



EUROPEAN COMMISSION

Brussels, 1 October 2014  
C(2014) 6846 final

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## COMMISSION DECISION

**of 1 October 2014**

**on state aid SA.27408 (C 24/2010) (ex NN 37/2010, ex CP 19/2009)  
implemented by the authorities of Castile-La Mancha  
for the deployment of digital terrestrial television in remote and less urbanised areas  
in Castile-La Mancha**

(Only the Spanish version 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, and having regard to their comments,

Whereas:

### 1. PROCEDURE

- (1) On 14 January 2009, the Commission received a complaint from Radiodifusión Digital SL (hereinafter ‘Radiodifusión’) and on 18 May 2009 a complaint from SES Astra S.A. (hereinafter ‘Astra’). Both complaints concern an 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. The contested scheme has its origin in Law 10/2005 of 14 June 2005 on Urgent Measures for the Promotion of Digital Terrestrial Television, Liberalisation of Cable TV and Support of Pluralism<sup>1</sup>. Further legislation adopted with respect to the digital terrestrial transition process includes, among others: Royal Decree 944/2005 of 29 July 2005 approving the National Technical Plan for Digital Terrestrial Television (hereinafter ‘the National Technical Plan’)<sup>2</sup>; Royal Decree 945/2005 of 29 July 2005 approving the General Regulations for the provision of the digital terrestrial television service; Order ITC/2476/2005 of 29 July 2005 approving the Technical Regulations and Regulations for the provision of the digital terrestrial service and Royal Decree 920/2006 of 28 July 2006 approving the General Regulations for the provision of the radio and cable television broadcasting service.

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<sup>1</sup> <http://www.boe.es/boe/dias/2005/06/15/pdfs/A20562-20567.pdf>.

<sup>2</sup> <http://www.boe.es/boe/dias/2005/07/30/pdfs/A27006-27014.pdf>.

- (2) These measures concern the entire territory of Spain. However, the Commission opened two different procedures, one for Spain with the exception of the region of Castile-La Mancha and one specifically for the region of Castile-La Mancha. While the state aid measure is the same in both cases and raises the same concerns, Castile-La Mancha presents certain particular issues which are of little (or no) importance to the general case. In particular, the complaint from Radiodifusión concerns only the case of Castile-La Mancha since the way in which the Regional Government of Castile-La Mancha implemented the aid scheme differs from the model applied in the other regions, and in the case of Castile-La Mancha it was necessary to carry out an in-depth assessment of an economic study.
- (3) In both cases, the Commission opened the formal investigation procedure on 29 September 2010, alleging that the state aid scheme discriminated between platform operators. The decision to initiate the formal investigation (hereinafter ‘the opening decision’) was published in the *Official Journal of the European Union* on 11 December 2010<sup>3</sup>. Comments were received from three interested parties: Radiodifusión on 11 January 2011, and Abertis and SES Astra S.A. (hereinafter ‘Astra’) on 4 February 2011.
- (4) On 19 January and 9 February 2011 the comments were forwarded to Spain, which was given the opportunity to react. On 18 February and 8 March 2011 the Permanent Representation of the Kingdom of Spain submitted observations from the Regional Government of Castile-La Mancha (*Junta de Comunidades de Castile-La Mancha*, hereinafter ‘the JCCM’) on the comments by third parties. On 27 May 2011 and 9 August 2012 the Commission sent requests for information to Spain, to which Spain (JCCM) replied on 10 June 2011 and 10 September 2012, respectively. On 20 August 2011 the Commission sent a request for information to Radiodifusión, which replied on 29 September 2011. On 14 October 2011, 15 November 2011 and 6 December 2012 the JCCM submitted additional information on its own initiative. In addition, the Commission held a meeting with the Spanish authorities and the JCCM on 18 May 2011.
- (5) On 15 May 2013, the JCCM provided information on the organisation of a tender for operating and maintenance aid. On 20 December 2013 it provided information on sanction procedures under way in Spain against Radiodifusión and its parent company, INGEST, and comments on ongoing discussions between the Commission and the Spanish authorities regarding state aid case No 28599. On 6 June 2014, the JCCM provided comments to demonstrate that its actions were in line with the ‘market economy investor principle’ and that it complied with EU public procurement rules. In addition, there have been several fact-finding exchanges between the Commission and the JCCM.
- (6) On 20 June 2013, the Commission adopted a final negative decision on state aid SA.28599 for the deployment of digital terrestrial television in remote and less urbanised areas in Spain (outside Castile-La Mancha)<sup>4</sup>.

