EUROPEAN COMMISSION

Brussels, 19 June 2013
C(2013) 3204 final

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COMMISSION DECISION

of 19 June 2013

on state aid SA.28599 (C 23/2010 (ex NN 36/2010, ex CP 163/2009))
implemented by the Kingdom of Spain
for the deployment of digital terrestrial television in remote and less urbanised areas (outside Castilla-La Mancha)

(Only the Spanish text is authentic)

(Text with EEA relevance)

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THE EUROPEAN COMMISSION,

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

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

Having called on interested parties to submit their comments pursuant to the provisions cited above[1], and having regard to their comments,

Whereas:

1. PROCEDURE

(1) On 18 May 2009 the Commission received a complaint from SES Astra S.A. (hereinafter referred to as "Astra"). The subject of the complaint was an alleged state aid scheme that the Spanish authorities had adopted in relation to the switch-over from analogue television to digital television in remote and less urbanised areas of Spain. Astra argued that the scheme constituted non-notified and therefore unlawful aid, resulting in a distortion of competition between the satellite and terrestrial broadcasting platforms.

[1] Commission decision 2010/C 337/07 of 29 September 2010 (OJ C 337, 14.12.2010, p.17).

(2) The contested scheme has its origin in Law 10/2005 of 14 June 2005 on Urgent Measures for the Promotion of Digital Terrestrial Television, Liberalization of Cable TV and Support of Pluralism[2]. Further legislation adopted with respect to the digital terrestrial transition television process includes, among others, Royal Decree 944/2005 of July 29, 2005 approving the National Technical Plan for Digital Terrestrial Television[3] (hereinafter "NTP"); Royal Decree 945/2005 of 29 July 2005 approving the General Regulations for the delivery of the digital terrestrial television service; Order ITC 2476/2005 of 29 July 2005 approving the General Regulations and the regulations for the delivery of the digital terrestrial television service, and Royal Decree 920/2006 of 28 July 2005 approving the General Regulations for the delivery of the radio and cable television broadcasting service.

(3) By letter dated 29 September 2010, the Commission informed the Kingdom of Spain that it had decided to initiate the formal investigation procedure laid down in Article 108(2) of the Treaty on the Functioning of the European Union (TFEU) in respect of the aid in question for the whole territory of Spain with the exception of Castilla-La Mancha, for which a separate procedure was opened[4]. The Commission decision to initiate the procedure (hereinafter "opening decision") was published on 14 December 2010 in the Official Journal of the European Union[5]. The Commission invited the interested parties to submit their observations on the measure.

(4) Following extension of the deadline, Spain replied by letter dated 30 November 2011 to the request for comments made in the opening decision. Apart from the central government, the authorities of Asturias, Aragon, the Basque country, Castilla y Leon, Castilla-La Mancha[6], Extremadura, Galicia, la Rioja, Madrid and Murcia submitted their comments and/or replies to questions asked in the opening decision.

(5) The Commission also received comments from Radiodifusion Digital SL by letter dated 11 January 2011, from Grupo Antena 3 and UTECA (Union de Televisiones Comerciales Asociadas) by letters dated 28 January 2011, from Gestora La Sexta by letter dated 31 January 2011, from Abertis Telecom SA (hereinafter "Abertis") by letter dated 2 February 2011, and from Astra and Telecinco by letters dated 4 February 2011. By letters dated 19 January 2011and 9 February 2011 the Commission forwarded those observations to Spain, which was given the opportunity to react. Spain provided comments by letters dated 22 February 2011 and 14 March 2011.

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2 http://www.boe.es/boe/dias/2005/06/15/pdfs/A20562-20567.pdf.

3 http://www.boe.es/boe/dias/2005/07/30/pdfs/A27006-27014.pdf.

4 Commission decision 2010/C 335/08 of 29 September 2010 (OJ C 335, 11.12.2010, p.8).

5 Commission decision 2010/C 337/07 of 29 September 2010 (OJ C 337, 14.12.2010, p.17).

6 In addition to submitting comments in this case, Castilla-La Mancha subsequently submitted its observations on case C 24/2010.

(6) In the course of the investigation, several meetings were held: between the Commission and Spain on 11 and 12 April 2011, between the Commission and Astra on 14 April 2011, between the Commission and Abertis on 5 May 2011 and between the Commission and UTECA on 5 July 2011. After several submissions of information by Spain on its own initiative, including observations from the Basque Country dated 24 February 2011, a formal request for information was addressed to Spain by letter dated 14 February 2012. Following extension of the deadline, Spain provided reply in a letter dated 16 April, which was followed up by letters dated 15, 19 and 25 June 2012. As part of the information was still missing, on 9 August 2012 the Commission addressed a request for additional information. After extension of the deadline, Spain provided replies in a letter dated 10 October 2012, followed by a letter dated 30 October 2012.

(7) Furthermore, Abertis provided on its own initiative additional submissions on 22 June 2011 and 25 July 2012. Astra provided additional information in letters dated 21 July 2011, 16 May 2011, 8 September 2011 and 11 November 2011, all of which were sent to Spain for comments.

2. DESCRIPTION OF THE MEASURE

2.1. Background

2.1.1. Complainant

(8) The complainant is a satellite platform operator. Set up in 1985 as Société Européenne des Satellites (SES), SES ASTRA (hereinafter "Astra") was the first private satellite operator in Europe. Astra operates the ASTRA Satellite System, which offers a comprehensive portfolio of broadcasting and broadband solutions for customers in and outside Europe. It broadcasts radio and television programmes directly to millions of homes, and provides internet access and network services to public authorities, large companies, SMEs and individual households.

(9) In its complaint, Astra alleges that the measures put in place by the Government and the Autonomous Communities in remote and less urbanised areas of Spain infringe the principle of technological neutrality, as they envisage terrestrial transmission as the only route towards digitisation. Astra refers in particular to the case of Cantabria. On the basis of a tender for extension of coverage of digital television for the whole territory of Cantabria launched in January 2008, the regional government of Cantabria had selected Astra to provide free-to-air channels via its platform. However, in November 2008 that contract was terminated by the regional government. According to Astra, the authorities only terminated the contract once they had been informed that the central government would finance the upgrade of the analogue terrestrial network. In fact, a letter from the Cantabrian authorities dated 7 November 2008 explained that the reason for the termination of the contract was that in the meantime the central government had taken decisions relating to the extension of coverage of digital television to the whole of Spain[7]. Thus, the case of Cantabria would appear to

[7] Astra challenged the termination of the contract before a court of first instance in Santander (procedure No. 1728/2009), which on 23 December 2011 ordered the Cantabrian authorities to indemnify Astra for the unjustified termination of the contract. The Court did not find any breach of contract on the part of Astra that would justify the termination of the contract. According to the Court, the decision of the Spanish central government to develop the national strategy for DTT was one of the reasons for the termination of the contract. See judgment 000313/2011 of the Court of First Instance of Santander.

demonstrate that, firstly, Astra could compete in that market and, secondly, that the decisions of the central government made this competition impossible.

2.1.2. The sector

(10) The case concerns the broadcasting sector, in which many players are active at the different levels of the broadcasting services products chain.

(11) Broadcasters are the editors of television channels which purchase or produce in-house TV contents and bundle them in channels. The channels are then provided to the public through various platforms (e.g. satellite, DTT, cable, IPTV). In Spain, broadcasting services have been deemed to be a public service by the legislator and are therefore provided both by State-owned broadcasters (RTVE) and by private broadcasters holding concessions from the State[8]. These so-called "free-to-air" (FTA) channels are provided free of charge to the viewers. In order to ensure that the population can effectively benefit from this public service, the law attaches minimum coverage obligations both for transmissions entrusted to the public broadcaster and for the private operators who hold the concessions. Consequently, the public broadcasters have the obligation to cover at least 98 % of the Spanish population, while private broadcasters must cover at least 96 % of the population. In Spain, national broadcasters do not own a national broadcasting network. They therefore enter into agreements with platform operators to have their content transmitted and to fulfil their coverage obligations.

(12) Hardware suppliers are manufacturers or installers of the necessary infrastructures and devices to build the various platforms.

(13) Platform operators (or network operators)[9] are private or publicly controlled entities operating the necessary infrastructure (i.e. they transport and broadcast the signal) to deliver to the public the channels produced by the broadcasters. In the early days of the television industry, the only platform available was the analogue terrestrial platform. As the technology improved, more platforms have become available on the market, namely the satellite platform, the cable platform and, more recently, the IPTV[10], which exploits the broadband connection to transmit the TV signal.

(14) In terrestrial broadcasting, the television signal is sent from a TV studio to a transmission centre (head-end), usually belonging to and operated by a network operator. Then the signal is transported and distributed from a transmission centre (head-end) to the broadcasting centres run by a network operator (e.g. a tower); sometimes the signal is transported via satellite. Lastly, the signal is broadcast from the broadcasting centres to homes. To digitise the analogue terrestrial network, it is necessary to replace the transmitters on the ground. However, as the digital signal has a lower range than the analogue and therefore the new

[8] The concession includes the assignment of a frequency for terrestrial broadcasting.

[9] The terms ‘platform operators’ and ‘network operators’ are used interchangeably in the text of the Decision.

[10] "Internet Protocol Television" is a term used to refer to distribution systems of TV and video signals through an electronic communications network using the Internet Protocol.

technology requires a more capillary network, in some cases the extension of coverage also requires the building of new transmission centres.

(15) In satellite broadcasting, the signal is sent to a transmission centre (head-end) and then transported to the satellite, which broadcasts it to homes. Alternatively, the signal could first be sent from a TV studio directly to the satellite, if the TV studio has the appropriate devices. The viewer has to be equipped with a satellite dish and a decoder. To increase satellite coverage in a region, the ground equipment needs to be installed in the customer's home. In terms of geographic coverage, the satellite platform could thus reach almost 100 % of the Spanish territory, whereas the terrestrial platform covers about 98 %.

2.1.3. Background

(16) The investigated measure must be examined in the context of the digitisation of broadcasting that the terrestrial, satellite and cable platforms have undergone or are currently undergoing. In comparison to analogue broadcasting, digitised broadcasting has the benefit of increased transmission capacity as a result of more efficient use of the radiofrequency spectrum. The switch to digital technology is especially significant for terrestrial broadcasting, where the frequency spectrum available is limited. Satellite transmission, on the other hand, has the advantage of operating in a completely different frequency band, where there is no scarcity of frequencies.

(17) The switch-over from analogue to digital television releases a significant amount of high quality radio spectrum in what is known as “the digital dividend”, which will be free for the deployment of electronic communication services. This digital dividend, and especially the frequency of 790-862MHz ("800 MHz band"), can boost the electronic communications industry, have a major impact on competitiveness and growth and provide a wide range of social and cultural benefits[11].

(18) The "digital dividend" could be reaped either by switching from terrestrial to a different platform or by moving from analogue to digital terrestrial broadcasting. Also, a mixed solution combining different platforms could be envisaged[12].

(19) However, in the case of terrestrial broadcasting, the scarcity of frequencies remains an issue even after digitisation. This is illustrated by the fact that shortly after the termination of the switch-over from analogue to digital TV in April 2010, the Spanish government had to relocate broadcasters from the 800 MHz band to another frequency band. The relocation of DTT multiplexes assigned to

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[11] The Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on transforming the digital dividend into social benefits and economic growth (COM (2009) 586) recommended that the Member States should cease using the 800 MHz band for high-power broadcasting services and fully implement the EU technical harmonisation decision by a certain date agreed at EU level.

[12] See for instance, for France state aid N666/2009 – Amendment of aid scheme to TNT N 111/2006, for Slovakia state aid N671/2009 - Switch-over to digital TV broadcasting in Slovakia, for Spain state aid SA.28685 (2011/NN) - Reception of digital television in Cantabria. It should also be noted that in Spain in the remote and less urbanised areas under investigation (“Area II”) it was not always viable to provide TV signal via the DTT platform and therefore satellite transmission was chosen in some areas.

broadcasters led to additional costs and additional state aid, which the Commission is currently examining in a formal investigation procedure[13].

(20) With regard to TV broadcasting, terrestrial digital transmission could be replaced in the future by broadband technology, as next generation broadband networks (NGA) are likely to become the leading transmission technology. For the time being, however, in Spain the geographical coverage of such NGA networks in not universal.

(21) In Spain there are today four broadcasting platforms: DTT - digital terrestrial technology (DBV-T), satellite (DBV-S), cable (DVB-C) and IPTV. DTT is the main platform for the free-to-air public and private Spanish channels[14]. The main operator of the terrestrial network is Abertis, which also controls the satellite operator Hispasat. There are also a number of local telecommunications operators carrying DTT signals, which are usually interconnected with Abertis' national network. As for the pay TV channels, they are broadcast mainly via satellite, cable and IPTV. Astra and Hispasat are the main satellite operators

(22) To address the process of digitisation, in order to switch from analogue to digital television, in 2005-2008 Spain adopted a series of regulatory measures that concerned the terrestrial network, as described in the section 2.2. They divided the Spanish territory into three distinct areas:

i) Area I – including the vast majority of the Spanish population, where the costs of switchover were borne by the broadcasters – 96 % of the territory for private broadcasters, and 98 % for public broadcasters. As broadcasters bore the costs, there was no need for state aid.

ii) Area II – less urbanised and remote areas covering 2.5 % of the population who in the past received public and private channels via analogue terrestrial television. However, as the switch to digital technology requires upgrading of the existing transmission centres and building of new ones, significant investments in the terrestrial network were necessary. The private broadcasters did not have sufficient commercial interest in providing the service in Area II and refused to bear the costs of digitisation. The Spanish authorities therefore established the state aid scheme under investigation, for upgrading the existing transmission centres and building new ones, in order to ensure that the residents, who until then had received private and public channels via analogue terrestrial TV, would continue to receive all the channels via DTT. This process was commonly referred to as "DTT coverage extension" (i.e. extension of coverage of DTT above what was compulsory for the commercial broadcasters).

iii) Area III – where due to the topography it is not possible to provide TV service via the terrestrial platform and it is therefore provided by satellite. The transmission of free-to-air TV signals in Area III is provided by Hispasat. The fact that the TV service is provided through satellite

[13] See Commission Decision SA.32619, *Compensation of damages for the liberation of digital dividend*, OJ C 213, 19.7.2012, p. 41.

[14] Around 26 free-to-air national channels and around 30 regional channels.

entails costs for consumers, who have to acquire satellite dishes and set-top boxes.

2.2. Description of the aid

(23) The scheme being investigated is based on a complex system of legal provisions put in place by the Spanish central authorities as from 2005. On the basis of these provisions, state aid for the deployment of the DTT in Area II was granted in the years 2008-2009 by the Autonomous Communities and town councils, who channelled to the recipients the funds from the central budget and from their respective budgets. Moreover, since 2009 ongoing aid has been granted by the Autonomous Communities for maintenance and operation of the networks in Area II.

