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**Subject: State aid No CP 24/2010 (ex NN 37/2010) – Spain - Aid for the deployment of digital terrestrial television (DTT) in Castilla-La Mancha.**

Sir,

The Commission wishes to inform the Kingdom of Spain that, having examined the information supplied by your authorities on the aid/measure referred to above, it has decided to initiate the procedure laid down in Article 108(2) of the Treaty on the Functioning of the European Union. This comprises the national plan for the introduction of DTT, as described below, and its implementation by the region of Castilla-La Mancha. This procedure is linked to State aid No NN 36 / 2010.

## **I. THE PROCEDURE**

1. On the 14 January 2009 the Commission received a complaint (ref. A/761) from Radiodifusión Digital SL (hereinafter "Radiodifusión" or "RD"). The subject of the complaint was an alleged aid scheme that the authorities of Castilla - La Mancha had adopted in relation to the switching from the analogue television to the digital television. The complainant argued that the measure entailed non-notified, and thus unlawful, aid which resulted in a distortion of competition between national platform operators and local platform operators. The Complaint was integrated by additional information submitted by RD throughout the procedure.

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2. On the 19 February 2009, the Commission requested (ref. D/50684) the Kingdom of Spain to provide comments on the complaint lodged by RD. The Spanish authorities replied on 24 March 2009 (ref. A/6958). An *ad hoc* meeting was held with the Spanish authorities on 14 January 2009, in order to obtain further clarification on any implementing steps adopted in the transition to the digital technology.
3. Notwithstanding the amount of documents submitted by the Spanish authorities, at the end of the review exercise, essential information is still missing. In particular, it was very difficult to obtain precise information from the region of Castilla-La Mancha as to the scope of application and the concrete implementation of the Decreto Ley 347/2008 (the "Decreto Ley") regulating the transition to the digital terrestrial technology.
4. Therefore, on 12 October 2009, a reminder (ref. D/54291) was addressed to the Spanish authorities in order to obtain more exhaustive information on the contested measure. The Spanish authorities replied on 2 November 2009. From that moment on, the Spanish authorities submitted, often on their own initiative, a number of documents which they considered relevant for the Commission assessment of the case. All the submitted information was subsequently reviewed. The Spanish authorities replied to the final request for information on 9 July 2010 (ref. A24 / 21672).

## II. BACKGROUND

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

- Area II: the area concerned by the contested measure, including 2.5% of the national population (this is a national average, as in some regions the percentage is different), where the minimum coverage obligation does not apply. As, according to the Spanish authorities, the digitisation is not privately profitable, in the absence of any measure, the viewers of this area would not have access to channels broadcast on the terrestrial network. However, they would be served by satellite transmission.
  - Area III: the most remote area, including 1.5% of the national population, where it is not possible to build a terrestrial network and where the satellite is the only platform available. In order to make *free-to-air* (FTA) channels available in this area, the Government has adopted Law Decrees 1/2009 and 7/2009. Such decrees provide for *must carry* obligations mandating terrestrial broadcasters to make their FTA channels available to at least one satellite operator. The Commission has indications that both Hispasat and Astra are availing themselves of this option.
8. Castilla-La Mancha, like all other Spanish regions, has followed the path set out by the central government's National Technical Plan for DTT. However, unlike those regions, Castilla-La Mancha has granted monetary aid directly to the platform operators, instead of launching tenders for the provision and installation of the hardware necessary to digitise existing transmission centres or building digital emission centres *ex novo*.
  9. The financial transfers from the central government to the regions (which, although relevant for the Commission assessment, are not State aid) take the form of Non Interest Bearing loans. They are repayable in 12-15 years, with a three-year latency period.
- b. The market players
10. The case at hand concerns the broadcasting industry, namely at least three different levels of the broadcasting product chain: (i) broadcasters of TV channels, (ii) platform operators, and (iii) hardware suppliers (also known as "installers").
  11. With regard to the disputed measure, on 29 October 2009, the Spanish Government has provided an exhaustive list of hardware supply contracts, on a region by region basis. In Castilla-La Mancha, Castilla-La Mancha Telecom, the incumbent telecom operator, is the largest contractor for the provision and installation of DTT hardware.
- c. The functioning of the regional scheme in Castilla-La Mancha
12. The philosophy underlying the action of the government of Castilla-La Mancha in relation to the transition to the digital technology relies on the digitisation of the already existing and operating emission centres. In this respect, in the prologue to the Decreto Ley 347/2008, adopted by the authorities of Castilla-La Mancha, the regional government explains that the choice is meant to enhance the overall efficiency of the transition process and minimize the costs and problems final users would face.