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<sup>3</sup> Commission Decision of 29 September 2010, OJ C 335, 11.12.2010, p. 8.

<sup>4</sup> Commission Decision 3204 of 20 June 2013 in Case SA.28599.

## 2. DESCRIPTION OF THE MEASURE

### 2.1. Background

#### 2.1.1. *The complainants*

- (7) Radiodifusión is a local telecom and terrestrial television platform operator registered with the Spanish national regulatory authority for telecommunications (*Comisión del Mercado de las Telecomunicaciones*, hereinafter ‘the CMT’) for the management of a public telecommunications network and for the provision of electronic communications services, in particular the provision of radio and television broadcasting services.
- (8) Radiodifusión complained that the financing schemes in Castile-La Mancha were targeted at platform operators already operating a network with national coverage. In this way all alternative networks (i.e. local network operators) were excluded. According to Radiodifusión, the contested scheme hindered both actual competition at local level and potential competition at regional and national levels.
- (9) Radiodifusión also argued that the bulk of the funds invested by the region of Castile-La Mancha were not used for upgrading existing analogue transmission centres but for building new ones. Radiodifusión supported this allegation by comparing the list of municipalities receiving funds with the list of those hosting an analogue transmission centre. Approximately 80% of the recipient municipalities were not hosting an analogue transmission centre before the scheme was put in place. Radiodifusión also emphasised that the mere digitisation of the terrestrial network would not make large-scale construction of additional centres necessary. Therefore the funds earmarked for such upgrading were disproportionately high.
- (10) From the above, Radiodifusión inferred that the true purpose of the subsidies was not the mere digitisation of the existing network, but rather the construction of a bigger and better network allowing the incumbent operators (mainly TelecomCLM and Abertis) to compete more actively on the market for local broadcasting and mobile television transmission services. Under these circumstances, Radiodifusión considered that the failure to adopt open and transparent procedures for the award of the subsidies was unjustified, as any network operator could have built the new centres. Radiodifusión therefore also points to a distortion in the market for network operators.
- (11) The second complainant is the satellite platform operator SES Astra. Set up in 1985, Astra was the first private satellite operator in Europe. It offers a comprehensive portfolio of broadcasting and broadband solutions for customers in Europe and beyond. It broadcasts television and radio programmes directly to millions of homes and provides internet access and network services to public and private users.
- (12) Astra argues that the measure infringes the principle of technological neutrality as it supports only terrestrial transmission for digitisation. To demonstrate that a satellite platform would be a real alternative, Astra refers in particular to the case of Cantabria. In January 2008, the Regional Government of Cantabria had launched a tender to extend digital television coverage to the entire territory of Cantabria. It then 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 terminated the contract only 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<sup>5</sup>. Thus, according to the complainant, the case of Cantabria demonstrates, first, that Astra could compete in that market and, second, that the decisions of the central government made this competition impossible.

### 2.1.2. *The sector*

- (13) The case concerns the broadcasting sector. Many players are active in this sector at different levels of the broadcasting services product chain.
- (14) Broadcasters are the editors of television channels which purchase or produce in-house TV content and bundle it 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<sup>6</sup>. These ‘free-to-air’ (FTA) channels are provided free of charge to viewers. In order to ensure that the population can effectively benefit from this public service, the law attaches minimum coverage obligations for the task 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, the 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.
- (15) Hardware suppliers are manufacturers or installers of the necessary infrastructures and devices to build the various platforms.
- (16) Platform operators (or network operators) are private or publicly controlled entities operating the infrastructure necessary to transport and broadcast the signal of the broadcasting channels. In the early days of the television industry, the only platform available was the analogue terrestrial platform. As the technology developed, more platforms have become available on the market, namely the satellite platform, the cable platform and, more recently, IPTV<sup>7</sup>, which uses the broadband connection to transmit the TV signal.

