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Subject: State aid No C 23 / 2010 (ex NN 36/2010) – Spain - Aid for the deployment of digital terrestrial television (DTT)

Sir,

The Commission wishes to inform the Kingdom of Spain that, having examined the information supplied by your authorities on the aid/measure referred to above, it has decided to initiate the procedure laid down in Article 108(2) of the Treaty on the Functioning of the European Union. This comprises the national plan for the introduction of DTT, as described below, and its implementation by all Spanish regions with the exception of Castilla-La Mancha. The latter is subject to a separate procedure.

I. THE PROCEDURE

1. Further to a clarification request by the Spanish Ministry of Industry, in a letter of 17 April 2009, DG Competition services took the view that transfers of funds from the Central Government to the different Autonomous Communities (CCAA) need not to be notified, *notwithstanding* the obligation to notify any subsequent awards of State aid by the CCAA. The letter also suggested notifying, if appropriate, a framework scheme valid for all CCAA awards rather than filing individual notifications. This suggestion has not been followed by the Spanish Government.
2. On the 18 May 2009 the Commission received a complaint (ref. A/11951) from SES Astra (hereinafter "Astra"). The subject of the complaint was an alleged aid scheme that the Spanish authorities had adopted in relation to the switching from

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the analogue television to the digital television. The complainant argued that the measure entailed non-notified, and thus unlawful, aid which resulted in a distortion of competition between the terrestrial and the satellite broadcasting platform. The Complaint was integrated by additional information submitted by Astra and by clarifications provided during *ad hoc* meetings with the Commission services.

3. On the 10 August 2009, the Commission requested (ref. D/53461) the Kingdom of Spain to provide comments on the complaint lodged by Astra. After a deadline extension, the Spanish authorities replied on the 4 September 2009 (ref. A/19192) and on the 5 October 2009 (ref. A/21238). Both submissions included extensive documentary evidence on Cd-rom.
4. Notwithstanding the amount of documents submitted by the Spanish authorities, at the end of the review exercise, essential information was still missing. Therefore, on the 12 October 2009, a reminder (ref. D/54291) was addressed to the Spanish authorities in order to obtain more exhaustive information on the contested measure. The Spanish authorities replied on the 2 November 2009. From that moment on, the Spanish authorities submitted, often on their own initiative, a number of documents which they considered relevant for the Commission assessment of the case. A final request for information was issued on the 17 June 2010 (ref. D/7719) and the Spanish authorities replied on the 28 June 2010 (ref. A/10340).

II. **BACKGROUND**

5. The case at hand concerns a possible violation of State aid rules, in relation to funds that the Spanish regions have spent in order to digitize parts of the existing terrestrial television platform and finance the extension of the latter in areas currently not covered by the service.
 - a. *The transition to digital technology and the regulatory framework*
6. In Spain, the transition to the digital television technology is regulated by the National Technical Plan for DTT (approved with Royal Decree 944/2005) and the National Plan for the Transition to DTT (approved by resolution of the Council of Ministers on 7 September 2007). These two regulatory instruments (the "Regulatory Framework") provide the legal basis and guidelines for the transition plans adopted by each of the Regions.
7. The transition to the digital technology has been completed on 3 April 2010, when the terrestrial emission centres, both those digitized and those newly built, have become active. In particular, the transition scheme concerned three different geographic areas.
 - Area I: includes 96% of the national population (98% for the public broadcaster), in respect to which the broadcasters' minimum coverage obligations apply. As regards this area, the terrestrial switch-over is compulsory, no public financing is made available and it is up to the broadcasters and/or the platform operators to invest in the digitisation of the network.

- Area II: the area concerned by the contested measure covers 2.5% of the national population (this is a national average, as in some regions the percentage is different), where the minimum coverage obligation does not apply. As, according to the Spanish authorities, the digitisation is not privately profitable, in the absence of any measure, the viewers of this area would not have access to channels broadcast on the terrestrial network. However, they would be served by satellite transmission.
 - Area III: the most remote area, including 1.5% of the national population, where it is not possible to build a terrestrial network and where the satellite is the only platform available. In order to make *free-to-air* (FTA) channels available in this area, the Government has adopted Law Decrees 1/2009 and 7/2009. Such decrees provide for *must carry* obligations mandating terrestrial broadcasters to make their FTA channels available to at least one satellite operator. The Commission has indications that both Hispasat and Astra are availing themselves of this option.
8. All Spanish Regions follow the path set out by the central government's National Technical Plan for DTT. Indeed, in execution of legislative and contractual instruments adopted at government level, the regions (with the exception of Castilla-La Mancha, which granted monetary aid directly to the platform operator) launched tenders for the provision and installation of the hardware necessary to digitise existing transmission centres or building digital emission centres *ex novo*. The regions contribute with budgetary funds to part of the necessary investment.
 9. The financial transfer from the central government to the regions takes the form of non-interest bearing loans. They are repayable in a number of years (usually fifteen), with a three-year latency period.
 10. The Spanish authorities have denied that the regions are acting in execution of Government guidelines, but this assertion is contradicted by the statements of the same regions in their replies to the Commission request for information.¹
 11. It must be noted, in this respect, that all Spanish Regions implemented such a financing scheme, without Spain notifying it as possible State aid to the Commission. Spain has only belatedly notified a scheme already implemented in the region of Murcia. According to the statistics provided by the Spanish