13. For the above reasons, the Decreto Ley mandates for the direct attribution of the funds necessary to the digitization to the owners of the emission centres which are currently operating (foregoing any open tender procedure). The procedure follows the following steps: (i) technical analysis of the centres currently providing the current analogue coverage, (ii) analysis of the digital coverage to achieve, (iii) selection of the emission centres to digitize, (iv) identification of the owner of the emission centres, (v) proposal made by the regional government to the owners of the emission centres, and (vi) adjudication of the subsidies.
14. The Decreto Ley, in its Article 4(3), excludes from the activities to be subsidized the "*installations or operations aimed at extending the digital coverage of private broadcasters holding concessions for regional or local operations*". While it does not formally exclude local platform operators, the decree adopts a functional criterion, by excluding private broadcasters active at regional or local level without a reasonable justification.
15. As the Decreto Ley does not seem to formally exclude local platform operators such as RD, the exclusion stems from the implementation of the Decreto Ley. Indeed, to the extent to which RD broadcasts the signal of national broadcasters, it might be eligible for the regional subsidies. As explained in the above summary, however, it is on the region to take the initiative, locate the emission centres that are currently broadcasting the signal of national broadcasters and offer them support for the digitisation. In this respect, RD complains that, despite the fact it is already broadcasting the television signal, it has never been approached by the public administration to discuss the financing of the digitization of its network.
16. In any event, it must be noted that the Spanish authorities have failed to notify any of these investments to the Commission as a possible State aid measure.

### **III. THE COMPLAINT**

17. RD is a local telecom and DTT platform operator, registered with the Spanish NRA (CMT) for the management of a public telecommunications network and for the provision of electronic communications services, in particular the provision of radio and TV broadcasting transmission services. RD provides transmission services to both local (mostly) and national broadcasters, covers more than 60% of the regional population and is currently migrating to the DTT technology on its own financial resources.
18. RD complains that the financing schemes in Castilla-La Mancha are aimed at platform operators which already operate a network with national coverage and thus exclude all alternative networks (*e.g.* local platform operators). Further, the complainant alleges that the aid will not exclusively target the rural areas falling out of the statutory coverage obligations (the so-called "area II"). In addition, there would not be any monitoring mechanism to ensure that the aid be limited to financing transmission centres falling within the statutory coverage obligation.
19. According to RD, the contested scheme would hinder both actual competition at local level and potential competition at regional and national level. Indeed, if enjoying equal treatment in the financing of the network setup, RD could extend

further its network, interconnect with other local platform operators and/or buy wholesale transmission capacity from Abertis<sup>1</sup>. By buying wholesale transmission capacity from Abertis, RD would be in a position to broadcast also at the national level. Thus it would be able to extend its coverage in both Castilla-La Mancha and in other regions and become a stronger competitor to incumbent operators (Castilla-La Mancha Telecom and Abertis).