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<sup>5</sup> 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.

<sup>6</sup> The concession includes the assignment of a frequency for terrestrial broadcasting.

<sup>7</sup> Internet Protocol Television (IPTV) is a term used to refer to distribution systems of TV and video signals through an electronic communications network using the Internet Protocol.

- (17) 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 signal and therefore the new technology requires a more capillary network, in some cases the extension of coverage also requires the building of new transmission centres. The viewer must have a decoder, which may already be integrated into the TV set.
- (18) 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 equipment. The viewer must have a satellite dish and a decoder. To expand satellite coverage in a region, the ground equipment must be installed in the customer's home. In terms of geographic coverage, the satellite platform could reach almost 100% of Spanish territory, whereas the terrestrial platform covers about 98%.

### 2.1.3. *The context*

- (19) The measure under investigation 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. This is especially significant for terrestrial broadcasting, where the frequency spectrum available is limited and therefore broadcasting competes with mobile telecommunications for scarce bandwidth. Satellite transmission, on the other hand, has the advantage of working in a completely different frequency band, where there is no scarcity of frequency.
- (20) 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 790-862 MHz ('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<sup>8</sup>.
- (21) 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<sup>9</sup>.

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<sup>8</sup> 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.

<sup>9</sup> See, for instance, for France state aid N 666/2009 – Amendment of aid scheme for DTT N 111/2006; for Slovakia state aid N 671/09 - 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 the TV signal via the DTT platform and therefore satellite transmission was chosen in some cases, both

- (22) However, in the case of terrestrial broadcasting, the scarcity of frequencies remains an issue even after digitisation. Shortly after the completion 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 a lower frequency band<sup>10</sup>. The relocation of DTT multiplexes assigned to broadcasters led to additional costs and additional state aid, which the Commission is currently examining in a formal investigation procedure<sup>11</sup>.
- (23) With regard to TV broadcasting, terrestrial digital transmission will remain a major distribution platform for the foreseeable future, but broadband technology, such as next generation access (NGA), is likely to become an important alternative as the leading transmission technology. For the time being, however, in Spain the geographical coverage of such NGA networks is not universal.
- (24) In Spain today there are four broadcasting platforms: DTT - digital terrestrial technology (DVB-T), satellite (DVB-S), cable (DVB-C) and IPTV. DTT is the main platform for the free-to-air public and private Spanish channels<sup>12</sup>. The main operator of the terrestrial network is Abertis, which also controls the satellite operator Hispasat. There is also a number of local telecommunications operators carrying DTT signals which are usually interconnected with Abertis' national network. In Castile-La Mancha, the main regional operator is TelecomCLM<sup>13</sup>. As for the pay-TV channels, they are broadcast mainly via satellite, cable and IPTV. Astra and Hispasat are the main satellite operators.
- (25) In order to switch from analogue to digital television, in 2005-08 Spain adopted a series of regulatory measures that concerned the terrestrial network, as described in section 2.2. The Spanish authorities divided 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 the broadcasters bore the costs of the switchover, no aid was granted Area I.
  - 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 the upgrading of the existing transmission centres and the building of new ones, significant investments in the terrestrial network were necessary. 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 in order to upgrade the

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for transmission between centres and for transmission to some households (for more detail see section 2.2.2.). For the purpose of this Decision, all of these installations are still considered to be 'terrestrial'.

<sup>10</sup> See Decision No 243/2012/EU and in particular Article 6(4) thereof.

<sup>11</sup> See the Commission Decision on SA.32619, Compensation of damages for the liberation of the digital dividend, OJ C 213, 19.7.2012. Due to the complexity of the reorganisation of services and spectrum use, Spain asked for a derogation from the date of implementation of Article 6(4) of Decision No 243/2012/EU.

<sup>12</sup> Around 26 national FTA channels and around 30 regional FTA channels.

<sup>13</sup> [...]

existing transmission centres and build new digital ones. This process was commonly referred to as ‘DTT coverage extension’ (i.e. extension of DTT coverage beyond what was compulsory for the commercial broadcasters).