¹ In the replies, the regions explicitly refer to the National Transition Plan adopted with Royal Decree 944/2005 and to the so called *Plan Avanza*, a national plan to enhance the digitisation of the communication networks (i.e. broadcasting and broadband networks). See, for example, the region Extremadura explaining that "*Conforme a lo dispuesto (...) del Real Decreto 944/2005 (...) por el que se aprueba el Plan técnico nacional de la televisión digital terrestre, en la qual se recoge la iniciativa local en la extensión de la cobertura de la TDT....*".

authorities, approximately EUR 196 million² have been spent or committed to expenditure pursuant to binding agreements.³

b. The market players

12. The case at hand concerns the broadcasting industry, namely at least three different levels of the broadcasting product chain: (i) broadcasters of TV channels, (ii) platform operators, and (iii) hardware suppliers (also known as "installers").
13. With regard to the disputed measure, on 29 October 2009, the Spanish Government has provided an exhaustive list of hardware supply contracts, on a region by region basis. The data provided show that Abertis, which is the dominant terrestrial platform operator, has participated in most tenders launched by the regions and has become the largest contractor of the regions for the supply and installation of hardware.
14. According to the Spanish authorities, Abertis participated in the tenders only as a "network supplier" and not as a "network operator". This means that, except for the start-up and guarantee period (on average, one year) the funded platforms will not be operated by Abertis, but by the regions themselves, either directly or through *ad hoc* departments or entities.

III. THE COMPLAINT

15. The complainant is a satellite platform operator. Set up in 1985 as Société Européenne des Satellites (SES), SES ASTRA (hereinafter "Astra") was Europe's first private satellite operator. Astra operates the ASTRA Satellite System, offering a comprehensive portfolio of broadcast and broadband solutions for customers in Europe and beyond. It broadcasts television and radio programmes directly to millions of homes, and provides internet access and network services to governments, large corporations, small- to medium-sized enterprises and individual households.
16. Astra has denounced the plan and its application as an illegal aid to a DTT platform operator in a *de facto* monopoly position (ABERTIS SA) and, possibly, to other DTT platform operators. In particular, Astra emphasises the lack of technological neutrality affecting the measure, which would discriminate against satellite operators and jeopardise their survival on the market.
17. In Astra's view, to meet the objective of offering digital *Free to Air* (FTA) TV to viewers in area II, the government had the choice between investing into digitising the analogue terrestrial network and making funds available to broadcast such services via already existing alternative digital platforms.

² Of such figure, EUR 60.2 million consist of non-performing loans from the central government to the regions and EUR 136.1 million are financed by the regions. As at February 2010, EUR 144.1 million had already been adjudicated for the extension of the DTT network, while the adjudication of EUR 52 million was still pending (*Source*: Spanish Government, doc. A/1980).

³ The figure is updated at February 2010. As at 15 October 2009, Abertis was by far the largest contractor (57.18% of the financed amount), followed by Castilla La Mancha Telecom (13.72%). Castilla La Mancha is the subject of complaint 19/2009.

According to Astra, it would be in a position to broadcast FTA channels over the satellite at a fraction of the amount spent on the terrestrial switch-over. The terrestrial switch-over therefore, in Astra's opinion, would not have been necessary in Area II.

18. Astra further argues that the Region of Cantabria has withdrawn a contract already signed with Astra,⁴ once the Government financial support for digital terrestrial technology became available. This would show (i) that satellite transmission would indeed be an alternative means to cover the disputed area and (ii) that Astra has been injured by the Spanish Government's intervention to the benefit of a particular technological platform.
19. Astra further argues that there will be continuous aid. Regional governments will finance the operation and maintenance costs of the local networks in Area II. This would amount to an annual expenditure of € 42.9 million per year, or about € 430 million over the next decade⁵.
20. Finally, ASTRA points out that by excluding it from competing in Area II, its competitive position in the overall Spanish platform market is weakened. As its pay-TV market does not grow any more, ASTRA is focussing on contracts with national broadcasters. Becoming the platform operator in area II would have "opened the door" to also compete in the future with Abertis on the wider Spanish TV market. From ASTRA's perspective that issue would be more important than the access to the regional markets itself.