(24) The regulation of the transition to digital television technology started when Law 10/2005 of 14 June 2005 was adopted[15]. It mentions the need to promote a transition from analogue to digital terrestrial technology and required that the government take the appropriate measures to ensure this transition.

(25) Following this mandate, with Royal Decree 944/2005 the Council of Ministers approved the National Technical Plan, which fixed the date of the analogue switch-off in Spain for 3 April 2010[16].

(26) As regards Area II and III, the Twelfth Additional Provision of the National Technical Plan already provided for the possibility that the local and regional authorities extend the coverage in the range between 96 % and 100 % of the population. In this regard, the Technical Plan explicitly refers to digital terrestrial television (DTT) and establishes six conditions under which the local authorities could carry out such extension. Condition (e) requires the local installation to be in conformity with the Technical Plan for digital terrestrial television.

(27) Subsequently, on 7 September 2007, the Council of Ministers approved the National Plan for the Transition to Digital Terrestrial Television (hereinafter "Transition Plan"[17], which implements the National Technical Plan. The Transition Plan divided the Spanish territory into ninety technical transition projects[18] and established a deadline for the switch-off of analogue broadcasting for each of these projects.

(28) On 29 February 2008, the Ministry of Industry, Tourism and Trade (hereinafter "MITyC") adopted a decision aimed at improving the telecommunications infrastructures and establishing the criteria and the distribution of the funding of the actions aimed at developing the Information Society under the Plan Avanza

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15 See above, footnote on p. 2.

16 It established the obligation of private broadcasters to reach by that date 96 % of the population in their respective areas of coverage, while public broadcasters were required to reach 98 % of the population in their respective areas of coverage. In this Area I, broadcasters had the obligation to cover these percentages of population with terrestrial digital television, and they had to bear the costs of digitisation themselves. Hence, no state aid was necessary

17 http://www.televisiondigital.es/Documents/PlanNacionalTransicionTDT.pdf.

18 Subsequently classified in Phases I, II and III.

for 2008[19]. The budget approved by this decision amounted to EUR 558 million and was partly allocated to development of broadband, and partly to digitisation of television in remote and less urbanised areas of Spain falling outside the statutory obligations of the commercial broadcasters[20]. Digitisation in those areas was commonly referred to as "extension of coverage". It was subsequently implemented through a series of addenda to existing framework agreements[21] signed by MITyC and the Autonomous Communities between July and November 2008 ("the Addenda to the 2006 Framework Agreements", published in the Spanish Official Gazette separately for each Autonomous Community. In most cases, the wording of these agreements points to digital terrestrial technology as the only technology to be funded. As a result of the agreements, MITyC transferred funds to the Autonomous Communities, which undertook to cover the remaining costs of the operation from their budgets. These addenda also included the obligation of the local authorities to comply with the provisions of the Twelfth Additional Provision of the National Technical Plan.

(29) In parallel, on 17 October 2008, the Council of Ministers agreed to allocate a further EUR 8.72 million to extend and complete DTT coverage within the transition projects to be completed during the first half of 2009, Phase I of the Transition Plan. The funding was granted following the signing of new framework agreements between MITyC and the Autonomous Communities in December 2008 ("the 2008 Framework Agreements"). These agreements refer to the aforementioned financing of EUR 8.72 million and were entitled "Framework Collaboration Agreement between the Ministry of Industry, Tourism and Trade and the Autonomous Community of [...] for the Development of the National Plan for the Transition to DTT." They lay down a list of activities that will be financed by the central and regional authorities in order to achieve coverage of digital television equal to the existing analogue coverage. These activities are related to the deployment of digital terrestrial television.

(30) On 29 May 2009, the Council of Ministers approved the criteria for the distribution of EUR 52 million for the funding of DTT transition actions, aimed at financing the extension of coverage of the projects under Phases II and III of the Transition Plan[22]. The agreement of the Council of Ministers established a direct link with the Transition Plan given that it stated that "in order to achieve the target set in the National Plan for Transition to DTT, namely a similar DTT coverage to that of the current terrestrial television coverage with analogue technology, the financial support of the public authorities is needed" and then that "the implementation of this cooperation will be formalized within the framework set by the National Plan for the Transition to DTT".

(31) Lastly, between October and December 2009, addenda to the Framework Agreements (mentioned in paragraph 0) were published in the Spanish Official Gazette, including the funding for the extension of the coverage of Phases II and

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19 http://www.boe.es/boe/dias/2008/03/06/pdfs/A13832-13834.pdf.

20 The decision regarding the distribution of funds for the development of broadband and the digitisation of television in Area II was left to the regional authorities.

21 The framework agreements were signed between MITyC and the Autonomous Communities in 2006 within the framework of the Plan Avanza.

22 http://www.boe.es/boe/dias/2009/07/02/pdfs/BOE-A-2009-10972.pdf.

III of the Transition Plan. These addenda define what should be understood by "action to extend the coverage", by making explicit reference only to terrestrial technology (although not formally excluding other technologies)[23].

(32) Following the publication of the 2008 Framework agreements and above-mentioned addenda[24], the governments of the Autonomous Communities started implementing the extension. They either organised public tenders themselves or charged a public undertaking with carrying out of the tender. The subsidies were partly agreed upon with MITyC and therefore funded from the central budget or partly funded by the Autonomous Communities themselves. In certain cases the Autonomous Communities mandated the town councils to carry out the extension.

(33) As a general pattern, two types of tenders were launched throughout the country. Firstly, there were tenders for the extension of coverage, which meant that the winning company was charged with the mission of providing (often building) an operative DTT network. The tasks to be carried out included the design and engineering of the network, transport of the signal, deployment of the network and supply of the necessary equipment. The other types of tenders were tenders for the supply of hardware, organised in the case of already existing networks. The winner of the tender was expected to upgrade it with the necessary equipment, i.e. supply, install and activate the equipment.

(34) In most tenders the organising authorities refer explicitly, through the definition of the object of the tender[25] and/or implicitly, in the description of the technical specifications or the equipment to be financed[26], to terrestrial technology and DTT. In the few cases where satellite technology is expressly mentioned, these references are to satellite dishes for the reception of the satellite signal on terrestrial towers[27] or equipment to access digital television in Area III[28]. Very few tenders for extension are technologically neutral and they do not exclude technologies other than DTT[29].

(35) In total, in the years 2008-2009 almost EUR 163 million from the central budget (partly soft loans granted by MITyC to Autonomous Communities[30]), and EUR 60 million from the budgets of 16 Autonomous Communities investigated

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23 See, for example, Andalucía's Addendum http://www.boe.es/boe/dias/2009/10/28/pdfs/BOE-A-2009-17108.pdf.

24 In total, over 600 agreements – framework agreements, addenda etc. - were concluded between the authorities concerning the extension of coverage.

25 E.g. Extremadura, Asturias, Canarias, Cataluña, Madrid.

26 E.g. Aragon.

27 As in the cases of Aragón or Asturias.

28 Extremadura.

29 Out of 516 tenders held by all the regions except Castilla-La Mancha the Commission analysed a sample of 82, both for extension (17) and supply (65). Only 9 of these were classified as technologically neutral: 3 tenders for extension (Castilla y Leon), and 6 for supply (5 in the Canary Islands and one in Cantabria).

30 Excluding Castilla-La Mancha.

were invested in the extension to Area II. In addition, town councils funded the extension for around EUR 3.5 million.

(36) As a second step after the extension of DTT to Area II, starting from the year 2009, some of the Autonomous Communities have been organising additional tenders, or have concluded relevant contracts without tenders, for the operation and maintenance of the equipment digitised and deployed during the extension. Unlike the aid for switch-over, the latter measures constitute ongoing aid. As they are for the operation and maintenance of the terrestrial network as installed in Area II, these contracts are not technologically neutral either. The total amount of funds granted through tenders for operation and maintenance (ongoing aid) in the years 2009-2011 was of at least EUR 32.7 million.

2.3. Grounds for initiating the procedure

(37) In the decision to initiate the procedure, the Commission noted, firstly, that the measure described seemed to meet all the criteria of Article 107(1) and could, therefore, be regarded as state aid.

(38) As there are different levels in the broadcasting market, three categories of state aid recipients were identified in the opening decision: (i) network operators, (ii) hardware suppliers participating in the tenders for supply of the equipment necessary for the extension and (iii) broadcasters of TV channels.

(39) The Commission reached the preliminary conclusion that by financing the costs associated with the extension of the DTT platform, the scheme might have created a potential or actual distortion of competition between hardware providers active in different technologies and between the terrestrial and the satellite platforms.

(40) The Commission, in its preliminary assessment, considered that the measure constituted state aid within the meaning of Article 107(1) TFEU and it did not see any grounds on which it could be compatible with the internal market, since no derogation seemed to be applicable.

(41) For additional factual details please refer to the opening decision, which should be considered an integral part of this Decision.

3. COMMENTS FROM SPAIN

3.1. General remarks

(42) In its defence to the opening decision, Spain and the Autonomous Communities have put forward numerous arguments[31]. Broadly speaking they fall into two categories. First, the Spanish authorities argue that there is no state aid involved, because as the service is an SGEI the measure does not constitute aid, as it falls under the public service remit of public broadcasting. Moreover, it does not generate any advantage. Secondly, even if there was any state aid, it would be compatible under Article 106(2) or Article 107(3)(c) given that (a) the analogue network already existed and, from an efficiency perspective, a mere upgrade of the existing infrastructure would be less costly than switching to a new platform;

[31] The arguments of the central and regional authorities are presented together as the position of Spain (or of the Spanish authorities), except for the Basque Country, which requested the application of public service compensation rules.

(b) only the DTT technology would fulfil the necessary quality criteria and (c) the tenders were technologically neutral and other platform operators could have participated in the tendering. These arguments are summarised below.

3.2. Absence of aid

3.2.1. Service of General Economic Interest (SGEI)

(43) Regarding the network operators, according to the Spanish authorities they provide a service of general economic interest within the meaning of the *Altmark* judgement[32]. However, as the Autonomous Communities are responsible for actions to extend coverage, the applicability of the *Altmark* judgment must be examined on a case-by-case basis and it is up to the Autonomous Communities to prove that the *Altmark* conditions had been fulfilled. The most thorough arguments were those submitted by the Basque Country, which carried out digitisation through a public company, Itelazpi S.A. (hereinafter "Itelazpi").

3.2.2. No advantage

(44) Concerning the hardware providers, Spain expressed the view that the fact that they won tenders for supply of equipment ruled out the existence of a selective advantage.

(45) As regards the network operators, although Abertis is the main operator in Area I and it owns 29 % of the sites in Area II which were upgraded, it does not operate the network in Area II. Abertis would therefore not benefit from the measure as a network operator.

(46) Network operation is, instead, carried out by some regional operators, by the Autonomous Communities or by local councils, which simply rent Abertis' premises and installations. The Autonomous Communities and local councils do not compete with other network operators, and therefore they do not obtain a competitive advantage. Moreover, they do not earn any revenue, as broadcasters do not pay for the provision of transmission services in Area II.

(47) As for the DTT broadcasters, Spain argues that the impact of the investigated measures on broadcasters is almost non-existent. The measures did not increase broadcasters' audiences compared with when programmes were transmitted on analogue, as 2.5 % of the population targeted by the extended coverage already received analogue terrestrial television. As a result, the measures have no impact on these businesses' finances.

3.3. Compatibility under Article 106(2) and 107(3)(c)

(48) The Basque Country authorities submitted that the state aid granted to Itelazpi is compatible with the internal market by virtue of the provisions of article 106 TFEU. In this respect, they believe that the measure fulfils all the conditions of the Decision of 28 November 2005 on the application of Article 86(2) of the EC Treaty to state aid in the form of public service compensation granted to

[32] Judgment of the ECJ of 24 July 2003 in case C-280/00, *Altmark Trans GMBH and Regierungspräsidium Magdeburg* v *Nahverkehrsgesellschaft Altmark GMBH*, ECR 2003 1-7747.

certain undertakings entrusted with the operation of services of general economic interest (hereinafter "86(2) Decision")[33].

(49) In the event of the Commission deciding that the measures taken by the Spanish authorities with regard the deployment of digital terrestrial television in Area II constitute state aid, and that they are not compatible with the internal market in application of article 106 TFEU, Spain claims that they would certainly be compatible with the internal market insofar as their purpose is to ensure that an objective which is of community interest is achieved (the conversion to digital broadcasting), so they would benefit from the exemption provided for in Article 107(3)(c) TFEU.

3.3.1. Efficiency arguments

(50) According to Spain, at national level the National Technical Plan and Transition Plan are not coverage extension plans since they refer only to the switchover in Area I. As such, the plans do not restrict the technology options available for the extension of coverage. The framework agreements, on the other hand, do not have the same regulatory status as the Plans and they are based on agreements between the central and regional authorities. Moreover, according to Spain, they would not exclude the use of satellite and other technologies. In any event, the extension of coverage and the choice of technology were done by the Autonomous Communities, usually through tendering procedure. One such tender – carried out in Castilla y Leon – was technologically neutral and the mere fact that such a tender was held proves that the central authorities did not impose the terrestrial technology on the Autonomous Communities.

(51) Even if some tenders held elsewhere do refer to certain technical elements of the terrestrial technology, this is explained by the fact that terrestrial broadcasting requires certain elements that satellite does not, and their insertion was necessary in order not to exclude terrestrial solutions from the tenders.

(52) The Spanish authorities also refer to a study into the feasibility of providing a universal DTT service through different technologies (DTT and satellite) carried out by the MITyC in July 2007, i.e. before proposing funding to extend DTT coverage. Although the authorities admit that the study was only an internal document not later taken on board, they nevertheless emphasise that it took into account the realistic costs of using either DTT or satellite transmission. The conclusions of the study were that it is not possible to establish in advance which technology is more efficient or cheaper to extend the coverage of television signal. Instead, a choice should be made on a region-by-region basis, preferably by means of studies carried out by the particular Autonomous Communities which analyse such factors as topography, territorial distribution of population and the state of the existing infrastructure.

[33] Commission Decision of 28 November 2005 on the application of Article 86(2) of the EC Treaty to state aid in the form of public service compensation granted to certain undertakings entrusted with the operation of services of general economic interest, OJ L 312, 29.11.2005, pp. 67-73 and Community framework for state aid in the form of public service compensation, OJ C 297, 29.11.2005, pp. 4-7 ("Framework").

3.3.2. Qualitative requirements

(53) Two qualitative arguments have been put forward. Firstly, to date DTT free-to-air channels have not been available via satellite broadcast in this area. Switching to the satellite platform would therefore mean that customers would have to pay for the service.

(54) Secondly, apart from national channels, regional channels also need to be broadcast. DTT technology allows each geographical area to receive the channels for that area. On the basis of the regional and local channels, a total of 1 380 frequencies are allocated to terrestrial television throughout Spain, without the need for any technical restrictions and without extending broadcasting beyond the target area of each channel. According to Spain, this would be impossible for satellite networks as they do not provide the possibility of geographical delimitation and would therefore have to use a complex system of conditional access. This would further increase the costs of satellite broadcasting, and broadcasters would not be willing to give access to their channels without being sure that delimitation is possible.