- iii. Area III – where, due to the topography, it is not possible to provide a 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 via satellite entails costs for consumers, who have to acquire satellite dishes and set-top boxes.

## 2.2. Description of the aid

### 2.2.1. The general measure

- (26) The scheme under investigation is based on a complex system of legal provisions put in place by the Spanish central authorities from 2005. On the basis of these provisions, state aid for the deployment of DTT in Area II was granted in 2008-2009 by the Autonomous Communities and municipal authorities. The latter channelled the funds from the central budget and from their respective budgets to the recipients. Moreover, since 2009 ongoing aid has been granted by the Autonomous Communities for the maintenance and operation of the networks in Area II.
- (27) The regulation of the transition to digital television technology started when Law 10/2005 of 14 June 2005 was adopted. It mentions the need to promote a transition from analogue to digital terrestrial technology and required the Government to take the appropriate measures to ensure this transition.
- (28) Following this mandate, with Royal Decree 944/2005 the Council of Ministers approved the National Technical Plan, which fixed 3 April 2010 as the date of the analogue switch-off in Spain<sup>14</sup>.
- (29) As regards Areas 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 this extension. Condition (e) requires that the local installation should be in conformity with the Technical Plan for digital terrestrial television.
- (30) Subsequently, on 7 September 2007, the Council of Ministers approved the National Plan for the Transition to Digital Terrestrial Television (hereinafter the ‘Transition Plan’)<sup>15</sup> which implements the National Technical Plan. The Transition Plan divided

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<sup>14</sup> It established the obligation for private broadcasters to reach 96% of the population in their respective areas of coverage by that date, 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.

<sup>15</sup> <http://www.televisiondigital.es/Documents/PlanNacionalTransicionTDT.pdf>

Spanish territory into ninety technical transition projects<sup>16</sup> and established a deadline for the switch-off of analogue broadcasting for each of these projects.

- (31) On 29 February 2008, the Ministry of Industry, Energy and Tourism (hereinafter ‘MIEyT’) adopted a decision to improve the telecommunications infrastructure and establishing the criteria and the distribution of the funding of the actions to develop the Information Society under the Plan Avanza for 2008<sup>17</sup>. The budget approved by this decision amounted to EUR 558 million and was partly allocated to the development of broadband, and partly to the digitisation of television in remote and less urbanised areas of Spain falling outside the statutory obligations of the commercial broadcasters<sup>18</sup>. 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<sup>19</sup> signed by MIEyT 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 states that digital terrestrial technology is the only technology to be funded. As a result of the agreements, MIEyT 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 for the local authorities to comply with the Twelfth Additional Provision of the National Technical Plan.
- (32) 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 MIEyT 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 Cooperation 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.
- (33) On 29 May 2009, the Council of Ministers approved the criteria to distribute 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<sup>20</sup>. 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 the Transition to DTT, namely a similar DTT coverage to that of the current terrestrial coverage with analogue technology, the financial support of the public authorities is needed’ and then that ‘the implementation of this cooperation will be formalised within the framework set by the National Plan for the Transition to DTT’.

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<sup>16</sup> Later classified into Phases I, II and III.

<sup>17</sup> <http://www.boe.es/boe/dias/2008/03/06/pdfs/A13832-13834.pdf>

<sup>18</sup> 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.

<sup>19</sup> The framework agreements were signed between MIEyT and the Autonomous Communities in 2006 under the Plan Avanza.

<sup>20</sup> <http://www.boe.es/boe/dias/2009/07/02/pdfs/BOE-A-2009-10972.pdf>

- (34) Lastly, between October and December 2009, addenda to the 2008 Framework Agreements (referred to in paragraph (32) were published in the Spanish Official Gazette, including the funding for the coverage extension of Phases II and 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)<sup>21</sup>.
- (35) Following the publication of the 2008 Framework Agreements and above-mentioned addenda<sup>22</sup>, the governments of the Autonomous Communities started implementing the extension. They either organised public tenders themselves or tasked a private undertaking with carrying out the tender. The subsidies were partly agreed with MIEyT and therefore funded from the central budget or partly funded by the Autonomous Communities themselves. In certain cases the Autonomous Communities mandated the municipal authorities to carry out the extension.