IV. THE POSITION OF THE SPANISH AUTHORITIES

21. The position of the Government rests on three main arguments: (i) there is no State aid involved in the transition to DTT; (ii) the *Altmark* jurisprudence is applicable, since a public service is concerned, and therefore the measure is not an aid; (iii) if State aid were considered to be involved, in any case it would be compatible pursuant to Art. 107(3) lett. c) of the TFEU. The Government's arguments are briefly summarised in what follows.

a. No State aid is involved

22. In the first place, the Government objects that there is no State aid involved in the contested measures. In particular, *inter alia*, it is argued that no subsidies are involved if the regions follow the public procurement rules when buying goods and services. In addition, there is no discrimination, as DTT and satellite

⁴ In a letter sent by Indican, the regional entity set up by the region of Cantabria, to Astra on 7 November 2008. The letter unilaterally terminates the contract with Astra, by arguing that "*la decisión sobrevenida de la Administración del Estado Español de implantar la cobertura del 100% de los servicios de televisión digital para todo el territorio nacional hace inviable la implantación del servicio concertado...y, por ello, la ejecución y implementación del referido contrato*". (submission of Astra of 30 November 2009)

⁵ In their reply to Astra's submission on 8 June 2010, the Spanish authorities have not denied that municipalities will finance operating and maintenance cost in the future. However, the overall figure is disputed. Among other points, the Spanish authorities put forward that in some contracts such cost are already included in the tender for the installation of DTT equipment. As a result, the overall figure would be smaller.

platforms operate on different markets. The former carries out a public service and mainly broadcast FTA channels, the latter relies on the pay-TV business model. It is also added that the contested measures are not selective, as also satellite operators may participate in the tenders launched by the Regions (and Astra has done so in Cantabria), which do not expressly exclude the participation of satellite platform operators.

b. The Altmark jurisprudence is applicable

23. Secondly, the Government argues that achieving maximum DTT coverage is part of a public service obligation and, therefore, the *Altmark* jurisprudence would apply to the contested measures. The measure at issue merely covers part of the costs of digitisation thus there would be no over-compensation and it enhances efficiency, compared to satellite. Finally, with regard to the 4th Altmark criterion, the awarding of the tenders for the supply of digital transmission hardware has been carried out through competitive procedures in compliance with the Community rules, which ensures that the most efficient provider has been selected.

c. Aid, if any, is compatible pursuant to Art. 107(3)

24. Finally, the Government submits that, if the Commission considered that State aid was indeed involved, such aid would be compatible with the common market pursuant to Art. 107(3) lett. c., as it fosters the fulfilment of an objective of Community interest (*i.e.* the switching to digital technology). The aid is well-designed as it only concerns the small portion of the market – 2.5% of the population - which does not fall within the coverage obligations imposed on terrestrial platform operators. There would be economies of scale and scope if the digital terrestrial network is also extended to area II. Thus, it would be more efficient to carry out such an up-grading of the already existing analogue network rather than switching to another platform. The Government also argues that, in this scenario, technological neutrality is not an absolute principle, as DTT is the only platform featuring a wide choice of FTA channels. In any event, *de facto*, there existed the possibility for ASTRA to participate in the tenders.⁶

V. PRELIMINARY ASSESSMENT

25. It is first considered whether the *Altmark* jurisprudence is applicable. If it is, then the contested measure cannot be considered as state aid. In the negative, however, it would be necessary to assess whether the contested measure entails state aid pursuant to Art. 107(1) and, if so, if such an aid can be considered compatible with the internal market pursuant to Art. 107(3).

a. General remarks

⁶ The Spanish authorities submitted correspondence between some regions and the central government, showing that the former did not exclude platforms alternative to the terrestrial platform. However, such evidence only concerns three regions out of nineteen and it merely shows that technology neutrality was considered *ex post*, but was not a guiding principle of the government digitisation plan (in a meeting on case N 595/2009, the government of Murcia confirmed that technological neutrality was only discussed after Astra's complaint to the Commission).

The public service remit

26. In Spain public and private broadcasting is by law defined as a public service.⁷ This public service definition, however, does not give preference to any particular platform as can be seen from the absence of a technological connotation of the television service in the most recent (2006) legislative definition of public service.