3.3.3. Technological neutrality

(55) According to Spain, the bilateral agreements between the central and regional authorities did not impose a particular digitisation technology. They merely established transfers to the Autonomous Communities in line with the costs of digitisation, calculated on the basis of what was considered to be an efficient reference technology, i.e. DTT. In this respect it should be taken to consideration, according to Spain, that at the time of extension, terrestrial analogue television reached 98.5 % of Spanish homes.

(56) Concerning the tender in Cantabria referred to in the opening decision, the Spanish authorities emphasise that the tender won by Astra concerned both Areas II and III, i.e. was aimed at universal provision of digital television in Cantabria. This would have a twofold impact on the assessment of the case.

(57) Firstly, the Cantabrian project became a failure when, after the award of the contract to Astra, some of the main broadcasters informed Astra and the Cantabrian government that they would not allow their content to be broadcast via satellite. As a result, the objective of the plan was no longer readily achievable. Secondly, the main reason for termination of the contract was the decision of the central government to provide satellite coverage across the whole of Area III in Spain, and not the decision to provide funding from the central government to extend the coverage in Area II. Furthermore, the contract was terminated in November 2008 because at this point in time it was obvious that Astra would not be able to comply with its obligations. In particular, Astra did not undertake the necessary works on time and did not receive authorisations from free-to-air broadcasters to broadcast their channels.

(58) In the context of this decision, the Cantabria project is relevant only to the extent that the satellite platform can be considered to be a valid alternative to the terrestrial platform. In this regard the above arguments are not pertinent. When opting for the satellite platform for Area III, the Spanish authorities adopted a national plan and enacted a special regulation requiring broadcasters to co-ordinate among themselves and to select one common satellite platform provider. A similar mechanism could also have been applied for Area II. The reasons given for the termination of the contract do not cast any doubt on the fact

that satellite technology may be a valid platform for the transmission of TV signals in Area II. Furthermore, they have been refuted by a national Court in Spain.

3.3.4. No distortion of competition and trade

(59) Concerning competition between network operators, Spain expressed the view that terrestrial and satellite television are two completely different markets and that therefore the investigated measures did not distort competition on the affected markets. Spain maintains that the investigated measures have no effect on the intra-Union market as they are aimed at the residents of a restricted geographical area. Since they are local services, the measure is unlikely to affect trade between Member States.

3.4. The applicability of the *de minimis* rule

(60) The Spanish authorities also expressed the view that the de *minimis* rule introduced by Regulation 1998/2006 on *de minimis aid*[34] certainly applies to a significant proportion of the funding. The hardware was purchased independently in each Autonomous Community or local council, and therefore the *de minimis* provisions should be analysed at that level. As in these cases the exact amount paid is known, as are the goods and services which were acquired, the aid was sufficiently transparent for the *de minimis* thresholds to apply.

3.5. Ongoing state aid

(61) Concerning the operation and maintenance of the transmission centres, the Spanish central authorities believe that they fall outside the work to extend coverage partially funded by the MITyC. The ministry has no jurisdiction to require councils or the Autonomous Communities to continue operation and maintenance beyond the period included in the tenders for extension of coverage. Therefore it cannot be entirely excluded that operation and maintenance of some centres might be interrupted because of local council budget cuts. The yearly costs of operation and maintenance were provisionally assessed by the central authorities as amounting to 10 % of the initial investment. During the course of the investigation, several Autonomous Communities provided more detailed data on the funds spent for operation and maintenance of the DTT network in Area II.

4. COMMENTS FROM INTERESTED PARTIES

4.1. Astra

4.1.1. General remarks

(62) Astra reiterates its earlier position that the measures leading to the switch-over to terrestrial digital television were a coordinated plan designed at the level of central government and implemented by the regional authorities. However, even assuming that the state aid for the extension of coverage was designed, organised

[34] Commission Regulation (EC) No 1998/2006 of 15 December 2006 on the application of Articles 87 and 88 of the Treaty to de minimis aid, OJ L 379, 28.12.2006.

and implemented at regional level, Astra believes that they would constitute unlawful and incompatible aid.

(63) Concerning the tender in Cantabria, Astra insists that contrary to what is claimed by Spain, it was the obligation of the Cantabrian authorities to receive the authorisations from broadcasters to make their channels available to satellite platform. Moreover, even though the letters were sent by the broadcasters in March 2008, the Cantabrian authorities offered to other Autonomous Communities the alternative which they had chosen in July 2008.

4.1.2. Presence of state aid

(64) Concerning the advantage received by network operators and especially Abertis, Astra notes that as hardware supplier Abertis was awarded around […]* of the tenders for the digitization of the terrestrial sites located in the extension of coverage areas. Since Albertis is a platform operator, the digitization of the network favours its commercial offering to broadcasters since the DTT network will now reach almost 100 % of the population at no additional cost as opposed to the 96/98 % that would have been terrestrially digitized in the absence of the contested measure. Furthermore, Abertis would benefit from the fact that Astra as the main competing alternative platform operator, would be prevented from obtaining a foothold in the Spanish market by entering Area II.

(65) Moreover, according to Astra, Abertis received other advantages as a result of the measures. Firstly, a significant number of Abertis' terrestrial sites have benefited from the funds provided by the Spanish Authorities in the scope of the investigated measures and are indeed operated by Abertis. This is in particular the case of sites that are located in the area where RTVE (public broadcaster) is obliged to provide its signal, but where there is no such obligation for the private broadcasters (around 2.5 % of the population). Secondly, Astra claims that Abertis benefited indirectly from the state aid in adjacent markets such as the transport market. Additionally, the complainant notes that the investigated measure leads to distortions of competition in Area III[35].

(66) Astra believes that the satellite and terrestrial platforms belong to the same market. The distinction between pay-per-view and free-to-air television would not be relevant, as far as platform competition is concerned. Already today the terrestrial and satellite platforms compete for the transmission of pay-TV, as there are already at least two pay-per-view channels offering their signal through the DTT platform and one of them is only available on DTT. Moreover, according to Astra, all currently authorized broadcasters have already requested a license from the Government to broadcast their content in the pay modality.

(67) Astra considers that the investigated measures were not proportional. It indicates that the switch to DTT required significant adaptations in apartment buildings and investment in cabling. Moreover, to support its argument that the extension of coverage via satellite would not have been more expensive than via the terrestrial

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* The confidential data are indicated in the text of the Decision with […].

[35] According to Astra, thanks to the funds provided by the authorities under Area II measures, Hispasat, a satellite provider co-owned by Abertis and serving Area III, can provide its satellite capacity to broadcasters at no additional cost. Finally, Astra claims that as a result of the measure, Abertis obtained the exclusive use of the must carry obligation in Area III.

platform, Astra referred to its internal cost study submitted together with the complaint, carried out in November 2008. The study compared the costs of extension of coverage using both technologies – terrestrial and satellite. The assumptions of the study differ from the ones carried out by Spain and Abertis in various respects, among others concerning the costs of satellite dishes and the need to purchase external set-top boxes for the reception of digital terrestrial TV. The findings of the study lead to the conclusion that the extension of coverage via satellite was not necessarily more expensive than using terrestrial technology. Astra also submitted additional documents aimed to show that the installation and operation costs of both technologies do not differ significantly.

(68) Astra also claims that ensuring the conditionality of access to satellite broadcasts is not an obstacle to broadcasting free-to-air channels. Conditional access systems are present all over the world and they are not difficult to use[36]. Moreover, the solution proposed in Cantabria for conditional access was accepted by the Cantabrian authorities, who could decide which users to activate in order to receive the service. Therefore the territorial limitation of the service was controlled by the Cantabrian government. There was no need for a specific adaptation to this effect.

(69) Concerning the appropriateness of the measure, Astra claims that thanks to economies of scale, the larger the geographical coverage, the more economically attractive satellite technology becomes. By splitting the measure in Area II into more than 600 local and regional tenders, satellite technology had already been put at a significant competitive disadvantage. However, even if the Spanish government had not been able to impose or suggest the need to take into account cross-regional synergies as a condition for the granting of the funds, the regions could have taken this possibility into account in order to ensure that they were choosing the most cost-efficient solution for their taxpayers. In fact, Astra argues that they tried to do so before the Spanish central government's intervention in favour of the terrestrial technology. Indeed, after having selected Astra in the public tender, the Cantabrian authorities initially tried to convince other regions to also select the satellite platform, as this would have reduced further their own costs.

4.1.3. Ongoing state aid

(70) Astra repeats that part of the contested measures amount to ongoing state aid, as the autonomous community governments will finance the costs of operation and maintenance of the local networks in Area II on an ongoing basis. Concerning the annual operation and maintenance costs for the satellite solution, Astra estimates that they would amount to EUR 100,000 per channel per year, although reductions could have been achieved had more than one region chosen the satellite solution.

4.2. Comments from Abertis

(71) Abertis is a telecommunications infrastructure operator and network equipment supplier. It owns, among other companies, Retevisión S.A. and Tradia S.A., which manage and operate telecommunication networks and infrastructures.

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[36] It claims that satellite platforms have a very high number of users with conditional access around the world, and the complexity of conditional access was not an obstacle for its deployment.

4.2.1. Presence of state aid

(72) First of all, Abertis notes that the investigated measures do not constitute state aid within the meaning of Article 107(1) TFEU. The regional authorities simply acquired goods and services on market terms by way of open tenders and they remain the owners of the equipment installed in the transmission centres in Area II. For this reason, neither any funds nor any digital equipment acquired with those funds were ever transferred to any external recipient.

(73) Abertis considers, in addition, that the contested measures did not confer any appreciable economic advantage on the network operators. Abertis claims that it does not operate any of the local networks located in Area II (even where it owns the related transmission centres) and that therefore it cannot obtain any direct advantage. Secondly, in Area II Abertis only acted as a hardware provider. Thirdly, even in cases where the digital equipment used to upgrade a transmission centre was sold by Abertis and this equipment was later installed in a transmission centre belonging to Abertis, there was no benefit. This is because Abertis simply rents those transmission centres to the local network operators on market terms and the amount of the rent paid to Abertis was not affected by the digitisation process. Fourthly, Abertis insists that the incremental increase of 1-2 % in the coverage of a DTT network does not translate into any economic benefit for Abertis as a platform operator in Area I. Finally, the digitisation of Area II does not affect the price that Abertis is able to charge to broadcasters for its transmission services, especially given that Abertis' wholesale pricing is regulated by the Comision del Mercado de Telecomunicaciones, the Spanish regulatory authority (hereinafter "CMT").

(74) Concerning the local network operators in Area II (town councils), Abertis considers that there cannot be any economic advantage as they do not qualify as undertakings within the meaning of Article 107(1) TFEU and in any event perform a public service.

(75) Abertis also expressed the view that the investigated measure did not entail any economic advantage for the broadcasters. The digital switchover in Area II did not increase the number of television viewers when compared to the number of viewers who had access to analogue television before the process of transition to digital broadcasting started in 2005.

(76) Moreover, Abertis considers that the contested measures did not have any appreciable effect on competition between the network operators. The fact that neither Astra nor any other private operator showed any interest in providing transmission services in Area II for the last 20 years, confirms that there was no market and that state intervention was required to facilitate the provision of services. In particular, there is no distortion of competition between satellite and DTT, as they are two separate markets. Moreover, the digitisation of the terrestrial networks in Area II did not change in any way the competitive structure of the relevant markets but simply represented a necessary technical upgrade of the existing analogue platform.

(77) Abertis claims that the broadcasting services provided over the networks in Area II are limited to certain isolated areas and therefore do not have an effect on trade between Member States.

(78) In the event the Commission considers that the relevant public authorities or their affiliates are undertakings within the meaning of Article 107(1) TFEU, Abertis

considers that the funds to cover the digital switchover in Area II were compensation for the provision of a public service. In this respect Abertis believes that the contested measures respect the conditions set out in the Altmark case-law and that there is no state aid involved.

4.2.2. Existing aid

(79) According to Abertis the deployment of broadcasting networks in Area II began in a non-liberalised broadcasting sector in 1982. At that time, the Spanish State held a legal monopoly in the market for terrestrial broadcasting. Public funds are now used to finance the installation, maintenance and operation of the local networks in Area II put in place prior to the liberalisation of this sector. Therefore, the investigated measure is ongoing, existing aid.

4.2.3. Compatibility

(80) Abertis argues that any potential state aid would be compatible by virtue of the provisions of article 106 TFEU, as it fulfils all the conditions of the 86(2) Decision.

(81) Should this not be the case, any potential aid would in any event be compatible with Article 107(3)(c) TFEU. Firstly, the aim of the measures adopted by the Spanish authorities is to accelerate the digital switchover process in Spain, which has been recognised in the Commission's state aid decision-making practice as an objective of common interest. Secondly, the aid was an appropriate instrument, as DTT is a more suitable technology to provide the coverage extension[37]. Apart from economic reasons, Abertis also notes that broadcasters are reluctant to use satellite platforms, due to the constraints faced by broadcasters when acquiring content rights for their free-to-air programmes. In most cases they only acquire the right to broadcast the contents over a specific platform, namely DTT, as this technology allows targeted transmission and geographical limitations. Moreover, the measures are proportionate since they cover only the costs strictly necessary for the switchover from analogue to digital television services in Area II. The only costs supported by the contested measures are those related to the digitisation of the transmission centres in Area II, which is carried out through the acquisition and installation of digital equipment.

(82) Regarding the technological neutrality of the measure, Abertis notes that terrestrial technology was not the only solution taken into consideration by the Spanish government. Moreover, in Area III the satellite platform was finally considered the most appropriate technological choice to provide digital television services. More importantly, Abertis claims that DTT is deemed to be the most appropriate and least costly platform to provide digital television services in Area

[37] Abertis refers to its own cost study conducted in January 2010 to compare the respective costs of using DTT and satellite technology to provide digital television services in Area II. According to this study, the overall cost for using DTT technology would represent about EUR 286 million over a 10-year period, whereas the total costs of using the satellite technology in the same period would amount to approximately EUR 532 million. Abertis submitted this internal study to an external accountancy company, whose report confirmed its findings, while pointing out that the satellite and DTT cost estimates were conservative. In any event, both studies confirmed the appropriateness of the cost comparators and the conclusion that using satellite technology to provide digital TV services in Area II would have been significantly more costly than using DTT, mainly owing to the higher economic and social costs to be borne by the consumers in the case of satellite.

II in order to achieve the same coverage that existed before the analogue switch-off, as is borne out by the submitted cost studies[38].

4.3. Comments from Radiodifusión

(83) Radiodifusión is a relatively new provider in the market of audio-visual signal transmission services registered with CMT's Registry of Operators in November 2005.

(84) Radiodifusión agrees in general with the opening decision and supports the Commission in its views, while providing some additional observations listed below. It agrees that the state aid does not meet Altmark requirements and entails a substantial transfer of State resources.