### *2.2.2. Implementation of the aid measure in Castile-La Mancha*

- (36) In contrast to the majority of the other Autonomous Communities, the Castile-La Mancha authorities did not organise regional tenders to extend coverage of digital television. This was apparently due to time constraints, as more than 400 transmission centres had to be upgraded<sup>23</sup>. Instead, the JCCM followed a particular procedure to select telecom operators to digitise broadcasting centres, which was set out in Decree 347/2008 of 2 December 2008 (hereinafter ‘the Decree’).
- (37) The Decree ordered the direct allocation of the funds necessary for digitisation to the owners of the existing (analogue) transmission centres. It therefore did not require an open tender procedure. The JCCM had to follow a particular procedure: (i) technical analysis of the centres providing analogue coverage at the time, (ii) analysis of the digital coverage to be achieved, (iii) selection of the transmission centres to be digitised, (iv) identification of the owners of the transmission centres, (v) proposal by the Regional Government to the owners of the transmission centres, and (vi) awarding of the subsidies.
- (38) The Decree was implemented accordingly. The owners of existing transmission centres were directly contacted and were informed of the requirements for benefiting from the public financing. Three different scenarios can be distinguished. First, in most cases, the transmission centres are owned by the municipal authorities, which are responsible for operation and maintenance. After receiving the funding from the JCCM, the municipal authorities bought the digital equipment from Abertis and TelecomCLM on the basis of a technical and economic tender, and subcontracted the installation, operation and maintenance of the equipment to these two companies. Only these two companies were contacted by the authorities and only they submitted

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<sup>21</sup> See, for example, Andalusia’s Addendum <http://www.boe.es/boe/dias/2009/10/28/pdfs/BOE-A-2009-17108.pdf>

<sup>22</sup> In total more than 600 agreements – framework agreements, addenda, etc. - were concluded between the authorities concerning the extension of coverage.

<sup>23</sup> The Government of Castile-La Mancha concluded that it would not have the time necessary to organise a public tender within the timeframe of the National Plan for the Transition to DTT. Compare: Annexes II – JCCM Internal Study on the implementation of the National plan for the Transition to DTT in Castile La-Mancha, p. 31.

technical proposals to apply for the aid. Second, in around a quarter of cases, the selected centres belong directly either to TelecomCLM or to Abertis. In these cases the two companies received the aid to upgrade their equipment. The third scenario is that some new transmission centres had to be built. While they were indeed publicly funded, they are now owned by TelecomCLM.

- (39) The JCCM entered into 147 cooperation agreements (*'convenios'*) with the two operators and 475 cooperation agreements with municipal authorities. About 84% of installations covered by these agreements were for DTT installations and 16% for household satellite receivers. Satellite receivers were used to ensure DTT channels coverage for very small villages. For that purpose, the JCCM decided to use Hispasat's satellite platform<sup>24</sup>. At the end of the process, the information on upgrades to the existing centres was published on the municipal authority notice boards.
- (40) The Commission was informed that a total of approximately EUR 46 million of public money was spent on upgrading transmission centres, of which EUR 32.6 million went directly to the municipalities owning 355 transmission centres<sup>25</sup>. The cooperation agreements between the JCCM and the municipal authorities state that the latter are responsible for contracting the selected operator to carry out the installation and maintenance<sup>26</sup>. Different selection procedures were chosen by the individual municipal authorities. Some sent letters directly to TelecomCLM and Abertis, while others published the information on their notice board, inviting operators to submit their technical proposals.
- (41) Under the cooperation agreement, the JCCM pays for the acquisition and installation of digital equipment, and the operation and maintenance for the first two years for each of the digitised transmission centres. As the cooperation agreement did not require the operator to pay for operation and maintenance after this period, TelecomCLM transferred the equipment to the JCCM<sup>27</sup>. Thereafter the JCCM became responsible for paying for the operation and maintenance of the DTT equipment.
- (42) The Commission was informed that, out of the total EUR 46 million of public funds spent, at least EUR 13.5 million was transferred to platform operators: EUR 13.2 million to TelecomCLM, which owns 138 of the transmission centres, and approximately EUR 250 000 to Abertis, which owns three centres. TelecomCLM and Abertis digitised their centres using their own equipment. In some cases, the equipment used to digitise TelecomCLM masts still belongs to the public authorities. In these cases the operator does not have to pay for the use of such equipment. In addition, the total amount of funds spent in 2009-2011 on operation and maintenance of the digitised centres (ongoing aid) was at least EUR 6.5 million.
- (43) However, the mere upgrading of the existing centres was not sufficient to complete the coverage of the extended area. Therefore, 20 new centres were built with public funds.