20. RD disputes that the goal of the Decreto Ley 347/2008 was to extend the network starting from the existing centres. Indeed, RD points out that, despite covering more than 60% of the regional population, it has never been contacted by any administration, whether regional or local, in order to discuss the financing of the digitization of its own emission centres.
21. RD also argues that the bulk of the funds invested by the region of Castilla-La Mancha have been used for the building of new emission centres. RD supports this allegation by comparing the list of municipalities receiving the funds with the list of those hosting an analogue emission centre and evidencing that approximately 80% of the receiving municipalities were not hosting any analogue emission centre before the scheme was put in place. RD also emphasises that the mere digitization of the terrestrial network would not make necessary a massive building of additional centres and that the amount of funds destined to such upgrade is thus disproportionately high.
22. From the above, RD infers that the actual purpose of the subsidies is not the digitisation of the existing network, but rather the realization of a new network allowing the incumbent operators (mainly Castilla-La Mancha Telecom) to compete more actively on the market for services to local broadcasters and for mobile television, which require a better capillarity of its network. Under such circumstances, RD considers that the failure to adopt open and transparent procedures for the award of the subsidies is unjustified, as any network supplier could have built the new centres. RD, therefore, also laments a distortion in the market for network suppliers (also referred to as "installers").
23. In relation to the exclusionary provision laid down by Art 4(3) of the Decreto Ley, RD comments that, by excluding from the benefit emission centres used to convey regional and local TV signal, the Decreto Ley merely channels the funds towards the incumbent platform operator that convey mainly the signal of national broadcasters.

#### **IV. THE POSITION OF THE CASTILLA-LA MANCHA AUTHORITIES**

24. In relation to the complaint raised by RD, the government of Castilla-La Mancha submits that the measure does not generate state aid, as the majority of the transmission centres to be digitalized are publicly-owned, while the private transmission centres concerned by the measure are a negligible minority. Therefore, there would be no private beneficiaries.

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<sup>1</sup> As an operator subject to the Spanish CMT's regulation significant market power (SMP) regulation, Abertis is obliged to give wholesale access to its network.

25. The Government of Castilla-La Mancha also envisages the applicability of the *Altmark* doctrine, as the measure aims at bringing digital television to areas which would otherwise be excluded from the switch-over.
26. The regional government submits that, if the Commission considered that state aid was indeed involved, such aid would be compatible with the internal market pursuant to Art. 107(3) lett. c. In addition, the regional government incidentally notes that RD should have no interest in filing a complaint, because there are no authorized broadcasters operating on the local market where RD is active and, therefore, RD would not have customers for its services.<sup>2</sup>
27. The government of Castilla-La Mancha, in a submission of 12 February 2010, also points out some factual circumstances that rebut RD's assertion that the measure result into a distortion of competition.
28. In the first place, the government cites a market analysis by the Spanish NRA (CMT) finding that national, regional and local markets for terrestrial platform operations are separate. However, the CMT's market definition is done for anti-trust and regulatory purposes. The Spanish authorities do not explain why and to what extent this conclusion should be applicable to the State aid analysis of the present case.
29. In the same submission, the government also denied to have in place any scheme to finance final users' connectivity to the DTT network. Such statement, however, seems to be contradicted by the text of the Decreto Ley which includes DTT decoders among costs eligible for the aid.
30. Finally, answering questions submitted by the Commission in a request for information, the government of Castilla-La Mancha, in its submission of 12 February 2010, confirmed that no tender has taken place in the region in order to award the funds for the network digitization.

## V. PRELIMINARY ASSESSMENT

31. In order to assess the merits of the Government's allegations, it is first considered whether the *Altmark* jurisprudence is applicable. If it is, then the contested measure cannot be considered as State aid. In the negative, however, it would be necessary to assess whether the contested measure entails State aid pursuant to Art. 107(1) and, if so, if such an aid can be considered compatible with the internal market pursuant to Art. 107(3).