(85) The investigated state aid scheme benefited network operators already operating in rural areas. In fact, in the market in question, which is characterized by high entry barriers, benefiting an already dominant operator, the measure has led to replicate the same historical monopoly patterns. In particular, Abertis has been able to reinforce its monopoly position and to actually use public funding to develop a new and denser network which will enable it to compete in new markets.

(86) Radiodifusión claims that the investigated state aid is not proportional. To be in line with the proportionality requirement, the aid should be limited to what is necessary, i.e. should apply only to remote rural areas, and it should benefit all operators equally by requiring effective access obligations.

4.4. Comments from broadcasters

(87) The broadcasters submit that the measure cannot be considered as state aid because it has not conferred a financial advantage on any company, in particular broadcasters. The measures have not increased broadcasters' audiences compared with when they were broadcasting in analogue. Moreover, the residents in the extended coverage areas, i.e. rural, remote and sparsely populated areas, have no impact on the advertising market and are not part of the broadcasters' target audience. In these circumstances the private operators did not increase advertising fees as a result of the extension.

(88) The broadcasters also expressed the view that they did not have an interest in migrating to a satellite platform, where their programmes would face competition from hundreds other channels. The terrestrial platform has the advantage of limited capacity, which for commercial free-to-air broadcasters means less competition. Moreover, they underlined the fact that they usually purchase contents only for the terrestrial platform. This is because terrestrial broadcasting guarantees the geographical delimitation of broadcasts, which is not the case for satellite.

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[38] According to those studies, satellite technology would entail higher costs for the provision of the services at issue. Those costs would have to be supported by broadcasters and local network operators as well as by the viewers. The cost study carried out by Abertis also concluded that the use of satellite technology would require an additional period of approximately six months before the digital switchover could be achieved, as consumers in Area II would need time to purchase and install satellite decoders and dishes, etc. This in turn would give rise to additional costs related to simulcast broadcasting (analogue and digital platforms broadcasting simultaneously) during that period of time.

(89) Broadcasters also insisted that after assignment of the Cantabrian tender to Astra, they informed the Cantabrian authorities that they would oppose satellite broadcasting, as they had acquired rights to broadcast contents only via the terrestrial platform.

5. LEGAL ASSESSMENT

5.1. Legal basis of the aid

(90) As described in detail above in section 2.2, paragraphs 0 to 0, the legal framework for the digital switch-over in Spain is a complex net of various acts issued both by the central government and the regional and local authorities over a period of four years. The 2005 National Technical Plan and the 2007 Transition Plan mainly regulate the transition to DTT in Area I but they also set the basis for further extension measures in Area II. These extension measures were implemented by the regional authorities, after conclusion of several framework agreements with the central government (the 2008 Framework Agreements) and addenda in 2008 to the previous 2006 Framework Agreements and in 2009 to the 2008 Framework Agreements.

(91) As a result of the conclusion of these agreements and addenda, the regional and/or local authorities carried out a wide array of measures aiming at extending the coverage of DTT in Area II, primarily through public tenders, as described above at paragraphs (32) to 0. The Commission therefore considers that the various acts adopted at central level and the agreements concluded and amended between the MITyC and the Autonomous Communities constitute the basis of the aid scheme for the extension of coverage in Area II. These acts and agreements led the Autonomous Communities to take measures which were not technologically neutral[39]. While the National Technical Plan regulates the switch-over to DTT in Area I, it also gives a mandate to local authorities to establish, in cooperation with the Autonomous Communities, additional transmission centres necessary to ensure reception of the DTT in Area II. Thus, at that point in time the central government already envisaged the extension of DTT coverage. The mandate contained in the main legal act regulating the switch-over to digital television refers only to the terrestrial platform. In practice, the Autonomous Communities have therefore applied the central government's guidelines on the extension of DTT[40].

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[39] Such guidance can be found in the relevant documents of the Central government. In particular, the framework agreements signed in December 2008, entitled *Framework Collaboration Agreement between the Ministry of Industry, Tourism and Trade and the Autonomous Community of [...] for the Development of the National Transition Plan to DTT*, provide for a list of activities that will be financed by the central and regional authorities in order to reach a digital television coverage equal to the existing analogue coverage. On the one hand they refer to existing transmission centres upgraded by broadcasters (DTT centres deployed in Area I) and, on the other hand, to "*coverage extensions*" – additional centres that will need to be deployed in order to ensure the same penetration of digital television. Given that only the DTT technology requires existence of transmission centres, it seems clear that the planned actions concern only the DTT technology. Further, the addenda to the Framework Agreements signed between October and December 2009 refer to funding for the coverage extension. They define what should be understood by "*actions to extend the coverage*", making explicit reference only to terrestrial technology.

[40] In meetings with the Autonomous Communities, MITyC expressed its objective of ensuring the transition to DTT also in Area II. This is confirmed by a presentation, publicly available on Internet, and signed by MITyC. http://www.fenitel.es/asamblea08/PONENCIAS/4SETSI.pdf. It is also confirmed by statements from Autonomous Communities in reply to the Commission's request for information. In their

(92) To corroborate this finding, the Commission has also investigated a sample of the individual tenders carried out by the Autonomous Communities themselves. This verification confirms the above conclusion, as the vast majority of the examined tenders have not been technologically neutral.

(93) The moment when the state aid for the deployment of the DTT in Area II was effectively disbursed was marked by the transfer of funds from the central and regional authorities to the beneficiaries. This happened over a period of time which varied from one Autonomous Community to another. From the information received, the earliest tenders took place in July 2008[41]. The Annex provides a calculation of aid amounts by region.

As for the ongoing aid for operation and maintenance of the networks, this was not decided at central level. Rather, some of the Autonomous Communities (see "Recurrent costs" in the Annex to the Decision) launched tenders for the operation and maintenance of the existing terrestrial digital networks, which were published in their respective official journals[42].

5.2. State aid assessment pursuant to Article 107(1) TFEU

5.2.1. Presence of aid within the meaning of Article 107(1) TFEU

(94) The measure in question, including the ongoing aid for operation and maintenance as described in paragraph (36), can be characterised as state aid within the meaning of Article 107(1) TFEU, which lays down the conditions for the presence of state aid. Firstly, there must be an intervention by the State or through state resources. Secondly, it must confer a selective economic advantage on the recipient. Thirdly, it must distort or threaten to distort competition. Fourthly, the intervention must be liable to affect trade between Member States.

5.2.1.1. State resources

(95) The measure in question originates from the system of the legal acts described above, adopted at both central and regional and local level, as well as from agreements concluded between different levels of the Spanish administration. Moreover, Spain did not contest the finding of the opening decision that the measure was financed from the budgetary resources. It insisted, however, that it was financed both from the central and from the regional and municipal budgets. It also expressed the view that the measure in question was actually a mere transfer of funds between different administrations. As such, the fact that the funds originate mainly from the central budget and partly from the regional and

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replies, the Autonomous Communities explicitly refer to the National Transition Plan adopted by Royal Decree 944/2005 and to the *Plan Avanza*. See, for example, the reply from Extremadura: "In accordance with… Royal Decree 944/2005… approving the National Technical Plan for terrestrial digital television setting out the local initiative concerning extension of DTT coverage…".

[41] Tender for supply of equipment of 30 July 2008 published by the Autonomous Community of La Rioja and tender for extension SE/CTTI/06/08 of 27 July 2008 published by the Autonomous Community of Catalonia.

[42] See, for example, resolution of the Authorities of Castilla y Leon: RESOLUCIÓN de 24 de septiembre de 2012, de la Dirección General de Telecomunicaciones, por la que se anuncia la licitación del servicio: Contrato de servicios para la conservación y renovación tecnológica de las infraestructuras de televisión digital de la Junta de Castilla y León. Expte.: Serv 05-4/12; BOCYL 10 Octubre 2012.

local budgets was not disputed by Spain. Furthermore, the measure was not a mere transfer of funds between administrations, as ultimately the funds were used for the deployment of the DTT network by entities carrying out an economic activity (as explained in section 5.2.1.2.).

(96) In these circumstances it is concluded that the measure under investigation was funded directly from the State budget and from the budgets of particular autonomous communities and local corporations. The ongoing aid, as described in paragraph (36), was not funded from the central State budget, but directly from the budget of the Autonomous Communities. It is therefore imputable to the State and involves the use of state resources.

5.2.1.2. Economic advantage to entities carrying out an economic activity

(97) The measure in question entails a transfer of State resources to certain undertakings. Although the concept of an undertaking is not defined by the Treaty, it refers to any natural or legal person, regardless of its legal status and its financing, who carries out an economic activity. In Commission practice, as confirmed by the Courts, operation of television transmission networks is considered to be an economic activity[43], similarly to other cases involving management of infrastructure by the regional authorities[44]. In the case at hand, most of the public undertakings or town councils are registered in the register of the CMT as network operators. This suggests that they provide certain services, which according to settled case practice constitutes an economic activity. A market exists if other operators would be willing or able to provide the service in question, which is the case. For instance Astra held several meetings with the Autonomous Communities before the implementation of the extension of the coverage in Area II to present them its offer. In addition, in March 2008 Astra participated in and won a technologically neutral tender for providing digital TV in Area II and Area III published in Cantabria. The fact that the public undertakings and town councils do not receive remuneration for the services provided does not preclude the activities in question from being considered to be an economic activity[45].

(98) The Commission does not agree with Spain's argument that operation of the terrestrial network by the Autonomous Communities, public undertakings and town councils falls within the exercise of official powers as a public authority and is therefore outside the scope of Article 107 TFEU. It has been recognised that the activities linked to the exercise of State prerogatives by the State itself or by authorities functioning within the limits of their public authority do not constitute

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[43] Commission decisions N622/2003 Digitalisierungsfonds Austria, C25/2004 DVB-T Berlin Brandenburg (paragraph 62), C34/2006 DVB-T North-Rhine Westphalia (paragraph 83), C52/2005 Mediaset (paragraph 96).

[44] Case T-196/04 *Ryanair Ltd*. v *European Commission*, [2007] ECR II-2379, paragraph 88, Case C-82/01P *Aéroports de Paris* v *Commission*, [2002] ECR I-9297, paragraphs 107-109 and 121-125.

[45] See Joined Cases T-443/08 and T-455/08, *Freistaat Sachsen and Land Sachsen-Anhalt* (T-443/08) and *Mitteldeutsche Flughafen AG and Flughafen Leipzig-Halle GmbH* (T-455/08) v *European Commission* [2011] ECR II-01311, paragraph 115, where the Court states: "The fact that an activity is not engaged in by private operators or that it is unprofitable are irrelevant criteria in regard to the classification of that activity as an economic activity (...)."

economic activities for the purposes of competition rules[46]. Such activities are those that form part of the essential functions of the State or are connected with those functions by their nature, their aim and the rules to which they are subject. The Courts' case law has provided several examples of activities that fall within this category, thus establishing a dividing line between pure State activities and the commercial activities a State entity may engage in. This list includes activities related to the army or the police, the maintenance and improvement of air navigation safety; air traffic control[47]; the anti-pollution surveillance which is a task in the public interest that forms part of the essential functions of the State as regards the protection of the environment in maritime areas[48] and standardisation activities as well as related research and development activities[49].

(99) In this light, the Commission is of the opinion that in the present case the operation of the terrestrial broadcasting network does not fall within the State's obligations or prerogatives nor is it a typical activity that could only be performed by the State. The services under consideration are not typically those of a public authority and are in themselves economic in nature, which is evidenced by the fact that several undertakings are active on the market in the Area I. Second, a private undertaking, not dependent on any public authorities – namely Astra (as evidenced by its presence as a bidder in the 2008 tender in Cantabria) – was interested in providing this service in Area II. Third, the deployment of the network in Area II only concerns the transmission of national and regional private channels[50]. As a result, it is concluded that the operation of the terrestrial network by the Autonomous Communities, public undertakings and town councils does not fall within the exercise of official powers as a public authority.

Direct beneficiaries of the aid

(100) The operators of the DTT platform are the direct beneficiaries of the contested measures, as they received the funds for the upgrading and extension of their network in Area II. Similarly, they benefit from the ongoing aid for the operation and maintenance of these networks. The Autonomous Communities chose different approaches to implement the coverage extension and therefore different types of direct beneficiaries have been identified.

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46 Communication from the Commission on the application of the European Union state aid rules to compensation granted for the provision of services of general economic interest, OJ C 8, 1.1.2012.

47 Case C-364/92, *SAT/Eurocontrol*,[1994] paragraphs 19 to 30, ECR I-43, C-113/07 P, *Selex*, [2009], ECR I-2207.

48 Case C-343/95, *Calì & Figli*, [1997], ECR I-1547, paragraph 22.

49 Case T-155/04 *Selex*, [2006] ECR II-4797, paragraphs 73-82, confirmed by C-113/07, *Selex* [2009] ECR I-2307.

50 As set out in section 2.1.3. public broadcasters have a 98 % coverage obligation and therefore had to cover Area II by their own means. Moreover, the national public TV channels of RTVE and regional public channels are broadcast via a different network. While private broadcasters use the Single Frequency Network (SFN) signal, public broadcasters use the Red Global Española (RGE) network. As a result of these differences, the terrestrial facilities require different equipment for each of the two networks.

(101) Firstly, some of the Autonomous Communities[51] charged a public undertaking, which sometimes operates as a telecommunications company, with the task of extending coverage. These undertakings either organised tenders for extension of coverage and left this task to the winner of the tender, or carried out the extension themselves, after acquiring the necessary hardware.

(102) These public undertakings are now in a position to operate the DTT network in Area II due to the public subsidy. They can also use the new infrastructure to provide other services, e.g. WiMax (wireless broadband standards which can provide fix or mobile broadband), digital radio, mobile television (DVB-H), or co-location services to Telefonica's basic broadband network in rural areas and to mobile operators. Due to these economies of scope, the DTT network operators have opportunities to raise income from the publicly financed infrastructure.

(103) The quantifiable advantage to the public undertakings is the amount of the funds received for the extension of coverage.

(104) Secondly, some of the Autonomous Communities[52] launched themselves tenders at the regional level for the extension of the DTT. Spain claims that the vast majority of tenders were for provision of hardware and equipment and the companies who won such tenders acted as hardware suppliers. This would also be the case of Abertis, Tradia and Retevision. The findings of the investigation point however to the conclusion that a significant number of tenders were for the extension of coverage, and not only for the supply of equipment[53]. Therefore, contrary to what is claimed by Spain, the Commission considers that Abertis and other companies participated in such tenders in their quality of network operators[54]. In this case, the winners of such tenders did receive a competitive advantage over other network operators who were not even able to participate in the selection process. Their advantage is the sum of the funds received for extension as a result of a technologically non-neutral tender.