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<sup>24</sup> Castile-La Mancha Government: The Implementation of the Plan for the Transition to DTT in Castile-La Mancha, presentation to the European Commission, 27 October 2010.

<sup>25</sup> Municipalities are equipment owners and they have to pay for operation and maintenance costs for the first two years of operation.

<sup>26</sup> Cooperation Agreement between the JCCM and the Municipality of Caspueñas, p. 76.

<sup>27</sup> On the basis of DTT Equipment Transfer Agreements signed on 17 May 2013. This was to ensure the operation and maintenance of the DTT equipment beyond the two-year period laid down in the cooperation agreements. However, in the case of three cooperation agreements Abertis remained the owner of the DTT equipment.

Without organising an open tender, the authorities contacted TelecomCLM directly and asked it to perform this task. According to the information provided to the Commission, a total of EUR 2.26 million was spent on the construction of the new sites, of which some EUR 751 000 was used for the construction of six centres which were later transferred to TelecomCLM. The ownership of the other 14 centres remained with the municipalities.

- (44) Finally, as pointed out in paragraph (39), where a DTT centre would be too expensive to deploy, satellite transmission was used instead. For that purpose, 100 agreements were concluded to install satellite receivers in individual homes. Satellite receivers are part of the satellite transmission network. According to the information provided, the total investment in satellite receivers amounted to EUR 1.6 million<sup>28</sup>. These households are served by the satellite platform operator Hispasat, which is controlled by Abertis and which was selected for these services without a public tender.
- (45) As a result of the procedure, the authorities signed a total of 622 agreements with the municipal authorities and operators concerned. Based on the information provided to the Commission, the breakdown of the amounts is as follows:

EUR million	Upgrade of transmission centres	New transmission centres	Upgrading the infrastructure of municipalities <sup>29</sup>	Operation & maintenance <sup>30</sup>	Satellite receivers
TelecomCLM	13.2	2.26	32.6	To be determined	---
Abertis	0.25	---		To be determined	---
Hispasat	---	---	---	To be determined	1.6
Total	13.45	2.26	32.6	At least 6.5	1.6

### 2.3. Grounds for initiating the procedure

- (46) In the opening decision, the Commission noted that the measure described seemed to meet all the criteria of Article 107(1) of the Treaty and could, therefore, be regarded as state aid. The contested measure seems to entail discrimination in favour of terrestrial

<sup>28</sup> JCCM internal study on the implementation of the National Plan for Transition to DTT in Castile-La Mancha, p. 52.

<sup>29</sup> To upgrade their networks, the municipal authorities paid up to EUR 32.6 million to TelecomCLM and Abertis.

<sup>30</sup> Cooperation agreements cover two years of operation and maintenance. This amounts to EUR 4.5 million for the municipal authorities and EUR 2 million for the operators. JCCM internal study on the implementation of the National Plan for Transition to DTT in Castile-La Mancha, p. 53.

platform operators, in breach of the principle of technological neutrality<sup>31</sup>. Furthermore, the contested measure seems to discriminate against platform operators which provide broadcasting services to regional and local terrestrial broadcasters. This would be to the advantage of national broadcasters and platform operators.

- (47) The Commission reached the preliminary conclusion that the scheme may have created a potential or actual distortion of competition between terrestrial and satellite platforms and between terrestrial platforms themselves. It did not see any grounds on which such measures could be compatible with the internal market, since no derogation seemed to be applicable.
- (48) For additional 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**

- (49) In its defence to the opening decision, Spain and the Autonomous Community of Castile-La Mancha put forward numerous arguments. Broadly speaking they fall into two categories. First, the Spanish authorities argued that no advantage had been granted to the aid recipients. Second, if it is considered, nevertheless, that state aid had been granted, in any event it would be compatible<sup>32</sup>. These arguments are summarised below.