Choice of technology

27. The Spanish authorities have explained that digitising the already existing terrestrial network was the cheapest and fastest route to the digital switch-over⁸. In order to extend coverage of the DTT platform, the Spanish authorities have envisaged the digitisation of existing transmission centres and the building of new ones *ex novo*.
28. However, the cost structure of terrestrial and satellite platforms are different. To establish whether indeed the digitisation of the terrestrial platform is less costly, the costs of extending DTT have to be compared with the costs which would arise from providing FTA channels on the satellite platform. In this respect, the Spanish Authorities have submitted a comparative cost analysis study carried out in 2007. As further discussed below, however, it seems that (i) its assumptions are not fully justified and (ii) it is not at all conclusive on which technology is less costly⁹.

b. Applicability of the Altmark jurisprudence

29. The Altmark jurisprudence establishes four criteria which have to be fulfilled so that a particular measure does not constitute State aid under Article 107(1)¹⁰. *Altmark* is a judgment concerning a situation where public money was paid to a direct beneficiary; there was a direct relationship (a *synallagma* in legal terms) between the public service and its compensation. Also, the cost-orientation test

⁷ The relevant laws date back to 1983-88 (television services at regional level), 1995 (television services at local level) and, most recently, 2006 (television services at national level).

⁸ In particular, in its first submission, the Government explained that "[...] *la evolución hacia la TDT puede requerir trabajos de adaptación de la antena existente (reorientación, amplificadores), pero en ningún caso su sustitución por un nuevo elemento de recepción. Por el contrario, la utilización de cualquier otro medio de recepción de televisión digital requiere la instalación de nuevos elementos de recepción, como puede ser una antena parabólica*" and that "[p]or tanto, se considera que el cubrir ese porcentaje del 2,5% de la población a través del servicio de TDT y no del servicio de TV por satélite es mucho más eficiente, especialmente para los ciudadanos nos afectados [...]".

⁹ For example, the Government has failed to estimate the costs of bringing public service broadcasting to viewers in area II under similar conditions as it was done for area III (with Decreto Ley 1/2009, in order to reach the 1.5% of the population by satellite in area III).

¹⁰ The *Altmark* jurisprudence is applicable provided that (i) the recipient undertaking is in charge of a public service, which has been clearly defined; (ii) the compensation is calculated based on parameters established beforehand in an objective and transparent manner; (iii) the compensation does not exceed what is necessary to cover all or part of the costs of the public service obligations, plus a reasonable profit; (iv) the undertaking entrusted with a public service needs to be chosen in a public procurement procedure or, alternatively, its remuneration needs to be calculated based on the costs of an efficient undertaking.

and the overcompensation test were applied with regard to the recipient of the public fund, which was the provider of the public service.

30. It must be borne in mind that there are (at least) three levels of competition, in the broadcasting production chain, concerned in the case at hand: (i) providers of DTT and satellite hardware, (ii) platform operators, and (iii) broadcasters. Hardware manufacturers do not have a public service remit. Thus, *Altmark* is not applicable to them.
31. A public service remit exists for broadcasters. However, the latter can only be considered to be indirect beneficiaries. In Area I, *i.e.* the 96% of the Spanish population, broadcasters pay the platform operator for the transmission of their signals. In Area II, broadcasters are not charged for the use of the platform¹¹. Thus, broadcasters benefit from the scheme as, due to a wider digital network, they can increase (or, at least, maintain) their viewership among the about 1 million people in area II. Supposedly this would also generate some additional advertising revenue¹². On the other hand, public broadcasters do not receive money for the up-grading of the terrestrial network. They would also not benefit if there was over-compensation. Thus, the *Altmark* test is not suitable for the evaluation of such indirect benefits which arise for broadcasters.
32. By way of contrast, terrestrial platform operators benefit directly from the state-financed extension of the DTT network. If the terrestrial platform operator owns the extended DTT network, it foregoes the network extension (and or technological upgrade) costs. However, also in that case, *Altmark* is not applicable. Most importantly, as discussed above, platform operators are not included in the public service mission. Thus, aid to terrestrial platform operators would not be covered by the first *Altmark* criterion¹³.
33. Even if one found that the public service remit extends to the terrestrial platform, it is doubtful that the DTT scheme would fulfil *Altmark* criteria III and IV.
34. With regard to the third criterion, the cost of digitisation of Area II, including operation and maintenance, are fully covered by State funding. In the light of benefits to broadcasters and platform operators, as discussed below, this could lead to over-compensation. No assessment has been made, by the Spanish authorities, on whether the State funding would exceed the cost of public service obligations plus a reasonable profit.

¹¹ In a meeting, on 14 January 2009, the Spanish authorities explained that the broadcasters had complained heavily about having to bear the cost of the digital switchover in area I. They would consider the benefits from covering the additional 2.5% of population in area II as small. As a result, they refused to pay for the transmission in area II.