(105) Thirdly, some of the Autonomous Communities[55] granted funds to the town councils for the extension of the DTT coverage. Spain argues that these were

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[51] For example, Aragon telecom, Gestión de Infraestructuras Públicas de Telecomunicaciones del Principado de Asturias, S.A., Multimedia de les Illes Balears S.A., Instituto Tecnologico de Canarias, Sociedad Regional de Cantabria I+D+I (IDICAN), RETEGAL and Itelazpi are public companies that were charged with the task of extension and for that reason they organised tenders for the supply of equipment necessary to digitise broadcasting centres. Fundación Centro Tecnológico en Logística Integral de Cantabria, Centre de Telecomunicacions i Tecnologies de la Informació in Catalunya and Agencia de Informatica y Comunicaciones de la Comunidad de Madrid were in charge of organising tenders for extension of DTT coverage, the extension was therefore executed by the successful bidders. OPNATEL in Navarra was in charge of carrying out extension and it acquired the necessary equipment without tenders.

[52] For example, Andalucía, Castilla y León, Extremadura, Murcia, La Rioja and Valencia.

[53] As explained above in paragraph (33), in the case of tenders for the extension of coverage, the winning company was charged with the mission of providing, and in many cases building, an operative DTT network. To this end, necessary tasks included design and engineering of the network, transport of the signal, deployment of the network and supply of the necessary equipment. In addition, tenders for the supply of hardware were organised in the case of already existing networks. The winner of such tenders was expected to upgrade with the necessary equipment, i.e. supply, instal and activate the equipment.

[54] E.g. Abertis and Retevision won non-neutral tenders for the extension of coverage in Extremadura and Castilla y Leon for the total sum of EUR […] million.

[55] Andalucía, Canarias, Extremadura, Murcia.

merely transfers of funds between different levels of administration and that, by extending networks owned by the town councils, the councils simply carried out their administrative obligations towards the inhabitants. However, Spain recognises that local corporations acted as network operators, that many of them are registered on the CMT's list of network operators and that they effectively carried out the extension of the network, in some cases via tendering procedure. The Commission therefore considers that, where the local corporations act as local DTT network operator, they are direct beneficiaries of the aid. Their advantage is the amount received from the regional and central authorities for the extension of coverage. This also applies if the extension is partially financed by own resources of a local corporation which constitutes aid to the undertaking or to the activity.

(106) Overall, Abertis and Retevision were the main beneficiaries of the tenders. In total, from the information received, it appears that they received approximately […]of the total amount of the funds aimed at extension of coverage: at least EUR […] million as a result of tenders for the extension of network coverage.

(107) In addition, some of the Autonomous Communities have granted state aid for the operation and maintenance of the networks. These tasks are performed either by the public undertakings, by the town councils or are tendered out, for example to the owners of the transmission centres. Spanish central authorities submitted that they did not impose the obligation to operate and maintain the digitised sites and that it was up to the Autonomous Communities to decide on this matter. During the course of the investigation various Autonomous Communities submitted figures indicating that they indeed financed the operation and maintenance of the transmission centres in Area II, especially starting from 2009, after the expiry of the initial two-year period of operation and maintenance included in the contracts with the successful tenderers. This is considered to be ongoing aid and the undertakings charged with the operation and maintenance of the digitised terrestrial network in Area II are the direct beneficiaries.

(108) Finally, in more general terms, Abertis also benefits from the exclusion of another platform operator from entering the market of transmitting free to air TV signals in Spain[56].

Indirect beneficiaries of the aid

(109) *Network operators.* Network operators who participated in the tenders for extension of coverage organised by the public undertakings under the first-case scenario described in the paragraph 0 are indirect beneficiaries of the aid. The public undertakings did not carry out the extension themselves and did not keep the funds aimed at extension of coverage; rather, they channelled them to the network operators by means of tenders for extension. These tenders for extension were targeted only at terrestrial network operators. The latter therefore benefited

[56] As set out in paragraph (21), Abertis dominates the market for the transmission of free to a TV signals on the terrestrial platform in Area I and via its subsidiary Hispasat in Area III. By extending the reach of digital terrestrial TV to Area II, the provision of nationwide free to air TV signals remains under Abertis' control. The entry of Astra in Area II could also generate more platform competition also in Areas I and III in the future. By way of analogy, there are numerous studies demonstrating the benefits in terms of lowering prices and increasing quality of service when satellite entered the TV market in the US. Prior to satellite entry, cable firms had enjoyed monopoly power in local geographic areas. Compare, for example, Chenghuan Sean Chu, *The effect of satellite entry on cable television prices and product quality*, RAND Journal of Economics Vol. 41, No. 4, winter 2010, pp. 730-764.

from the exclusion of satellite operators. Furthermore, due to the small number of operators in the market, the terrestrial network operators faced only a limited competitive constraint. As pointed out for direct beneficiaries above, they also benefit if they use the new infrastructure also for the provision of other services (as WiMax, digital radio, mobile TV etc.). The advantage received by these network operators amounts to the sum of the funds received following a tender for extension[57].

(110) *Hardware suppliers.* Unlike network operators, hardware suppliers are not considered to be indirect beneficiaries as they did not receive a selective advantage. As in the case of digital decoders in Italy[58], it has not been possible to draw a distinction between different categories of producers of various types of digital infrastructure because producers should be able to produce any type of equipment. The companies winning the tenders are not different from the group of undertakings who would have participated in tenders if the scheme had been technologically neutral with regard to platform operators[59]. In Spain, the companies, which integrate, install and supply the hardware necessary for DTT extension usually also offer other services. Such equipment manufacturers, as well as telecommunications operators, may also offer terrestrial or satellite solutions or a combination of the two[60].

(111) The measure in question does not seek, through its object or general structure, to create an advantage for manufacturers. Indeed, any public policy in favour of digitisation (even the most technologically neutral) would favour producers of digital equipment. In the case of equipment manufacturers, the fact that they benefited from an increase in sales due to the measure can therefore be considered to be a mechanical side effect. As a matter of principle, any state aid has a trickle-down effect on suppliers to the state aid recipient. This, however, does not necessarily create a selective advantage for such suppliers. Hardware suppliers were not targeted by the aid and therefore did not benefit from a targeted indirect effect. Furthermore, as they were selected on the basis of transparent tender procedures, which were open to all equipment suppliers, including those from other Member States, they cannot be expected to have benefitted from abnormal profits.

(112) *Broadcasters.* Spain has sufficiently demonstrated that the terrestrial broadcasters did not receive any advantage following the extension of the coverage. In contrast to Area I, the broadcasters refused to pay for digitisation in Area II as this would

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57 This was the case of Retevision, entirely owned by Abertis, which won non-neutral tenders for extension organised in Madrid and Catalonia for the total sum of EUR […] million.

58 C52/05 - Digital decoders Italy, OJ C 118, 19.5.2006, p.10 and OJ L 147, 8.6.2007, p.1.

59 To give some examples of companies which have won tenders, Tredess is a manufacturer of digital transmission equipment belonging to the Televes Group which also manufactures digital satellite TV receivers, antennas, dishes (Compare: http://www.tredess.com and http://www.televes.es.) Similar: Mier (http://www.mier.es), Elecnor (http://www.elecnor.es/es.negocios.infraestructuras/telecomunicaciones) Itelsis, BTESA, Axion, Retegal, Itelazpi, Telecom CLM.

60 The tenders in Area II regarding the extension of coverage often ask for turnkey solutions which require integrating, installing and supplying several equipment components (dish, antenna, transmitter, satellite receiver). In most cases the solution provided included satellite receiver equipment in order to receive the digital signal already distributed through satellite by the broadcasters.

not generate any additional revenue for them. In fact, in the light of the limited population at stake, which does not seem to be the commercial target of the advertisers, following the extension to Area II, broadcasters could not significantly raise advertising fees. Therefore, the terrestrial broadcasters are not indirect beneficiaries of the measure under investigation.

5.2.1.3. Selectivity

(113) The advantage provided by the measure, including the ongoing aid, to the network operators is selective, as it only applies to the broadcasting sector. Within that sector it only concerns the undertakings active in the terrestrial platform market. The legislative framework sets technical specifications of eligibility that only terrestrial technology is able to fulfil. Moreover, only undertakings in the terrestrial platform market received the ongoing aid for maintenance and operation of the network. Therefore network operators who operate other platforms, such as satellite, cable and IPTV, are excluded from the measure.

5.2.2. Public service remit

(114) Due to the administrative organisation of the country and the division of competences between the central and regional authorities, according to Spain it is up to the regions to claim the absence of state aid under the Altmark case law. As its best and only example, the Spanish authorities put forward the case of the Basque country. No other Autonomous Community provided reasoning supporting the claim that the operation of the terrestrial network is a public service.

(115) In the Basque Country, a public company of the Basque Government – Itelazpi S.A. ("Itelazpi") provides transport services and broadcasting coverage to radio and television. For this aim, it operates around 200 broadcasting centres, most of which belong to the Basque government. In order to extend the coverage, Itelazpi was charged with the task of organising ten tenders at regional level for the supply of equipment necessary for digitising the terrestrial infrastructure.

(116) According to the Basque Country, Member States have significant discretion to define an SGEI. The definition can be questioned by the Commission only in the case of manifest error; this margin of discretion is even wider in the case of public service broadcasting[61]. On this basis, the Basque Country has argued that the operation of broadcasting networks can be considered to be an SGEI. It would not be on a stand-alone basis but rather as an "essential service" inherent to the public broadcasting service stemming from various provisions of Spanish law and case law[62].

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[61] As stated in the protocol on the public broadcasting system of the Member States annexed to the Treaty of Amsterdam.

[62] Among others, Ley 31/1987, de 18 diciembre, de Ordenación de las Telecomunicaciones; Royal Decree-Law 529/2002 of 14 July, regulating the provision of the essential service relating to the support network for broadcasting television services during a strike; rulings of the Supreme Court (Judicial Review Court, 3rd Section) of 23 July 2009 (JUR 2009\381376), Legal Basis Two; and of 18 December 2009 (RJ 2010\2313), Legal Basis Three: "It is unquestionably of public interest to guarantee the extension and universal cover of the state television channels in remote and isolated areas of the country (to be in parity with those which do not have these characteristics) which are not covered by the commitment made by the television operators".

(117) According to the Basque authorities, the funding granted to Itelazpi was in fact compensation for the provision of the services of general economic interest fulfilling the Altmark criteria.

(118) In its Altmark judgment, the Court stated that public service compensation does not constitute an economic advantage in the meaning of Article 107(1) of the EC Treaty if all of the following four conditions are met: 1) the recipient undertaking must actually have a public service mandate and the tasks and related obligations must be clearly defined; 2) the parameters of the compensation must be established in advance in an objective and transparent manner; 3) the compensation must not exceed the costs incurred in discharging the public service mandate; 4) in order to ensure the least cost to the community, the company which is to discharge public service obligations is chosen either through public procurement, or the costs of providing the services of general economic interest are determined on the basis of the costs of a typical, well-run undertaking.

First Altmark condition: Clear definition and assignment of public service obligations

(119) Spanish law does not declare the operation of a terrestrial network to be a public service. The 1998 Telecommunications Law[63] states that telecommunications services, including operation of networks supporting radio and television, are services of general economic interest but they do not have the status of public services, which are reserved only for a limited number of telecommunications services[64]. The Telecommunications Law currently in force[65] maintains the same qualification. The transmission services for the broadcasting of television, i.e. transport of signals through the telecommunications networks, are considered to be telecommunication services and as such are services of general interest but not public service[66].

(120) In any event, the provisions of the Telecommunications Law are technology neutral. Article 1 of the Law defines telecommunications as exploitation of networks and the provision of services of electronic communications and associated facilities. Telecommunications is the transmission of signals through any telecom network, and not through the terrestrial network in particular[67].

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63 Ley 11/1998, de 24 de abril, General de Telecomunicaciones.

64 These include services related to public defence and civil protection and operation of the telephony network.

65 Ley 32/2003, de 3 de noviembre, General de Telecomunicaciones.

66 Article 2(1) of the Law states: "Telecommunications services are services of general interest provided under the rules of free competition".

67 Annex II of the law 32/2003 contains precise, technologically neutral, definitions of the telecommunications and electronic communications network. "Telecommunications: any transmission, emission or reception of signs, signals, writing, images and sounds or information of any nature by wire, radio electricity, optical means or other electromagnetic systems". "Electronic communications network means transmission systems and, where applicable, switching or routing equipment and other resources which permit the conveyance of signals by wire, radio, optical or other electromagnetic means, including satellite networks, fixed (circuit- *and packet-switched*, including Internet) and mobile terrestrial networks, electricity cable systems, to the extent that they are used for the purpose of transmitting signals, networks used for radio and television broadcasting, and cable television networks, irrespective of the type of information conveyed".

Moreover, Article 3 of the Law specifies as one of its objectives to encourage, to the extent possible, technological neutrality in regulation.

(121) Although the law in force and applicable at the time of transfer of funds to Itelazpi defined public broadcasting as a public service, according to the Commission it is not possible to extend this definition to the operation of a particular supporting platform. Moreover, where several transmission platforms exist, one particular platform cannot be considered to be "essential" for the transmission of broadcasting signals. It would therefore have constituted a manifest error, if Spanish legislation had declared the use of a particular platform for the transmission of broadcasting signals to be a public service.

(122) It is therefore concluded that under Spanish law the operation of terrestrial networks does not have the status of a public service.

(123) The Basque authorities argue that the assignment of the provision of this service of general economic interest to Itelazpi is explicitly contained in the Conventions concluded between the Basque Government, EUDEL (Association of Basque Town Councils) and the three Basque Regional Councils.

(124) In the Conventions the Basque administration recognises that values such as universal access to information and plurality of information require the universalization of free-to-air television and undertakes to safeguard these values by extending the coverage of the state multiplexes[68]. However, no provision of the Conventions actually suggests that the operation of terrestrial network is considered to be a public service. Therefore, the Commission is of the view that the wording of the Conventions is not sufficient to clearly set out the scope of the mission of the public service, and it cannot be argued on that basis that transmission via the terrestrial network is a public service.

(125) As a result, it has not been established that the first Altmark condition has been satisfied.

(126) The criteria laid down in the Altmark judgement are cumulative, i.e. they all have to be fulfilled in order for the measure not to be considered state aid. In the absence of satisfaction of the first criterion, the financing granted to Itelazpi by the Basque Country authorities does not therefore qualify as compensation for the provision of a service of general economic interest.

Fourth Altmark condition: ensure the least costs to the community

(127) In the absence of a tender, the fourth Altmark condition requires that the level of necessary compensation must be determined on the basis of an analysis of the costs which a typical undertaking, well run and adequately provided with means of transport so as to be able to meet the necessary public service requirements, would have incurred in discharging those obligations. For this purpose, the relevant revenues and a reasonable profit for discharging the obligations should be taken into account.

(128) As there was no tender, the Basque authorities argue that the criterion is fulfilled due to the fact that Itelazpi itself is a well-run and suitably equipped company to perform the requested activities. On the basis of a cost comparison, the

[68] Recitals 6 and 7 and Article 5 of the Conventions.