#### **3.2. Absence of aid**

##### *3.2.1. No advantage*

- (50) According to the authorities of Castile-La Mancha, the measure under investigation does not constitute state aid and does not involve an advantage for undertakings. A combination of funds from the Spanish State and the Autonomous Communities were directly transferred to the beneficiaries acting in their official capacity or as a public authority<sup>33</sup>. These contested subsidies were exclusively used to digitize 141 pre-existing analogue transmission centres, and to build 6 new centres. The digitisation of the transmission centres was carried out after a thorough assessment of a technical report submitted by the operators owning those centres. The cooperation agreement with the owners of the centres was signed only on the basis of such technical reports<sup>34</sup>. This ‘negotiated procedure’ should be regarded as open, transparent and non-

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<sup>31</sup> See in particular the judgments in Case T-21/06 *Germany v Commission* (DVB-T Brandenburg) [2009] ECR II-197, paragraph 69, and Case T-177/07 *Mediaset SpA v Commission* [2010] ECR II-2341.

<sup>32</sup> In the case of Castile-La Mancha the authorities did not argue that the measure should be regarded as an SGEI. It would not fulfil the Altmark criteria either as, among other reasons, there is no entrustment act, the beneficiaries were not selected on the basis of an open tender, and the authority did not calculate the compensation on the basis of the costs that a well-run undertaking would have paid for providing such services.

<sup>33</sup> Originally, the municipal authorities had built and owned analogue transmission centres over the last decades. They received public funding for digitising this infrastructure.

<sup>34</sup> Castile-La Mancha Government submission to the EC (Case C24/2010) – deployment of digital terrestrial television in remote and less-urbanised areas in Castile-La Mancha, submitted on 6 June 2014.

discriminatory, also because of the publication on municipal authority notice boards (see paragraph 39).

- (51) The national authorities claim that, to the extent that platform operators received public funding, this was only for the operation and maintenance of the electronic transmission equipment owned by the municipal authorities. They acted as mere suppliers and installers of the technical equipment necessary to upgrade and adapt those centres, but not as platform operators<sup>35</sup>. Where they provide services in Area II after the public funding, it is only for the provision of the terrestrial TV signal as a basic and public service.
- (52) To carry out the digitisation of their networks, the 475 municipal authorities commissioned technical reports which were often drawn up by platform operators. No economic advantage was granted to the operators in this case either.
- (53) According to the national authorities, the digitised transmission centres owned by either TelecomCLM or Abertis Telecom existed before the granting of the contested subsidies, so these subsidies were not used to finance the network expansion of the network of either of the two network operators involved in the extension of DTT coverage in Area II of Castile-La Mancha.
- (54) Public funding was granted to TelecomCLM and Abertis to digitise 141 of their own transmission centres. The national authorities point out that this happened only in areas where municipal authorities did not own transmission or retransmission centres that were suitable for extending DTT coverage. However, the national authorities claim that these investments did not give TelecomCLM and Abertis a competitive advantage in adjacent markets such as local television or Digital Video Broadcasting (DV-BH). The digitisation of TelecomCLM sites did not enable the company to provide region-wide service to broadcasters, nor did it increase the capillarity of its network to provide new types of services.
- (55) The network operators involved in the digitisation process of the three types of transmission centres in Area II did not obtain an economic advantage. In all three centres, services such as the provision, installation and operation and maintenance of DTT equipment were provided at market price by the operators.