### Existence of state aid

32. The government of Castilla-La Mancha has not adduced sufficient evidence to substantiate the claim that the *Altmark* jurisprudence is applicable. In this case,

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<sup>2</sup> In its submission of 24 March 2009, the government of Castilla - La Mancha argued that "*Por otro lado, los operadores que han conformado su red a partir del servicio a televisiones locales en Castilla-La Mancha lo han hecho sin respaldo legal, porque el Gobierno Regional –el único competente- no ha adjudicado aún ninguna licencia de televisión local, analógica o digital*". However, the Commission understands that in the past RD had also contracts with national broadcasters (e.g LaSexta)

the *Altmark* jurisprudence is not applicable as (i) the regional government has not proved that DTT operators are entrusted with a public service (which would also exclude the application of Art. 106(2) TFUE), and (ii) it has not provided sufficient elements to show that the four-prong *Altmark* test is met<sup>3</sup>.

33. Terrestrial platform operator(s) benefit directly from the state-financed extension of the DTT network. It foregoes the network extension (and or technological upgrade) costs. However, platform operators are not included in the public service mission. Thus, aid to terrestrial platform operators would not be covered by the first *Altmark* criterion<sup>4</sup>.
34. The second criterion is not fulfilled as the Spanish authorities have not provided information on the parameters for compensation which would have to be established beforehand in an objective and transparent manner.
35. With regard to the third criterion, the cost of digitisation of Area II, including operation and maintenance, are fully covered by State funding. In the light of benefits to broadcasters and platform operators, as discussed below, this could lead to over-compensation. No assessment has been made, by the Spanish authorities, on whether the State funding would exceed the cost of public service obligations plus a reasonable profit.
36. As regards the fourth *Altmark* criterion, the Spanish authorities refer to competition between hardware providers. However, to address a possible advantage at the level of platform operators, it would have been necessary to organise a public tender allowing for competition between different platform operators or, at least, to carry out a comparison between the investments made by the Spanish authorities and the costs of an as efficient competitor. However, such a tender has not taken place.
37. Finally, broadcasters can be considered to be indirect beneficiaries. In Area I, *i.e.* the 96% of the Spanish population, broadcasters pay the platform operator for the transmission of their signals. In Area II, broadcasters are not charged for the use of the platform. Thus, broadcasters benefit from the scheme as, due to a wider digital network, they can increase (or, at least, maintain) their viewership among the people in area II. On the other hand, public broadcasters do not receive money for the up-grading of the terrestrial network. They would also not benefit if there

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<sup>3</sup> The *Altmark* jurisprudence is applicable provided that (i) the recipient undertaking is in charge of a public service, which has been clearly defined; (ii) the compensation is calculated based on parameters established beforehand in an objective and transparent manner; (iii) the compensation does not exceed what is necessary to cover all or part of the costs of the public service obligations, plus a reasonable profit; (iv) the undertaking entrusted with a public service needs to be chosen in a public procurement procedure or, alternatively, its remuneration needs to be calculated based on the costs of an efficient undertaking.

<sup>4</sup> In addition, the contested measure affects 2.5% of the population which is not reached by DTT, as it falls out of the coverage obligations imposed on the broadcasters in their quality of concession-holders for the public service. It therefore may even be considered that area II is not covered by the public service remit of the broadcasters. So far, the Government has not provided clear indications on the point, nor has it provided any entrustment act concerning the terrestrial platform.

was over-compensation. Thus, the *Altmark* test is not suitable for the evaluation of such indirect benefits which arise for broadcasters.

38. In assessing the measure subject to the RD's complaint, the Commission has found that:

(i) *Entails a transfer of state resources*

39. The funds set aside by the central government with the legislative instruments of the period 2005-2007 (Plan Avanza) are transferred to the regional administration and hence directly granted to entities in charge of platform operations (mainly Castilla-La Mancha Telecom). In the case of Castilla – La Mancha, approximately EUR 16 million have been already granted to Castilla – La Mancha Telecom for the purchase, installation and operation of network hardware and additional EUR 6 million have been set aside.<sup>5</sup>

(ii) *Selectivity and advantage: beneficiaries of the contested measure*

40. The Decreto Ley merely takes into consideration the digitization of terrestrial emission centres, without considering other already existing alternatives like the satellite platform (or cable). In addition, the Decreto Ley provides an advantage to those platform operators servicing national broadcasters. While other platform operators, like RD, need to invest into the digitisation of their networks, the beneficiaries of the government support do not have to do so to extend their coverage to Area II.