Basque authorities conclude that satellite provision would have been more expensive than upgrading Itelazpi's terrestrial network[69]. However, to fulfil the fourth Altmark criterion, a comparison with satellite technology is not sufficient to establish that Itelazpi is efficient. There could also have been other terrestrial operators which could have performed this service at lower cost.

In the light of the above it is concluded that in the case of the Basque Country too, the fourth *Altmark* condition has not been fulfilled. Given that these conditions are cumulative, it cannot be considered that the financing granted to Itelazpi by the Basque Country authorities does not constitute state aid because it fulfils the conditions for being deemed compensation for the provision of a service of general economic interest.

5.2.2.1. Distortion of competition

(129) Spain and Abertis claim that DTT and satellite technology are two different markets. DTT is the main platform for free-to-air terrestrial television where the number of operators in the national market is determined by the number of licences granted by the Spanish government. Funding for free-to-air terrestrial television channels comes from advertising. As for satellite television, a large number of channels are available on the only pay-television platform in Spain, for which Astra is the network operator. These channels are funded by subscriptions, generally for a package of channels. The Spanish authorities also point out that in Spain the cost of satellite distribution for broadcasters is much higher than the cost of terrestrial broadcasting and therefore the free-to-air broadcasters, including regional and local broadcasters, are not interested in switching to this platform.

(130) For several reasons it is concluded that the terrestrial and satellite platforms operate in the same market.

(131) Firstly, in 2008 Astra competed for the extension of coverage of digital television in Cantabria and won the tender. In 2008 Astra held a series of meetings with the Autonomous Communities to present its offer to broadcast digital television channels, which had hitherto been broadcasted via terrestrial platform. Even though the contract with Cantabria was later terminated by the authorities, the interest of the satellite operator in providing services in competition with the terrestrial platform suggests that there is a possibility for satellite operators to provide similar services.

(132) Secondly, the satellite operator Hispasat (a subsidiary of Abertis) provides services in some parts of Area II[70] and the satellite platform is exclusively used in Area III. Other Member States also use satellite services to cover more remote areas of their countries with the free-to-air channels[71].

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69 The study has not been made available to the Commission.

70 Hispasat provides these services in support of the DTT network in Area II.

71 As, for example, France.

(133) Thirdly, several public and private channels distributed via the terrestrial platform are also broadcasted via satellite platforms, including Astra itself[72].

(134) Fourthly, concerning the regional channels, some of them are available or were available in the recent past via the satellite platform. This contradicts the statement that the regional broadcasters are not interested in satellite.

(135) Fifthly, the Commission also notes Astra's argument concerning the capacity of satellite to deliver 1 380 channels and delimitate them geographically. Astra claims that there are no limitations for satellite to broadcast such a number of channels. Moreover, the figure of 1 380 regional channels seems to be inflated. While this is the maximum number of frequencies available throughout Spain for national, regional and local channels, the number of licences granted was in fact much lower (see footnote 13). In addition, not all the broadcasters that received a license actually broadcast on the frequencies assigned.

(136) Sixthly, some broadcasters have declared a preference for terrestrial transmission because they have acquired rights to broadcast content only for the terrestrial platform. This, however, does not mean that there are different markets for terrestrial and satellite transmission. As they have acquired content rights for the terrestrial platform, if necessary, broadcasters could do the same for the satellite. Furthermore, if a satellite platform is selected on the basis of a public tender, as in the case of Area III, a "must carry obligation" could be imposed on the broadcasters.

(137) Finally, according to data from May 2010[73], the coverage of DTT in Spain reaches 98.85 % of the population while only 93.5 % of the households watch TV via the terrestrial platform. Thus, 5 % of households have access to DTT but choose not to use it, as most of them subscribe to pay-TV via satellite.

(138) In conclusion, since satellite and terrestrial broadcasting platforms are in competition with each other, the measure, for the deployment, operation and maintenance of DTT in Area II, entails a distortion of competition between the two platforms. It should be noted that other platforms, especially IPTV, are also disadvantaged due to the measure. Although broadband has not yet reached the whole of Area II, it is highly likely that in the future it will extend its coverage significantly.

5.2.2.2. Effect on trade

(139) The measure has an impact on intra-Union trade. According to the case law of the European Courts, when "*State financial aid or aid from State resources strengthens the position of an undertaking as compared with undertakings competing in intra-Community trade, the latter must be regarded as affected by that aid*" [74].

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[72] For example, Antena 3, Cuatro, Telecinco, La Sexta, La Siete, Teledeporte, TVE, La2, Canal 24 horas.

[73] Analysis of the television market submitted by Spain in the notification of the measure: Compensation for damages for liberation of the digital dividend in Spain, SA.32619 (2011/N).

[74] T-55/99, *Confederación Espanola de Transporte de Mercancias* (CETM) v *Commission of the European Communities*, [2000] ECR II-3207.

(140) Network operators are active in a sector in which trade exists between Member States. Abertis forms part of an international group of companies, so does the complainant, Astra. The measure for the deployment and operation and maintenance of DTT in Area II therefore affects trade between Member States.

5.2.3. Conclusions on the presence of aid

(141) In view of the arguments put forward above, the Commission considers that the measure fulfils the criteria laid down in Article 107(1) TFEU. Under these circumstances, the measure has to be considered as state aid within the meaning of Article 107 (1) TFEU.

5.3. Compatibility assessment

5.3.1. General considerations

(142) The Commission actively supports the transition from analogue to digital broadcasting. The advantages of the digital switch-over were underlined in the Action Plan eEurope 2005 and in the two Communications on the digital switchover[75]. The Commission also recognises that the digital switch-over could be delayed if left entirely to market forces.

(143) Member States may use aid to overcome a specific market failure or to ensure social or regional cohesion[76]. However, it must be shown in each specific case that the aid in question is an appropriate instrument to address the problem, is limited to the minimum necessary and does not unduly distort competition. Similarly, the Switchover Communication provides that in the specific area of digitisation, public intervention would be justified under two conditions: firstly, where general interests are at stake and secondly, in the event of a market failure, i.e. market forces alone fail to deliver in terms of collective welfare. It also specifies that in any case, public intervention should be supported by a sound market analysis.

(144) The Switchover Communication also indicates that the transition to digital broadcasting represents a major industrial challenge that must be led by the market. In principle, each network should compete on its own strengths. In order to safeguard this principle, any public intervention should aim to be technologically neutral. Exceptions from this principle can be envisaged only if the intervention targets a specific market failure or imbalance and is at the same time appropriate, necessary and proportionate to overcome these difficulties.

(145) If left to the market, in view of their disadvantaged social situation, there is a risk that not all parts of the population can benefit from the advantages of digital television. With respect to this social cohesion problem, Member States may want to make sure that all citizens have access to digital television once analogue TV is switched off. Since the digital switch-over entails costs for consumers and

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[75] COM(2002)263 final, *eEurope 2005: An information society for all*, COM(2003)541 final, *Communication from the Commission on the transition from analogue to digital broadcasting (from digital "switchover" to analogue "switch-off")"* and COM(2005)204 final, *Communication from the Commission on accelerating the transition from analogue to digital broadcasting*.

[76] See *Less and better target state aid: a roadmap for state aid reform 2005-2009*, COM(2005)107 final.

requires a change in habits, Member States may want to assist in particular the disadvantaged groups of society such as elderly people, low-income households or people living in peripheral regions.

(146) In several state aid decisions, based on the Communications on the digital switch-over, the Commission applied the state aid rules in this sector[77]. Member States have several possibilities to grant public funding for the switch-over to ensure that all geographical areas continue to have appropriate TV coverage. This includes funding for the roll-out of a transmission network in areas where otherwise there would be insufficient TV coverage[78]. Such funding may however be granted only if it does not entail an unnecessary distortion between technologies or companies and is limited to the minimum necessary.

5.3.2. Legal bases for assessing the compatibility of the envisaged measure

(147) The Spanish authorities have invoked Articles 107(3)(c) and 106(2) TFEU to justify the measure if it was found to constitute state aid in accordance with Article 107(1) TFEU. Below, the Commission assesses the compatibility of the measure in the light of these provisions, taking into account the general considerations outlined above.

5.3.3. Article 107(3)(c) TFEU

(148) In order for the aid to be compatible under article 107 (3)(c), the Commission balances the positive and negative effects of the aid. In applying the balancing test, the Commission assesses 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 it 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 the effect on trade limited, so that the overall balance is positive?

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[77] See, among others, N622/03 Digitalisierungsfonds – Austria, OJ C 228, 17.9.2005, p.12; C25/04 Introduction of digital terrestrial television (DVB-T) in Berlin-Brandenburg – Germany, OJ L 200, 22.7.2006, p.14; C24/04 Digital terrestrial television in Sweden, OJ L 112, 30.4.2007, p.77; C52/05 Digital decoders Italy, OJ L 147, 8.6.2007, p.1; N270/06 Subsidies to digital decoders with API – Italy, OJ C 80, 13.4. 2007, p.3; N107/07 Subsidies to IdTV – Italy, OJ C 246, 20.10.2007; C34/06 Introduction of digital terrestrial television (DVB-T) in Nordrhein-Westfalen, OJ L 236, 3.9.2008, p.10; SA.28685 Captación de Televisión Digital en Cantabria – Spain, , OJ C 119, 24.04. 2012.

[78] See paragraph 132 of the Commission's decision C25/04, Introduction of digital terrestrial television (DVB-T) in Berlin-Brandenburg – Germany, OJ L 200, 22.7.2006.

5.3.3.1. Objective of common interest

(149) The aid scheme is aimed at accelerating the digital switch-over process in Spain and ensuring the continuity of TV reception to residents of certain remote and rural areas. In this respect, the measure is targeted to allow people living in those areas to watch television. Access to media, including TV transmission, is important for citizens to exercise their constitutional right to access information. The Commission has recognised the importance and the benefits of digital transmission in the Action Plan eEurope 2005[79] as well as in its two Communications on the transition from analogue to digital broadcasting[80]. In its Communication *i2010 - A European Information Society for growth and employment*[81], the Commission has pointed out that the planned switch-off of analogue terrestrial television by 2012 will improve access to spectrum in Europe. As digital broadcasting uses spectrum more efficiently, it frees up spectrum capacity for other users, such as the new broadcasting and mobile telephony services, which will in turn stimulate innovation and growth in the TV and electronic communications industries.

(150) It is therefore concluded that the measure is targeted at a well-defined objective of common interest.

5.3.3.2. Well-defined aid

Market failure

(151) As stated by the Spanish authorities, it is generally recognised that there is a risk that not all sectors of the population can benefit from the advantages of digital television (problem of social and regional cohesion). A market failure might exist where market players do not take sufficiently into account the positive effects of the digital switch-over on society as a whole because they do not have the economic incentives to do so (positive externalities). Moreover, with respect to social cohesion, Member States may want to make sure that all citizens have access to digital TV once analogue TV is switched off and may therefore also consider measures to ensure that all geographical areas continue to have appropriate TV coverage.

(152) In the opening decision, the Commission recognised that there is a market failure in that the broadcasters are unwilling to bear the additional costs of the extension of coverage beyond their statutory obligations. Moreover, neither the satellite platforms nor private households have carried out investments ensuring the reception of digital channels via satellite by all the inhabitants of Area II. Therefore, the Commission recognises that people whose usual residence is in a rural area may be totally excluded from the free-to-air digital television signal reception if the digital coverage is left entirely to market forces and that public intervention can be beneficial through financial supports to individuals.

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79 COM(2002)263 final, *eEurope 2005: An information society for all*.

80 COM (2003)541 final, *Communication on the transition from analogue to digital broadcasting (from digital "switchover" to analogue "switchoff"),* and COM(2005)204 final, *Communication from the Commission on accelerating the transition from analogue to digital broadcasting*.

81 COM(2005)229 final, 1 June 2005.

Technological neutrality, appropriateness and proportionality of the measure

(153) In digital switchover cases, the principle of technological neutrality is well enshrined in several Commission decisions[82]. It has been upheld by the General Court and the Court of Justice[83].

(154) The choice of technology should normally be established by a technologically neutral tender, as happened in other Member States[84]. In the absence of such a tender, the choice of a particular technology could be accepted if it had been justified by findings of an *ex-ante* study proving that, in terms of quality and cost, only one technological solution could have been selected[85]. The burden of proof lies with the Member State, which has to demonstrate that such a study is sufficiently robust and was carried out in the most independent manner[86].

(155) As pointed out in section 2.2., the vast majority of tenders have not been technologically neutral, since they refer, either explicitly through the definition of the object of the tender or implicitly in the description of the technical specifications, to terrestrial technology and DTT. Only DTT operators could fulfil these requirements (and only such operators have in fact participated in these tenders).Spain argues that references in the tender to DTT, or specifications referring to DTT equipment and transmission centres, do not mean that the use of such centres was compulsory for the bidders. These references cannot reasonably be interpreted as indicated by Spain. In any case, even if this were the right interpretation, such a formal argument ignores the commercial reality. Participating in tenders is resource intensive and therefore costly for any bidder. Splitting up the intervention in Area II in several hundred individual tenders has multiplied the costs, which amount to a significant entry barrier to any bidder wishing to cover the entire Area II. The combination of central government interventions in favour of DTT technology, as explained in paragraphs 88 and 89, specific tender references to DTT and the need to enter into hundreds of different tender procedures therefore sent a strong signal to other platform operators that participating in such tenders would not be commercially justified. It is therefore concluded that these references in the vast majority of cases made it impossible for operators of other platforms to compete[87].

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82 See above, footnote 77.

83 Cases T-8/06 - FAB *Fernsehen aus Berlin GmbH* v *Commission*, Judgment of 6 October 2009, [2009] ECR II-00196; C-544/09P - *Germany* v *Commission*, Judgment of 15 September 2011, not yet published; T-177/07, *Mediaset SpA* v *Commission*, Judgment of 15 June 2010, [2010] ECR II-02341; and C-403/10 P – *Mediaset SpA* v *Commission*, Judgment of 28 July 2011.

84 See footnote 12.

85 Such a study served as a justification for a choice of a particular technology in a broadband case. See Commission Decision N222/2006 – *Aid to bridge the digital divide in Sardinia*, OJ C 68, 24.3.2007.

86 The UK chose DTT for the provision of local TV on the basis of an ex ante study carried out by its regulator OFCOM and an ex ante consultation of market players. On this basis, the Commission did not insist on carrying out a technologically neutral tender. SA.33980 (2012/N) – *Local TV in the UK*, http://ec.europa.eu/competition/state_aid/cases/244689/244689_1425664_116_2.pdf.

87 Although in the technologically neutral initial tender of Cantabria three consortia put in a bid which was built on a satellite solution (Castilla-La-Mancha Telecom, Telefónica and Astra), none of these companies – or any other non-DTT platform operator - participated again in any of the subsequent tenders.

(156) The *ex-ante* study provided by the Spanish authorities, as discussed in paragraph 0, does not sufficiently demonstrate the superiority of the terrestrial platform over satellite. On the contrary, the study concludes that the choice of a particular technological solution for the extension of coverage shall be analysed on a region-by-region basis, taking into account the topographic and demographic particularities of every region. This conclusion advocates instead the need to carry out a technologically neutral tender to determine which platform is the most suitable.