¹² In the same meeting, the Spanish authorities put forward that such additional advertising revenue would be small. However, no evidence has been produced in this regard.

¹³ In addition, the contested measure affects 2.5% of the population which is not reached by DTT, as it falls out of the coverage obligations imposed on the broadcasters in their quality of concession-holders for the public service. It therefore may even be considered that area II is not covered by the public service remit of the broadcasters. So far, the Government has not provided clear indications on the point, nor has it provided any entrustment act concerning the terrestrial platform.

35. As regards the fourth Altmark criterion, the Spanish authorities refer to competition between hardware providers. However, to address a possible advantage at the level of platform operators, it would have been necessary to organise a public tender allowing for competition between different platform operators or, at least, to carry out a comparison between the investments made by the Spanish authorities and the costs of an as efficient competitor. However, such a tender has not taken place, and the above mentioned cost study of 2007 does not provide for a reliable and conclusive cost analysis in this regard.
36. In conclusion, the Commission considers that the Altmark jurisprudence cannot be applied to this case. Apart from the fact that benefits to the broadcasters, as indirect beneficiaries, are difficult to reconcile with the Altmark approach, there does not exist a public service remit for the terrestrial platform operator. Even if such a public service remit existed, the other Altmark criteria do not seem to be fulfilled.

c. Existence of State aid pursuant to Article 107(1)

Transfer of State resources

37. The contested measure entails a transfer of State financial resources to entities carrying out an economic activity. First, budgetary resources are transferred from the central government to the Regions. Then, the Regions finance the extension of the DTT network.

Selectivity and advantage: beneficiaries of the contested measure

Hardware providers

38. Hardware providers are the direct contractors of the Regions once tenders for the digitalisation are adjudicated. The government purchases DTT equipment at market conditions and in compliance with public procurement rules (open tender). As the procurement is carried out at market price, *prima facie*, it does not imply an advantage for a specific network provider (despite the fact that Abertis has secured the majority of the works tendered). However, as there is an increased demand for these products because of the aid measure, at this stage it cannot fully be excluded that the measure entails a selective advantage for the hardware providers.
39. In addition, the decision of the Spanish authorities to procure only hardware for the upgrade of the terrestrial platform implies a discrimination against providers of equipment used by other platforms (e.g. satellite decoders and dishes).

Platform operators

40. As regards platform operators, different measures have been taken by the regions. Where there existed already an operator of the analogue network, that operator continues operating the DTT network (e.g. Telecom Castilla-La Mancha, Aragon Telecom, etc.). According to the Spanish authorities, in the majority of cases the municipalities operate the network themselves. In other cases, a public entity is responsible. These operators do not receive directly government money.

However, the equipment purchased by the (regional) government is made available to them to expand their network. Platform operators, therefore, directly benefit from public financing of the extension and upgrade of their digital network.

41. Where a regional platform operator is the beneficiary, this operator benefits from the extension of its regional network into the remote areas of this particular region. In some regions the "Area II" part can include up to 10% of the region's population. As a result, due to the State measure, the overall coverage of the regional networks is increased, which increases the attractiveness of the network when competing with other platforms for the transmission of TV signals in that particular region.
42. In addition, the subsidized installations increase the capillarity of the DTT network as a whole. As a consequence, the network becomes suitable to the provision of value-added services (*e.g.* digital mobile television or DVB-H) and broadcasters and platform operators will have increasing opportunities to be first-mover providers of next generation digital services.
43. These benefits are further strengthened by the continuous subsidisation of operating cost of the local networks by the regional governments. In some regions the local governments have indicated their commitment to bear the network's personnel and maintenance expenses. This also applies where the operation of the infrastructure is carried out by a private entity. Where such payments are made to local network operators, a further risk of over-compensation, *i.e.* the partial coverage of other network costs, exists. This may, for instance, arise when equipment is used jointly for Area I and II.
44. Similarly, according to ASTRA, a direct advantage also arises for Abertis when competing with other platform operators. As a network supplier, Abertis has won the majority of contracts for up-grading these local networks, however it does not operate any of the local networks at issue itself. Nevertheless, when competing with another platform as a platform operator, the extension of the terrestrial network allows Abertis to offer broadcasters a wider reach and a higher capillarity of its own network. While without the measure, the digital terrestrial network only reached 96-98% of the population, this reach is increased to nearly 100%, without additional cost to the broadcaster. A broadcaster interested in national coverage would therefore have less of an incentive to choose the satellite platform.