#### ***Hardware providers***

41. The decision of the regional authorities to procure only hardware for the upgrade of the terrestrial platform implies a discrimination against providers of equipment used by other platforms (e.g. satellite decoders and dishes, cable). In this respect, the contested measure seems to confer a selective advantage to hardware providers in the form of an increased demand for their DTT devices.

#### ***Platform operators***

42. In Castilla-La Mancha, platform operators (e.g. Telecom Castilla-La Mancha) are directly and heavily subsidized by the region for the digitization of their network and for the building of new emission centres. Platform operators, therefore, directly benefit from public financing of the extension and upgrade of their digital network.

43. In Castilla-La Mancha the "Area II" part includes approximately 4% of the region's population. As a result, and due to the measure, the overall coverage of the regional networks is increased, which is positive. However, it also increases the attractiveness of the network when competing with other platforms for the transmission of TV signals in the region.

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<sup>5</sup> Based on figures provided by the Spanish authorities and updated on October 2009.



44. In addition, the subsidized installations increase the capillarity of the DTT network as a whole. As a consequence, the network becomes suitable to the provision of value-added services (e.g. digital mobile television or DVB-H) and terrestrial broadcasters and platform operators will have increasing opportunities to be first-mover providers of next generation digital services.
45. These benefits are further strengthened by the continuous subsidisation of operating cost of the local networks by the regional government. Where such payments are made to local network operators, a further risk of over-compensation, *i.e.* the partial coverage of other network costs, exists. This may, for instance, arise when equipment is used jointly for Area I and II.

### ***DTT Broadcasters***

46. Broadcasters, finally, could be considered indirect beneficiaries. In the absence of the government scheme, in Area II, they could not reach the 4% of population in Area II via the terrestrial network. In order to do so, the only option would be to purchase satellite capacity. However, even if they did, they would reach fewer households in Area II, as at least some of them would refrain from purchasing the necessary ground equipment (satellite decoder and dish). Thus, the aid scheme provides them access to an additional customer base.
47. In the pay-TV market, *pay-per-view* initiatives recently launched on the DTT platform compete with the channels broadcast on the satellite platform. As the contested measure extends the DTT platform, DTT *pay-per-view* channels are favoured over *pay-per-view* channels on the satellite platform.

### Conclusion on the selective advantage

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

### *(iii) Distortion of competition*

49. Considering that the funds are also used for the construction of additional emission centres, platform operators servicing national broadcasters will have the possibility to increase the capillarity of their network and will become a more powerful competitor in the markets for local platform operations and for mobile television, both requiring a capillary network at the moment available only to local platform operators.

### ***Hardware providers***

50. As explained, it is not clear, before an in-depth investigation, if terrestrial network installers compete with satellite installers. In that respect, it will be sufficient the finding that the contested measure has the potential to generate an additional turnover for the DTT network installers and thus create a potential distortion of competition.

### ***Platform Operators***

51. Distortion of competition could arise between different platforms (terrestrial and satellite), which seem to be in the same market.
52. The unwillingness of broadcasters to switch to another platform by itself does not preclude platform competition. This unwillingness may itself result from the particular State intervention. As, due to the state intervention, the extension of DTT to Area II is free of charge, currently broadcasters have no incentive to switch to the satellite platform for Area II. This, of course, could be different in the absence of State subsidies for DTT. If, either in the absence of any State aid or because of the outcome of a technologically neutral open tender, another platform prevailed, as it was done for Area III, the government could have used must-carry obligations to ensure transmission in area II<sup>6</sup>.
53. Finally, in relation to the DTT technology, the contested measure might entail discrimination between operators servicing national broadcasters and those servicing regional or local broadcasters, as only the first group of platform operators qualify for the subsidies under the Decreto Ley.