(157) In the course of the investigation, some of the Autonomous Communities submitted internal calculations comparing the costs of using both technologies to extend the coverage. However, in addition to uncertainty about the date of these calculations, none of them was detailed and robust enough to justify the choice of terrestrial technology to extend the coverage. What is more, none of them was carried out by an independent expert.

(158) Concerning the two cost studies submitted by Abertis, it has to be noted that they were performed in 2010, long after the investigated measures were put into effect. Irrespectively of whether they could be considered independent and sufficiently robust, the fact that they are subsequent to the contested measures means that such studies cannot be cited in support of the argument that the Spanish government failed to hold a technologically neutral tender. In addition, the results of these studies are contradicted by cost estimations provided by Astra which demonstrate that satellite technology is more cost effective.

(159) Furthermore, the investigated measure cannot be considered appropriate.

(160) The fact that some households in Area II receive free-to-air channels via satellite[88] demonstrates that terrestrial technology is not always the most efficient and appropriate platform. It is also noted that satellite solution has been used in some other Member States[89].

(161) Moreover, the fact that Astra competed in and won the technologically neutral tender for extension of digital television coverage in Cantabria suggests, at least, that satellite platform can provide this service[90].

(162) The appropriateness of the measure is still being questioned. While the transition from analogue TV to DTT in the 800 MHz band was completed in Spain on 3 April 2010, in 2011 it was decided to auction the 800MHz band frequencies. As a result, it is necessary to transfer broadcasts to other channels located below 790 MHz, no later than by 1 January 2014. As this creates additional costs, on 5 November 2011 Spain notified two measures for households and broadcasters with a budget of €600 - 800 million in Area I (no measure has yet been notified

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88 Hispasat, co- owned by Abertis and by the Spanish government, provides services in certain Autonomous Communities in parts of Area II. For example, in the Canary Islands, 16 villages located in Area II receive free-to-air television via satellite. In Castilla y Leon the same applies to around 9000 people. As Abertis is in charge of the control of the satellite receivers in all terrestrial sites and it does not allow other satellite operators to interconnect with such receivers, only Hispasat can offer such DTT transport services to feed terrestrial towers.

89 E.g. France, UK, Italy, Slovakia.

90 As further underlined by the judgement of the national court. See above, footnote on p. 7.

for Area II)[91]. Such cost would not have arisen if other platforms (IPTV, cable or satellite) had been chosen.

(163) What is more, it has been pointed out that 4G mobile frequencies LTE interfere with DTT signals, as a result of which households need to buy costly filters to protect their DTT signal from the LTE waves[92]. It cannot be ruled out that similar interferences are a more general problem undermining the future appropriateness of terrestrial broadcasting, especially in the context of greater and wider roll-out of NGA networks.

(164) Spain put forward two other arguments in support of the view that satellite transmission would be more expensive than DTT. Firstly, in their agreements with certain providers, broadcasters have territorial restrictions. To ensure such conditional access would be more expensive for satellite technology. Secondly, satellite technology would not be equipped to broadcast a large number of regional channels. These allegations have not been substantiated and are contradicted by the fact that Astra's Cantabria contract contained a professional system of conditional access. Moreover, according to Astra's cost calculations, satellite technology would still be cheaper even if separate agreements had to be entered into with each of the Spanish regions. As regards regional broadcasting, Astra maintains that the Spanish government's number of 1 380 channels is hugely inflated[93]. Again, according to its own calculations, the satellite option would be cheaper even if regional and local channels were included.

(165) There is also evidence that the regional governments were aware that a technological alternative existed to the extension of the terrestrial platform. The investigation revealed that early in the process some regions met Astra representatives. At these meetings, Astra presented to them a proposal for a satellite solution, which, however was not further explored by the regional governments.

(166) As regards proportionality, when designing the intervention for Area II, it would have been appropriate for the central government to first carry out a cost comparison (or tender) at the national level. As the main cost of the satellite network arises from its satellite capacity, this platform operates with significant economies of scale[94]. Astra's negotiations with the regional governments show that it offered significant price reductions if several regions jointly entered into a contract. Further price reductions could therefore have been expected if a national tender had been carried out. Instead, by carrying out decentralised and non-harmonised measures, sometimes even at municipal level, a technology with such economies of scale was already put at a significant disadvantage. As a result, the total amount of state aid necessary to provide digital TV services to households in Area II increased. While it is for Spain to decide on its administrative organisation, when providing central government funding, instead of pushing for

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91 See Commission decision opening the investigation in case SA.32619, *Compensation of damages for the liberation of digital dividend*, OJ C 213, 19.7.2012.

92 http://stakeholders.ofcom.org.uk/consultations/second-coexistence-consultation/.

93 According to Astra's estimates, the total number of local channels currently broadcasted is limited to 415 channels.

94 The satellite signal can be broadcast over the entire Spanish territory. However, in the case of the terrestrial platform, geographical extension requires the installation of additional repeaters and/or relay towers.

the use of DTT, the Spanish government could at least have encouraged the Autonomous Communities to take into account in their tenders possible cost saving efficiencies available from particular platforms.

(167) In conclusion, the Commission considers that the investigated measure did not respect the principle of technological neutrality. As explained above, the measure is not proportional and it is not an appropriate instrument for ensuring the coverage of free-to-air channels to the residents of Area II.

Operation and maintenance of the networks

(168) Concerning the ongoing financing granted for operation and maintenance of the subsidised networks, as this is ancillary to the deployment aid, it cannot be considered technologically neutral. It has been directed to the conservation of the centres that broadcast a signal via terrestrial platforms. Such aid is therefore also incompatible.

(169) Any future aid for operation and maintenance has to be notified and has to respect the principle of technological neutrality.

5.3.3.3. Avoiding unnecessary distortions

(170) While public intervention might be justified in view of the existence of certain market failures and possible cohesion problems, the way the measure is designed gives rise to unnecessary distortions of competition.

Conclusion regarding Article 107(3)(c) of TFEU

(171) It is concluded that the investigated measure, including the ongoing aid, is not an appropriate, necessary and proportionate instrument to remedy the identified market failure.

5.3.4. Article 106(2) TFEU

(172) The Article 106(2) exception that can apply to State compensation for the costs of providing a public service cannot be invoked neither in this case in general, nor in the case of the Basque Country in particular. The Commission considers that the national (or regional) authorities have to define the SGEI clearly and entrust it to a particular undertaking. As assessed in paragraphs (119) to (122), it is considered that the Spanish and Basque authorities did not clearly define the operation of a terrestrial platform as a public service.

5.3.5. Existing aid

(173) Abertis suggests that the deployment of the terrestrial broadcasting network in Area II was financed almost entirely by the Spanish regions using public funds based on legislation dating back to 1982, i.e. prior to the date of accession of Spain to the European Economic Community in 1986. Therefore, according to Abertis, the scheme could be considered part of the ongoing public financing of the operation of local terrestrial networks and could therefore be considered as existing aid.

(174) The financing of the extension of the terrestrial network by the regions indeed started in the early 1980s, but at that time there were no private broadcasters on

the market. The extended infrastructure served therefore only the needs of the public broadcaster who, in any event, had the obligation to provide its signal to the majority of the population. Moreover, at that time terrestrial television was the only platform for transmitting the television signal in Spain. As a result, the extension of the only available network did not create distortion of competition with other platforms.

(175) Since then the legislation and the technology developed, leading to new broadcasting platforms and new market players, in particular private broadcasters. Since the beneficiary and the overall circumstances of the public financing have changed substantially, the investigated measure cannot be regarded as an alteration of purely formal or administrative nature. It is rather an alteration affecting the actual substance of the original scheme and therefore is to be considered as a new aid scheme[95]. In any case, the switch from analogue to digital TV has become possible only due to recent technological advance and it is therefore a new phenomenon. The Spanish authorities should therefore have notified this new aid.

5.4. Conclusion

(176) It is considered that the financing granted by Spain (including aid granted by the Spanish Autonomous Communities and the local corporations) to terrestrial network operators for the upgrade and digitisation of their network to provide free-to-air TV channels in Area II constitutes aid within the meaning of Article 107(1) TFEU. The aid is not compatible with the common market, to the extent the criteria of technological neutrality was not complied with. Furthermore, the aid was not notified[96] to the Commission as required by Article 108(3) TFEU and was unlawfully put into effect without Commission authorisation. It must therefore be recovered from the terrestrial network operators.

(177) In addition, the Commission considers that the ongoing aid for operation and maintenance of the digitised network granted without tenders or following technologically non-neutral tenders is also incompatible. Furthermore, this aid was not notified to the Commission as required by Article 108(3) TFEU and was unlawfully put into effect without Commission authorisation.

(178) Any future state aid for maintenance and operation needs to be notified and has to respect the principle of technological neutrality.

6. RECOVERY

6.1. Need to eliminate aid

(179) According to the TFEU and the established case law of the Court of Justice, the Commission is competent to decide that the State concerned must abolish or alter aid[97] when it has been found to be incompatible with the internal market. The Court has also consistently held that the obligation on a State to abolish aid

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95 Cases T-195/01 and T-207/01, Gibraltar [2002] ECR II-2309, paragraphs 109-111.

96 With the exception of Murcia, which notified the measure after it had already been implemented.

97 Case C-70/72 *Commission v Germany* [1973] ECR 00813, point 13.

regarded by the Commission as being incompatible with the internal market is designed to re-establish the situation previously existing[98]. In this context, the Court has established that this objective is attained once the recipient has repaid the amounts granted by way of unlawful aid, thus forfeiting the advantage that it had enjoyed over its competitors on the market, and the situation prior to the payment of the aid is restored[99].

(180) In accordance with that case-law, Article 14 of Regulation (EC) No 659/1999[100] states that '*where negative decisions are taken in respect of unlawful aid, the Commission shall decide that the Member State concerned shall take all necessary measures to recover the aid from the beneficiary*'.

(181) Thus, given that the financing of upgrade and digitisation of the terrestrial platform and subsequent maintenance and operation granted in Spain since the years 2008-2009 is illegal and incompatible aid, Spain should therefore be required to recover the incompatible aid, in order to re-establish the situation that existed on the market prior to the granting of the aid.

6.2. State aid recipients and quantification of the aid

(182) Platform operators are direct beneficiaries where they directly receive funds for the upgrading and extension of their networks and/or for the operation and maintenance. Where the aid was paid to public undertakings which subsequently carried out tenders for extension of coverage, the selected platform operator is considered to be the indirect beneficiary. The illegal and incompatible aid shall be recovered from the platform operators whether they are direct or indirect beneficiaries.

6.2.1. Qualification of the tenders

(183) In cases where the illegal aid was granted following a technologically non-neutral tender for extension of coverage, the Member State must qualify the tenders as falling into category of supply of hardware or extension of coverage, subject to the conditions set out below.

(184) Tenders for the extension of coverage entrust the winning company with the mission of providing (including building) an operative DTT network. To this end, necessary tasks include design and engineering of the network, transport of the signal, deployment of the network and supply of the necessary equipment.

(185) In tenders for the supply of hardware, the winning company is requested to provide the equipment necessary for the upgrading of the network. To this end, necessary tasks include the supply, installation and activation of the equipment, as well as training of the staff. No recovery is required for these tenders for supply of equipment.

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98 Joined Cases C-278/92, C-279/92 and C-280/92 *Spain* v *Commission* [1994] ECR I-4103, paragraph 75.

99 Case C-75/97 *Belgium* v *Commission* [1999] ECR I-3705, paragraphs 64-65.

100 OJ L 83, 27.3.1999, p. 1.

(186) Having classified these tenders for an extension of coverage, Spain has to recover the aid whenever a tender does not fulfil two cumulative conditions: (1) the tender refers to extension of coverage of digital television (and not digital terrestrial television) and/or contains a clause of technological neutrality; and (2) their technical specifications admit technologies other than terrestrial. Apart from the tenders, which the Commission itself considers technologically neutral, if Spain considers that other tenders fulfil the two conditions, it will provide the Commission with the related tender documents.

Example

Among the tenders reviewed by the Commission, the one organised by the Autonomous Community of Extremadura is provided as an example of technologically non-neutral tender for extension of coverage[101]. Despite the title of the tender, which refers only to the supply of hardware, the object of the tender did in fact include the design and deployment of the network[102]. The specifications of the tender make it technologically non-neutral[103], despite the insertion of a clause that is at first sight a clause of technological neutrality[104].

Another example of a technologically non-neutral tender for extension of coverage is the one organised by the public undertaking (AICCM) in the Autonomous Community of Madrid[105]. In this case, both the title and the contents of the tender imply that it is a tender for extension[106] only directed to the terrestrial platform[107].

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101 Supply, installation and start-up of the necessary equipment to provide the service of transport and broadcasting of DTT, for 6 national multiplexes (state global network, single frequency network) and an autonomous community multiplex, in locations in Extremadura under Phase II of the National Plan for Transition to DTT. Case SU-28/2009.

102 Supply, installation and start-up of the necessary equipment to provide the service of transport and broadcasting of DTT for 6 national multiplexes (Red Global Estatal (state global network) Red de Frecuencia Unica (single frequency network)) and an autonomous community multiplex (hereinafter RGE, SFN and AUT) in locations under Phase II of the National Plan for Transition to DTT. It includes the following activities: (a) design of the technical broadcasting and distribution networks that will support the service; (b) planning of supply of the necessary equipment for the proposed network; (c) roll-out of the network, including the installation and start-up of the necessary equipment and infrastructure. This supply will be made on a turnkey basis.

103 Page 2, paragraph 5 – "The main objective to be pursued is to extend and guarantee a percentage as close as possible to 100 % of coverage of Digital Terrestrial Television (DTT) to all citizens in the districts coming under Extremadura Phase II. No limitations are established as regards the network architecture or the technology/ies to be used provided the minimum requirements established are met.

Page 10 paragraph 7 – Bidders should include in their bids the architecture of the proposed distribution network, which must be consistent with the broadcasting network. For each multiplex, the best solution for this service is sought, always subject to criteria of economic and technological optimisation.

104 Other tenders identified by the Commission as falling into the same category are tender 2009/000127 organised by the Junta de Andalucía and tender S-004/10/10 organised by Junta de Extremadura.

105 Technical specifications for the contract for "Drafting of projects, supply, installation and start-up of the necessary infrastructure and communications for extension of the Digital Terrestrial Television (DTT) signal coverage in the Madrid autonomous community." To be concluded by the ordinary simplified procedure on a multi-criteria basis. Case ECON/000572/2008.

106 Page 3, paragraph 3 - " (…) supply, installation and start-up of the necessary infrastructure and communications for extension of the Digital Terrestrial Television (DTT) signal coverage in the Madrid

(187) The tenders shall be qualified not only according to their title, but above all according to their content, as the title alone does not make it possible to clearly define their scope.

(188) The aid granted after non-neutral tenders for extension of coverage have been held will then be subject to recovery.