DTT Broadcasters

45. Broadcasters, finally, could be considered indirect beneficiaries. Without the government scheme, in Area II, they would only have the option to purchase satellite capacity from Astra. Even if they did, they would reach fewer households, as at least some of them would refrain from purchasing the necessary ground equipment (satellite decoder and dish).
46. In the pay-TV market, *pay-per-view* initiatives recently launched on the DTT platform compete with the channels broadcast on the satellite platform. As the

contested measure extends the DTT platform, DTT *pay-per-view* channels are favoured over *pay-per-view* channels on the satellite platform.

Conclusion on the selective advantage

47. Thus, the disputed scheme seems to result in a selective advantage for network suppliers/installers (sectoral advantage), for DTT platform operators and for DTT broadcasters, both in FTA and in pay-TV mode.

Distortion of competition

Hardware providers

48. At first sight, the contested measure appears to entail a competitive advantage (in the form of increased demand) to the benefit of hardware providers.

Platform Operators

49. Distortion of competition could arise between different platforms (terrestrial and satellite), as the contested measure aims at the digitization and installation *ex novo* of terrestrial emission centres, without considering the satellite technology.
50. The Spanish authorities have put forward that the satellite platform operated by ASTRA is not in the same market as the terrestrial platform, as it does not have the FTA rights.
51. Information in the file shows that Astra was able to compete for platform extension in Cantabria and that the Cantabrian government terminated unilaterally the contract once the contested measures in favour of DTT were approved. In addition, one of the broadcasters indicated that it would not grant any rights to Astra, as long as DTT coverage was available in the area. Further, the satellite platform is used in area III and the government has imposed "must carry" obligations on the broadcasters to ensure that their signals are sent via this platform.
52. The fact that currently FTA broadcasters are not inclined using the satellite platform does not imply that the satellite and terrestrial platforms are in different markets. Basically broadcasters may choose one of the two platforms. Broadcasting over both platforms simultaneously would only increase broadcasters' costs without adding much value as long as both platforms offer nationwide coverage. As, due to the state intervention, the extension of DTT to Area II is free of charge, broadcasters have no incentive to switch to the satellite platform for Area II. This, of course, could be different in the absence of State subsidies. In that case, as it was done for Area III, the government could have used must-carry obligations to ensure transmission in area II¹⁴.

¹⁴ It must also be borne in mind that, in a market context where platforms are progressively converging and where Abertis is dominant in the DTT market and has a stake also in the satellite platform market, the measure envisaged by the Government could weaken Astra, thus reducing competition in the market for platform operators.

Broadcasters

53. The contested measure might also distort competition between broadcasters. In the past, the terrestrial platform has traditionally hosted FTA broadcasters and the satellite platform mainly pay-TV or pay-per-view broadcasters. Currently, however, FTA broadcasters are launching pay-TV initiatives on the terrestrial platform and satellite broadcasters seek access to FTA channels in order to complete their offer and compete more actively with the FTA broadcasters.

Conclusion on distortion of competition

54. By financing the costs associated to the extension of the DTT platform, the scheme might therefore determine a distortion of potential or actual competition among hardware providers active in different technologies and between the terrestrial and the satellite platform. In addition, the measure might create a distortion of competition between DTT broadcasters and satellite broadcasters, both FTA and Pay-TV, to the extent that the former use a platform which would not be available (or would be available at a higher cost) in the absence of the measure.

Effect on trade between Member States

55. The contested measure also has effect on trade, as it modifies the competitive conditions in the entirety of the territory of a Member State and, in addition, because undertakings from other member States invest in the Spanish broadcasting industry (e.g. Telecinco, a broadcaster controlled by the Italian Mediaset or ASTRA).
56. *d. Compatibility pursuant to Art. 107(3) lett. c* Once the conclusion is reached that the contested measure entails State aid, the scheme adopted by the Spanish authorities should be assessed in the context of Article 107 (3) lett. c, in order to verify its possible compatibility with the internal market. The compatibility of the contested measure must be assessed in the context of the transition from analogue to digital television.
57. In this respect, the Government has argued that the public financing was necessary in order to overcome a market failure preventing the digitalisation of areas falling outside the legal coverage obligations of the broadcasters.
58. In its judgment of 6 October 2009,¹⁵ the General Court has ruled on the appeal lodged by Germany against the Commission decision in the case *DVB-T – Berlin/Brandebourg*,¹⁶ addressing similar issues the Commission has to deal with in the case at hand. In particular, the Court has addressed the criteria the Commission has to apply in the compatibility assessment pursuant to Art. 107(3) TFEU. They are considered in what follows.

¹⁵ General Court, judgment of 6 October 2009, in Case T-21/06, *Germany v Commission*.

¹⁶ Commission decision no. 2006/513/CE of 9 November 2005, in OJ 2006, L 200, p.14.

