constitutes an aid compatible under article 87(3)(c) EC.
IV. CONCLUSION

97. On the basis of the foregoing assessment, the Commission decided that the measure in object is compatible with the common market pursuant to Article 87(3)(c) of the EC Treaty.

98. If this letter contains confidential information which should not be disclosed to third parties, please inform the Commission within fifteen working days of the date of receipt. If the Commission does not receive a reasoned request by that deadline, you will be deemed to agree to the disclosure to third parties and to the publication of the full text of the letter in the authentic language on the Internet site: http://europa.eu.int/comm/secretariat_general/sgb/state_aids/. Your request should be sent by registered letter or fax to:

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Yours faithfully,
For the Commission

Neelie KROES

Member of the Commission