### ***Broadcasters***

54. The contested measure might also distort competition between broadcasters. In the past, the terrestrial platform has traditionally hosted FTA broadcasters and the satellite platform mainly pay-TV or pay-per-view broadcasters. Currently, however, FTA broadcasters are launching pay-TV initiatives on the terrestrial platform and satellite broadcasters seek access to FTA channels in order to complete their offer and compete more actively with the FTA broadcasters. In this respect, subsidies to the terrestrial platform could improve the competitive position on broadcasters, whether FTA or pay-TV, active on the DTT platform.
55. In addition, as the Decreto Ley only grants funds to terrestrial platform operators who service national broadcasters, the latter might benefit from lower technology costs, compared to their regional and local competitors. Such economic advantage might distort competition in the purchase of TV contents and in the sale of advertising space by the different groups of broadcasters.

### **Conclusion on distortion of competition**

56. By financing the costs associated to the extension of the DTT platform, the scheme might therefore determine a distortion of competition among hardware providers active in different technologies, of competition between the terrestrial and the satellite platform<sup>7</sup> and between DTT network operators servicing national broadcasters and those servicing regional and local broadcasters. The latter group

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<sup>6</sup> It must also be borne in mind that, in a market context where platforms are progressively converging and where Abertis is dominant in the DTT market and has a stake also in the satellite platform market, the measure envisaged by the Government could weaken its competitors using other platforms, thus reducing competition in the market for platform operators.

<sup>7</sup> If one concluded that the two platforms were not competing, one may still have to look at a possible impact of the contested measure on potential competition.

of broadcasters might also suffer from discrimination, in consequence of higher infrastructure and technology costs.

57. The measure may also create a distortion of competition between DTT broadcasters and satellite broadcasters, both FTA and Pay-TV, to the extent that the former use a platform which would not be available (or would be available at a higher cost) in the absence of the measure.

(iv) *Has an effect on trade between Member States*

58. The contested measure is likely to have effect on trade between Member States, as foreign operators (for instance, content providers, advertisers and/or broadcasters) are active on the television market in Castilla-La Mancha. It also affects other platform operators as Luxembourg-based Astra.
59. Therefore, in the light of the above considerations, the Commission is of the opinion that the contested measure enacted by the government of Castilla-La Mancha is a State aid. Then, the question becomes relevant whether such aid can be considered compatible with the internal market.

*Compatibility assessment*

60. The scheme adopted by the region of Castilla-La Mancha should be assessed in the context of Article 107 (3) lett. C. The compatibility of the contested measure must be assessed in the context of the transition from analogue to digital television. The analysis of the preliminary information gathered suggests that absent public funding, broadcaster and/or terrestrial platform operators would not invest in the digital terrestrial network in area II. As the terrestrial network is the main broadcasting platform for FTA channels (in turn a "*must have*" for viewers), without the measure, viewers would not have essential TV content, hence the market failure.
61. One may also come to the conclusion that an incentive effect exists, since broadcasters have demonstrated little interest in covering Area II with their signal. As a result, it is unlikely that platform operators would by themselves invest sufficiently to cover all parts of Area II. In this respect, by investing in the building of a DTT platform, the contested measure also provides broadcasters with an incentive to make their TV signal available on such platform without any subscription or licence cost, which ultimately goes to the benefit of the consumers.
62. Concerns, however, arise with regard to the proportionality of the measure and the distortions of competition it brings about. As regards the criterion of proportionality, the regional government of Castilla La Mancha has not taken sufficient measures to ensure that the aid is limited to a minimum. As described above, Decreto Ley 347/2008 provides that the government identifies the emission centres to be digitised and their owners and subsequently approaches them in order to finance the upgrade of the network.
63. This process gives rise to two concerns. First, platform operators are already investing themselves in the digitisation of their networks in Area I. As a result,

possibly they may have covered at least also a part of Area II in the region of Castilla-La Mancha. By adopting a decree which provides that the government will pay for the entire investment in Area II, the government may not be able to limit the aid to the minimum. An open tender would have been one possible instrument to identify the necessary amount of aid.