Market failure¹⁷

59. In principle, in the case of digital switch-over, the market failure argument was accepted by the Commission in *DVB-T Brandenburg*. There are positive externalities from the digital switch-over (the digital dividend). The digital technology leads to a broader offer for the final customer. However, it would be necessary to show as well that terrestrial operators would not by themselves invest in the digitisation of their network¹⁸. In this respect, the Spanish Government has provided sufficient indication of broadcasters' unwillingness to bear additional investments for the extension of the DTT network¹⁹.
60. As an alternative, the satellite platform could already be used to provide digital transmission. However, also in that case additional investments would have to be made. Households would be required to purchase the necessary ground equipment, which entails a significant investment (also including the satellite dish installation). Neither the satellite operator nor private households have so far carried out such investments in ground installations at a scale that one could consider Area II to be sufficiently served by the satellite network.
61. For reasons of cohesion and access to information, the government wishes to provide the entire population with access to FTA TV on the same terms, *i.e.* without any subscription for viewers to access the TV channels. As, also in the case of satellite transmission, this could only be achieved with governmental support, it can be concluded that a market failure exists.

Proportionality

62. As regards proportionality, in its *DVB-T Brandenburg* decision, the Commission found it necessary to compare the adopted measure with possible alternatives. It concluded that the aid was neither necessary nor proportionate.
63. The Spanish authorities argue that the digitisation of the existing terrestrial transmission centres (and, on occasions, building of new centres) was the least expensive and most expedite solution for digitisation. To such regard, they have submitted a cost analysis study comparing the costs of the terrestrial and satellite

¹⁷ The Commission has referred to "market failure" as a factor to be taken into account in the compatibility analysis both in the Communication for the transition from analogue to digital technology [COM (2003) 541 final] and in its 2005 Action Plan on State Aids [COM (2005) 107 final] and in related state aid decisions.

¹⁸ In *DVB-T Brandenburg*, the Commission found that digital terrestrial transmission is cheaper than analogue transmission. Companies therefore would have switched anyway and the aid was not necessary.

¹⁹ In particular, with respect to the necessity of the measure, the Government submitted documents showing that the commercial broadcasters have requested the Spanish Government to lower the minimum coverage obligation from 96% to 90% for area I. As already the obligatory coverage of 96% of population would not be commercially viable, the broadcasters had refused to finance the switch-over for the additional 2.5% of population in area II. See, *inter alia*, the submission by UTECA dated 16 January 2007, submitted by the Ministry of Industry. Also the government of Cantabria, in its latest submission, has confirmed that "*todas las tentativas de compartir gastos con los radiodifusores en televisión digital han dado resultados negativos*".

technology.²⁰ That study, however, provides little evidence to tackle the issue of proportionality.

64. First, in comparing the costs of the two technologies, the study assesses the cost of decoders for the satellite technology, but fails to assess the cost of decoders (or of a new TV receiver with a decoder embedded), antenna orientation and cable replacing that are necessary in case of switching to the DTT technology. Secondly, the study concludes that one or the other technology is more efficient, depending on the geographic conditions and on the size of the town or village to be covered. The latter conclusion, however, would suggest that the regions launch tenders for both the satellite and the DTT technology, as the territorial bodies to be served are variable in size. By launching tenders exclusively for the DTT technology, the study's conclusion was ignored²¹.
65. The Spanish Government is invited to provide further information on this point.

Technological neutrality

66. The 2003 Commission Communication on the transition to digital technology provides that, in order to achieve the transition to the digital standard, all transmission modes need to be taken into consideration. In its *DVB-T Brandenburg* decision, the Commission concluded that the terrestrial DVB-T technology is not superior to other technological solutions. The support for that platform would be an unjustified departure from the principle of technological neutrality and could hamper other platforms. In its judgement T-21/06, the Court referred to the 2003 Communication and found that, as DVB-T clearly supported only the terrestrial network, this measure would not fulfil the neutrality requirement²².
67. In the *Mediaset* case (T-177/07), concerning subsidies to users for the purchase of digital terrestrial and cable decoders, the General Court upheld the Commission's finding that the exclusion of satellite decoders from the subsidy entailed discrimination in breach of the principle of technological neutrality and as such prevented the contested measure from being declared compatible with the internal market.
68. In the case at hand, the Government has focused on the DTT technology as the main solution for the digitisation. Indeed, the technological choice has been made at the very beginning of the administrative process, when Royal Decree 944/2005 was approved. It makes explicit reference to the DTT technology. The Regions have simply followed the Government directives. However, there is a large variety of different tender procedures chosen by the different municipalities. In some cases the wording of the tender leaves open which technology to use. In

²⁰ See "*Informe de costes de referencia para el proceso de universalización de la televisión digital terrestre en España*" submitted by the Spanish Government on 21 January 2001. The Government explained that such study, dated July 2007, was submitted to the regions as a reference in assessing which technology, between terrestrial and satellite, was more efficient.