6.2.2. State aid recipients and recovery

(189) Below are the different categories of aid beneficiaries. On the basis of the information received from Spain, the Autonomous Communities and the approximate aid categories are listed in tables. Since Spain has not provided full information on the aid beneficiaries, Spain must classify the beneficiaries in the different categories above and provide the Commission with the relevant supporting evidence. As already underlined in paragraph (138), the regime as such is discriminatory.

(190) In addition, the vast majority of tenders for extension reviewed by the Commission were classified as not respecting the principle of technological neutrality. Nevertheless, the Commission has also shown that it cannot be ruled out that in exceptional individual cases the tender was technologically neutral.

Spain must therefore indicate and provide sufficient evidence on particular tenders that were technologically neutral, on the basis of the conditions specified in paragraph (186) above.

(191) Where Autonomous Communities have organised non-neutral tenders for extension of coverage, as in the case of Extremadura referred to in the above example, the winners of such tenders are direct beneficiaries of the illegal aid subject to recovery. The sum to be recovered equals the full amount received by the winners of the tenders for the extension. From the information received from Spain, the Commission has found that (at least) the Autonomous Communities of Andalucía, Extremadura, Murcia, La Rioja and Valencia have carried out such tenders.

Undertakings subject to recovery	**Recovery**	**Method by which the aid is provided**	**CA concerned**
Direct beneficiaries	Full amount received under the	Transfer of funds to the beneficiary selected in the	• Andalucía • Extremadura

autonomous community, including all the work relating to performance of the related technical projects, measurement, maintenance, operation and management of the installations making up the service for the infrastructure deployed, and work necessary to disseminate institutional information to promote Digital Terrestrial Television."

Page 9, paragraph 8 – "The broadcasting network proposed to provide digital terrestrial television coverage, based on the timetable for switch-off and the budget allocation available, will be specified."

[107] Page 4, paragraphs 2 and 8 - "The main objective to be pursued through the execution of the work detailed below is to extend and guarantee a percentage as close as possible to 100 % of coverage of Digital Terrestrial Television (DTT) to all citizens in the autonomous community of Madrid. To facilitate DTT reception in the coverage areas, it is advisable for the broadcasting centres to have sites compatible with the orientation of the existing satellite dishes in buildings, so that citizens do not have to install new dishes or reorientate the existing dishes. Bidders should therefore state how they will address this issue in the proposed solution." Page 12, paragraph 4 - "The micro broadcaster/micro transmitter will be designed in accordance with the following specifications"..

Winner(s) of the technologically non-neutral tender(s) for extension of coverage organised by the autonomous communities	technologically non-neutral tender(s) for extension of coverage	tenders	• Murcia • La Rioja • Valencia

(192) In the cases where illegal aid was granted for the upgrade of the terrestrial network to town councils acting as network operators, the town councils are direct beneficiaries of the aid. The sum to be recovered equals the full amount received by the town councils from the central and regional authorities for the extension of coverage of their network. On the basis of the information received from Spain, the Commission has found that this applies at least to town councils located in the Autonomous Communities of Andalucía, Canarias, Extremadura and Murcia (non-exhaustive list).

Undertakings subject to recovery	Recovery	Method by which the aid is provided	CA concerned
Direct beneficiaries Town councils acting as network operators	Full amount received from the authorities for extension of coverage	Transfer of funds to the beneficiary	• Andalucía • Canary Islands • Extremadura • Murcia

Example

In Murcia, using the money received from the region and MITyC, the town councils organised almost all of the 143 tenders identified. Provided that they are not de minimis, they would fall under this category.

(193) In the cases of Autonomous Communities where a public undertaking acting as a network operator carried out the extension of coverage of the network, such an undertaking is considered to be a direct beneficiary and is subject to recovery. The Commission has identified Aragón Telecom, Gestión de Infraestructuras Públicas de Telecomunicaciones del Principado de Asturias, S.A., Multimedia de les Illes Balears S.A., Instituto Tecnologico de Canarias, Sociedad Regional de Cantabria I+D+I (IDICAN), Fundación Centro Tecnológico en Logística Integral de Cantabria (CTL), Promoción de Viviendas, Infraestructuras y Logística, S.A in Castilla y León (Provilsa), Redes de Telecomunicación Galegas Retegal, S.A. (Retegal), Obras Publicas y Telecomunicaciones De Navarra, S.A. (Opnatel), Itelazpi S.A., Centre de Telecomunicacions i Tecnologies de la Informació (CTTI) in Cataluña and Agencia de Informática y Comunicaciones de la Comunidad de Madrid (AICCM) to be companies falling into this category. The sum to be recovered is the full amount of funds received from the authorities for the extension.

(194) In these cases, however, it is not ruled out that the public undertakings carried out part of the extension themselves, and partly contracted the extension to a network operator through a tender. In the latter case the illegal aid was actually transferred to the companies who won the tenders, and they are therefore effective, although indirect, beneficiaries of the aid. Thus, to avoid double recovery, the illegal aid shall be recovered from the effective beneficiaries, i.e. (a) from the public undertaking for the amount received for the extension minus the funds transferred to network operators following technologically non-neutral tenders for extension

of coverage and (b) from the network operators for the amounts contracted following a technologically not neutral tender for extension of coverage organised by the public undertaking concerned.

Undertakings subject to recovery	**Recovery**	**Method by which the aid is provided**	**AC concerned/ public undertaking concerned/ approximate amount received by the public undertaking for the extension of coverage**
Direct beneficiaries Public undertaking AND if applicable	Full amount received from the authorities for extension of coverage (minus funds transferred to network operators following technologically non-neutral tenders for extension of coverage, if applicable)	Time of transfer of funds from the authorities	• Aragón (Aragón Telecom, EUR 9 million) • Asturias (Gestión de Infraestructuras Públicas de Telecomunicaciones del Principado de Asturias SA, EUR 14 million) • Balearic Islands (Multimedia de Illes Balears SA, EUR 4 million) • Canary Islands (Instituto Tecnológico de Canarias, EUR 3.7 million) • Cantabria (Idican; CTL, EUR 3 million) • Castilla y León (Provilsa, EUR 44 million) • Cataluña (CTTI, EUR 52 million) • Galicia (Retegal, EUR 17 million) • Madrid (AICCM, EUR 3.6 million) • Navarra (Opnatel, EUR 7 million) • Basque Country (Itelazpi, EUR 10 million)
Indirect beneficiaries Winner(s) of the technologically non-neutral tenders for extension of coverage organised by the public undertaking	Full amount received under the technologically not neutral tenders for extension of coverage	Transfer of funds to the beneficiary selected in the tender	

Example

In the case of Madrid, where a tender organised by the public undertaking (AICCM) was provided as an example of a technologically non-neutral tender for extension of coverage (see paragraph (186), the amount of EUR 3 622 744 granted to the contracted company, Retevision S.A., must be recovered in full from Retevision, as winner of the non-neutral tender, and subtracted from the amount to be recovered from AICCM, the public undertaking which is the direct beneficiary[108].

(195) The ongoing aid is for the maintenance and operation of DTT networks. The operators of these networks are the beneficiaries of the maintenance and operation aid. The aid has therefore to be recovered from those network operators.

(196) In the cases where the individual beneficiaries received funding not exceeding thresholds specified in Commission Regulation (EC) No 1998/2006 of

[108] Other tenders identified by the Commission as falling into the same category are, amongst others, two tenders organised by Provilsa in March 2009 won by Retevision SA and Telvent Energía S.A.; tender SE/CTTI/06/08 organised by CTTI and won by Abertis S.A., tender Contratación del suministro de la fase II y III para la extensión de la TDT en Aragón organised in June 2009 by Aragón Telecom and won by Abertis.

15 December 2006 on the application of Articles 87 and 88 of the Treaty to de minimis aid[109], such funding is not considered state aid if all the conditions set by this Regulation are fulfilled, and is not subject to recovery.

(197) Recovery shall be effected from the date on which the advantage to the beneficiaries took effect, i.e. when the aid was made available to the beneficiary, and shall bear interest until effective recovery.

7. CONCLUSION

The Commission finds that the Kingdom of Spain has unlawfully implemented the aid for the operators of the terrestrial television platform for the extension of coverage of digital terrestrial television in remote and less urbanised areas of Spain in breach of Article 108(3) of the Treaty on the Functioning of the European Union. The aid, including the (ongoing) aid for operation and maintenance, shall be recovered from the platform operators which are the direct or indirect beneficiaries. This includes local corporations where they act as platform operators.

HAS ADOPTED THIS DECISION:

Article 1

The state aid granted to the operators of the terrestrial television platform for the deployment, maintenance and operation of the digital terrestrial television network in Area II unlawfully put into effect by Spain in breach of Article 108(3) of the TFEU is incompatible with the internal market, except for the aid which was granted in compliance with the criterion of technological neutrality.

Article 2

The individual aid granted under the scheme referred to in Article 1 does not constitute aid if, at the time it is granted, it fulfils the conditions laid down by the regulation adopted pursuant to Article 2 of Regulation (EC) No 994/98 applicable at the time the aid is granted.

Article 3

1. Spain shall recover the incompatible aid granted under the scheme referred to in Article 1 from the Digital Terrestrial Television operators, whether they received the aid directly or indirectly.
2. The sums to be recovered shall bear interest from the date on which they were made available to the beneficiaries until their recovery.
3. The interest shall be calculated on a compound basis in accordance with Chapter V of Regulation (EC) No 794/2004.
4. Spain shall cancel all outstanding payments of aid under the scheme referred to in Article 1 with effect from the date of notification of this decision.

[109] O J L 379, 28.12.2006.

Article 4

1. Recovery of the aid granted under the scheme referred to in Article 1 shall be immediate and effective.
2. Spain shall ensure that this Decision is implemented within four months following the date of notification thereof.
3. Within two months following notification of this Decision, Spain shall submit the following information to the Commission:
   (a) the list of beneficiaries that have received aid under the scheme referred to in Article 1 and the total amount of aid received by each of them under that scheme, broken down by the categories indicated in section 6.2 above;
   (b) the total amount (principal and recovery interests) to be recovered from each beneficiary;
   (c) a detailed description of the measures already taken and planned in order to comply with this Decision;
   (d) documents demonstrating that the beneficiaries have been ordered to repay the aid.
4. Spain shall keep the Commission informed of the progress of the national measures taken to implement this Decision until recovery of the aid granted under the scheme referred to in Article 1 has been completed. It shall immediately submit, at the Commission's request, information on the measures already taken and planned in order to comply with this Decision. It shall also provide detailed information concerning the amounts of aid and interest already recovered from the beneficiaries.

Article 5

This Decision is addressed to the Kingdom of Spain.

Done at Brussels, on 19 June 2013

For the Commission

Joaquín ALMUNIA
Vice-President

Notice

If the decision contains confidential information which should not be published, 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 publication of the full text of the decision. Your request specifying the relevant information should be sent by registered letter or fax to:

European Commission
Directorate-General for Competition
State Aid Greffe
Place Madou 1 / Madouplein 1
MADO 12/59
B-1210 Brussels
Belgium

Fax No: +32 2 29 61242

Information about the amounts of aid received, to be recovered and already recovered

Identity of the beneficiary	Total amount of aid received under the scheme (°)	Total amount of aid to be recovered (°) (Principal)	Total amount already reimbursed (°)	
			Principal	Recovery interest

(°) Million of national currency

Annex: Public spending in Area II on DTT deployment, by Spanish regions (Autonomous Communities, except Castilla La Mancha)

BUDGET (in EUR)								
Region (Autonomous Community)	**MYTIC direct subsidies***	**MYTIC soft-loans***	**Regional funds***	**Local Funds***	**Recurrent cost (2009-2011)***	**Total funds**	**Total amount of organised tenders ****	**Total public spending *****
ANDALUCIA	4.668.500,00	1.220.690,00	8.712.873,00	491.203,00	2.250.479,00	15.093.266,00	3.678.242,17	15.093.266,00
ARAGON	5.900.000,00	8.700.000,00	5.400.000,00	-	5.000.000,00	20.000.000,00	16.281.754,30	20.000.000,00
ASTURIAS	-	13.430.787,00	353.535,00	-	2.129.698,00	13.784.322,00	13.784.322,00	13.784.322,00
BALEARES	-	-	913.034,00	-	763.034,00	913.034,00	3.294.429,02	3.294.429,02
CANARIAS	2.905.766,26	1.130.595,85	1.792.402,57	-	-	5.828.764,68	5.284.331,67	5.828.764,68
CANTABRIA	3.229.500,00	3.851.949,80	622.449,00	-	860.850,00	7.703.898,80	6.355.613,68	7.703.898,80
CASTILLA Y LEON	13.830.850,00	20.316.585,73	10.324.906,71	-	6.716.000,00	37.756.342,44	37.756.342,44	37.756.342,44
CATALUÑA	13.838.368,00	26.024.223,00	NO DATA	NO DATA	-	39.862.591,00	52.316.794,34	52.316.794,34
CEUTA	54.000,00	91.786,17	10.000,00	-	NO DATA	155.786,17	50.000,00	155.786,17
EXTREMADURA	2.238.250,00	7.800.000,00	18.718,00	-	-	10.056.968,00	9.549.379,74	10.056.968,00
GALICIA	6.083.300,00	5.000.000,00	6.003.336,00	-	873.000,00	17.086.636,00	12.644.112,98	17.086.636,00
MADRID	554.200,00	-	3.068.444,00	-	-	3.622.644,00	3.622.744,00	3.622.644,00
MELILLA	254.000,00	NO DATA	2.000,00	NO DATA	NO DATA	256.000,00	-	256.000,00
MURCIA	135.750,00	-	2.478.700,00	40.188,00	212.371,00	2.654.638,00	2.788.407,32	2.788.407,32
NAVARRA	316.850,00	-	6.675.028,00	-	4.256.508,39	6.991.878,00	6.991.878,00	6.991.878,00
LA RIOJA	1.229.350,00	3.000.000,00	3.737.425,00	-	944.000,00	7.966.775,00	5.766.775,00	7.966.775,00
PAIS VASCO	2.487.800,00	-	9.802.703,00	2.425.000,00	1.508.308,00	14.715.503,00	179.000,00	14.715.503,00
VALENCIA	1.822.250,00	13.384.248,94	818.280,30	586.234,17	679.500,00	16.611.013,41	15.412.499,00	16.611.013,41

* Amounts reported by the Spanish central and regional authorities during the investigation.

** Sum of funds transferred to the successful bidders following the tenders submitted to the Commission.

*** Only data coming from four Regions (in green) allow to define precisely the amount of State aid, as both (i) the declared sum of funds granted by the authorities and (ii) the total of the fund transferred following the tenders submitted to the Commission coincide. Due to the difficulty to obtain precise information from other Regions, it is considered that the amount of State aid granted in a particular region is the **higher** of the two declared amounts: (i) total of the funds granted by the authorities or (ii) the total of the funds transferred following the tenders submitted to the Commission.