64. The second concern arises from possible negative spill-over into Area I territory in the region of Castilla La Mancha. In its reply to the complaint, the regional government has not addressed RD's allegation that its measure also pays for the digitisation of masts and equipment which are used in Area I, *i.e.* where the recipient directly competes with other local platform operators as RD. If that is the case, the measure would pay for investments which are privately profitable. This would be a further indication that the aid is not kept to the minimum.
65. The most serious concerns, however, arise with regard to undue distortion of competition. As the contested measure creates an incentive effect for the extension of DTT coverage, it has potentially anticompetitive effects concerning the satellite platform, breaching the principle of technological neutrality.
66. Indeed, the Decreto Ley 347/2008 provides that the administration will award the subsidies to the owners of emission centres currently operating on the territory, towards which the users' antennas are already oriented. Such provision excludes from the outset the satellite platform from the range of the potential beneficiaries. In addition the Decreto Ley includes in the list of eligible costs the "purchase by citizens of DTT decoders" thus reinforcing the discrimination effect against the satellite platform. Indeed, to the extent that such subsidies are not open to satellite decoders, the case seems to constitute an incompatible State aid in line with the *Digital Decoders* Commission precedent in Italy.<sup>8</sup>
67. Furthermore, the contested measure entails a possible discrimination against terrestrial platform operators, whether local, regional or national. Indeed, to the extent that they intend to set up network infrastructures to provide services to regional and local broadcasters, they would be excluded from the subsidies pursuant to Art. 4(3) of the Decreto Ley.
68. In this context, the regional government has provided little evidence that limiting the aid to platform operators which service national broadcasters is justified. As a dominant operator, Abertis is subject to regulatory obligations by the CMT. The latter requires Abertis to interconnect with regional and local platform operators such that these can offer nationwide coverage. Thus, once their network is digitised, operators like RD would be in a position to transmit public TV channels on a national scope, including Area II.
69. Decreto Ley 347/2008 provides that the regional government identifies the network to be digitised. It is then up to the government to contact the owner and to discuss the necessary measures. RD complains that it was never contacted by the regional government. Due to the opaque procedure in place, it was not in a position to demonstrate its ability to meet the government's demands.

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<sup>8</sup> Decision of 24 January 2007, OJEU 8.6.2007, L 147, page 1.

70. Apart from excluding RD from the Area II territory, the measure might also distort competition in Area I, as the government support might finance partly also the digitisation of Telecom Castilla-La Mancha's network in that area. RD puts forward that the former is its direct competitor as a regional platform and telecom service provider. To the extent that the regional government will also pay for operation and maintenance cost in the future, the distortion of competition would be further magnified.
71. In its reply to the complaint, the regional government has not pointed out whether it has spoken to any other operator apart from the local telecom company Castilla-La Mancha Telecom.

#### Conclusion on the compatibility assessment

72. Based on the above considerations, the contested measure seems to entail a discrimination against satellite platform operators, in breach of the technological neutrality principle. Such principle has been recently upheld by the General Court in its *DVB-T Brandebourg* and *Mediaset* judgments.
73. In the *DVB-T Brandebourg* judgement (T-21/06), the Court referred to the 2003 Commission Communication and found that, as DVB-T funds clearly supported only the terrestrial network, this measure would not fulfil the neutrality requirement<sup>9</sup>.
74. In the *Mediaset* case (T-177/07), concerning subsidies to users for the purchase of digital terrestrial and cable decoders, the General Court upheld the Commission's finding that the exclusion of satellite decoders from the subsidy entailed discrimination in breach of the principle of technological neutrality and as such prevented the contested measure from being declared compatible with the internal market.
75. Furthermore, the contested measure seems to discriminate against platform operators which provide broadcasting capacity to regional and local terrestrial broadcasters, resulting in a competitive advantage for national broadcasters and platform operators of their choice.
76. In addition, on the basis of the available information, it appears that the aid is not kept to the minimum, thereby violating the principle of proportionality, and that it unduly distorts competition. In spite of the positive elements as the existence of a market failure and an incentive effect, the balancing test would suggest a negative result.
77. Finally, the Commission has doubts as to the fact that the initiative of the region of Castilla - La Mancha has been carried out in compliance with the applicable EU rules on public procurement. Therefore, in the context of the coming investigation, the Commission will also request additional details on the modalities adopted by the region of Castilla La Mancha to award the funds necessary for the digitization of the network in order to assess the relevance, if any, of a potential breach of those rules for the present assessment.