²¹ Also, the possibility to impose must carry obligations on broadcasters seems to have been neglected as an option to bring FTA channels to the 2.5% of the population in area II.

²² T-21/06, Germany against Commission, not yet published, paragraph 69.

some other cases the tender provides a list of emission centres to be used when deploying DTT equipment.

69. At a later stage in the procedure, the Government has submitted to the Commission samples of correspondence (*i.e.* three e-mails) between the Ministry of Industry and the Autonomous Communities. In these e-mails, Regions inquire on whether the Government funds for DTT can also be used for financing the satellite technology (which was confirmed). The Government suggests that this evidence shows that the tender launched by the Regions, although making explicit reference to DTT, were *de facto* open to all technologies. However, this only applies to a small number of regions. Second, where the technological choice was confirmed *ex post*, this was not public knowledge and could therefore not prevent that non-DTT platform operators were discouraged from participating in the tender. In fact, in its submissions, Astra has pointed out that the general reference to DTT in the tender documents made it refrain from participating in the tenders.

e. Applicability of the de minimis rule

70. In relation to the applicability of the *de minimis* rule, the Commission observes that the aid is not "transparent" in the sense of Art. 2(4) of regulation No. 1998/2006 on *de minimis* aid. Indeed the amount of the aid is the economic value of the technological upgrade enjoyed by DTT platform operators and broadcasters and of increased demand for hardware providers.

f. Applicability of Article 106 (2)

71. Art. 106(2) of the EC Treaty provides for a "public service exception" which may find application in cases where the *Altmark* criteria are not fulfilled. However, it can be concluded, in this respect, that the factual elements preventing the application of the *Altmark* jurisprudence (in particular, lack of a precise definition of public service and lack of clear entrustment of such service) also put into doubt the application of Art. 106(2).

CONCLUSION

72. It is preliminarily concluded that the above discussed scheme for a transition to digital television technology constitutes unlawful State aid under Article 107 (1) of the EC Treaty. The Commission regrets that this aid has been implemented without prior authorisation. On the basis of existing information, such aid may not be compatible unless adequate measures are taken in particular to address the distortive affect on competition between platform operators.
73. In the light of the foregoing considerations, the Commission, acting under the procedure laid down in Article 108(2) of the Treaty on the Functioning of the European Union, requests the Kingdom of Spain to submit its comments and to provide all such information as may help to assess the measure, within one month of the date of receipt of this letter. In its reply, the Kingdom of Spain is invited to comment also on the following questions:

(1) What scope does there exist for the development of platform competition in the Spanish TV broadcasting market in the future?

(2) What barriers exist for platform competition in the Spanish market and how could they be overcome?

(3) For the entire Area II, taken all Spanish regions together, approximately how much money will be spent for operation and maintenance cost of DTT networks in the period 2010 – 2015?

(4) Would it be feasible to tender the operation of digital transmission of TV broadcasting in a technologically neutral way (so that the operation and maintenance costs are minimised)?

74. Further, the Commission requests your authorities to forward a copy of this letter to the potential recipients of the aid immediately.

75. The Commission wishes to remind the Kingdom of Spain that Article 108(3) of the Treaty on the Functioning of the European Union has suspensary effect, and would draw your attention to Article 14 of Council Regulation (EC) No 659/1999, which provides that all unlawful aid may be recovered from the recipient.

76. The Commission warns the Kingdom of Spain that it will inform interested parties by publishing this letter and a meaningful summary of it in the *Official Journal of the European Union*. It will also inform interested parties in the EFTA countries which are signatories to the EEA Agreement, by publication of a notice in the EEA Supplement to the *Official Journal of the European Union* and will inform the EFTA Surveillance Authority by sending a copy of this letter. All such interested parties will be invited to submit their comments within one month of the date of such publication.

77. If this letter contains confidential information which should not be disclosed to third parties, please inform the Commission within fifteen working days of the date of receipt. If the Commission does not receive a reasoned request by that deadline, you will be deemed to agree to the disclosure to third parties and to the publication of the full text of the letter in the authentic language on the internet site:

http://ec.europa.eu/community_law/state_aids/state_aids_texts_en.htm.

78. your request should be sent by encrypted e-mail to stateaidgreffe@ec.europa.eu or, alternatively, by registered letter or fax to:

European Commission
Directorate-General for Competition
State Aid Greffe
Rue Joseph II 70
B-1049 Brussels
Fax No: +32 2 2961242

Yours faithfully,
For the Commission

Joaquin ALMUNIA
Vice-President of the Commission