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<sup>9</sup> T-21/06, Germany against Commission, not yet published, paragraph 69.

e. Applicability of the de minimis rule

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

f. Applicability of Article 106 (2)

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

## CONCLUSION

80. In the light of the foregoing considerations, the Commission, acting under the procedure laid down in Article 108(2) of the Treaty on the Functioning of the European Union, has doubts about the compatibility of the aid for the deployment of digital terrestrial television (DTT) in Castilla-La Mancha with the internal market and requests the Kingdom of Spain to submit its comments and to provide all such information as may help to assess the measure adopted by the regional government of Castilla-La Mancha, within one month of the date of receipt of this letter. It requests your authorities to forward a copy of this letter to the potential recipient of the aid immediately. The Commission regrets that such an unlawful aid has been implemented without prior authorization.

81. The Commission wishes to remind the Kingdom of Spain that Article 108(3) of the Treaty on the Functioning of the European Union has suspensory effect, and would draw your attention to Article 14 of Council Regulation (EC) No 659/1999, which provides that all unlawful aid may be recovered from the recipient. In its reply, the Kingdom of Spain is invited to comment also on the following questions:

(1) What companies have the Spanish authorities contacted in the Region Castilla-La Mancha to carry out the up-grading of the DTT network?

(2) What companies have actually received state funding for the up-grading of their network? Please specify the amount received by each company so far.

(3) To what extent can the digitised network equipment be used also outside Area II and for the provision of services other than TV broadcasting?

(4) How much money expect the public authorities to spend for operation and maintenance cost of the DTT network in the period 2010-2015?

(5) What measures would be necessary to take to tender the operation of digital transmission of TV broadcasting in a technologically neutral way (so that the operation and maintenance costs could be minimised)?

(6) In order to digitize Area II in Castilla-La Mancha, was it necessary to build all the new emission centres or would it have been sufficient to merely up-grade existing infrastructure?

82. The Commission warns the Kingdom of Spain that it will inform interested parties by publishing this letter and a meaningful summary of it in the *Official Journal of the European Union*. It will also inform interested parties in the EFTA countries which are signatories to the EEA Agreement, by publication of a notice in the EEA Supplement to the *Official Journal of the European Union* and will inform the EFTA Surveillance Authority by sending a copy of this letter. All such interested parties will be invited to submit their comments within one month of the date of such publication.
83. If this letter contains confidential information which should not be disclosed to third parties, please inform the Commission within fifteen working days of the date of receipt. If the Commission does not receive a reasoned request by that deadline, you will be deemed to agree to the disclosure to third parties and to the publication of the full text of the letter in the authentic language on the internet site:

[http://ec.europa.eu/community\\_law/state\\_aids/state\\_aids\\_texts\\_en.htm](http://ec.europa.eu/community_law/state_aids/state_aids_texts_en.htm).

84. Your request should be sent by encrypted e-mail to [stateaidgreffe@ec.europa.eu](mailto:stateaidgreffe@ec.europa.eu) or, alternatively, by registered letter or fax to:

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

Yours faithfully,

For the Commission

*Joaquin ALMUNIA*  
Vice-President of the Commission