### *3.2.2. No distortion of competition and trade*

- (56) There has been no distortion of competition and trade. Any telecom operator listed in the CMT's Register of Operators can act as a subcontractor of the municipal authorities and, therefore, be eligible for the subsidies under Decree 347/2008. This also applies to satellite, cable, and TV operators and to all operators irrespective of whether they are operating at national, regional or local level.
- (57) According to the national authorities, the selection process under consideration was transparent and was carried out in accordance with both Spanish and EU public procurement legislation. The subsidies were published by the regional authorities. All the DTT extension procedures were published on municipal authority notice boards

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<sup>35</sup> This, however, is in contradiction with the documents provided by Spain. For instance, Article 7 of the DTT Equipment Transfer Agreement between TelecomCLM and the JCCM refers to the DTT services provided by the operator in Area II. Moreover, as set out in paragraph (73), the JCCM itself has argued that Abertis and TelecomCLM should be regarded as network operators in Area II. This also contradicts the operators' activities as described in detail in paragraphs (113) to (120).

and letters were sent to the major network operators in the region, i.e. TelecomCLM and Abertis Telecom.

- (58) Hence the subsidies granted to the municipal authorities did not reinforce the competitive position of one type of network operator compared with other competing operators. The main beneficiaries are the municipal authorities, while network operators are simply suppliers of transmission equipment and maintenance services for a maximum period of two years. Radiodifusión was never contacted because there was no evidence at that time that it owned a single transmission centre in the region.
- (59) Moreover, the Castile-La Mancha authorities claim to have carefully assessed the satellite platform solution as an option to extend digital coverage before issuing Decree No 347/2008. In an internal study<sup>36</sup> two technologies for the extension – DTT and satellite - were compared. The study took into account the criteria for granting subsidies for coverage of the digital signal in Area II. This includes the requirement that the switch-over has to be carried out without additional costs or inconvenience for citizens, using existing infrastructure.
- (60) The study concludes that, over a period of 10 years, the total costs associated with the terrestrial DTT solution would range from approximately EUR 15.2 million to EUR 17.3 million, whereas choosing satellite technology would cost more than EUR 47 million.
- (61) The study contains several recommendations on the most suitable methods of extending coverage of the DTT signal to those population centres of Castile-La Mancha not included in the official coverage plans of regional and national broadcasters. It also assessed all the implications of a satellite solution for the extension of digital coverage. It concluded that satellite technology would generate investments three to six times greater than in terrestrial technology. This difference in costs stems directly from the costs associated with renting the satellite transmission equipment, independently of the cost of the satellite decoder. As a result, it would be reasonable to conclude that the extension of the universal DTT service to the population of Castile-La Mancha should be carried out using terrestrial DTT technology<sup>37</sup>.
- (62) In addition, the Spanish Government provided an in-house study into the feasibility of providing the universal DTT service using DTT or satellite, carried out by the MIEyT in July 2007. The authorities consider that the study takes into account the realistic costs of using either DTT or satellite transmission. These two studies are discussed in more detail in section 5.3.2.2.
- (63) When taking its decision to extend DTT coverage in Area II of Castile-La Mancha, the JCCM claims to have taken into consideration only technical and economic efficiency

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<sup>36</sup> Dr Julian Seseña, 'Extensión de la cobertura de la señal TDT en Castilla - La Mancha: Estudio comparativo socio-económico de opciones tecnológicas', September 2008, carried out for the Castile-La Mancha Regional Government (JCCM)

<sup>37</sup> Furthermore, the JCCM argues that a later ex post comparative cost breakdown confirms the conclusion that the terrestrial solution would be better than the satellite solution. This breakdown complements the studies previously submitted by JCCM to the Commission and shows that, even though the initial investment for the terrestrial solution was slightly higher than for the satellite solution, from the fourth year the terrestrial solution would have been more economically efficient than the platform offered by Astra. For that calculation the JCCM used cost assumptions presented by Astra in a Memorandum dated 10 November 2011.

criteria. Any network operator – terrestrial, satellite, cable, etc. – could have submitted a technical proposal since the only requirement was to be listed in the CMT Register of Operators<sup>38</sup>. For that reason, the decision was in line with the principle of technological neutrality. This would also be confirmed by the fact that in specific cases the JCCM retained the satellite platform previously developed by Abertis, based strictly on cost-analysis criteria<sup>39</sup>.

- (64) Concerning the alleged discrimination against local operators, the JCCM admits that, under Article 4 of the Decree, broadcasters are specifically excluded (regardless of whether they operate at national, regional or local level) as beneficiaries of the subsidies<sup>40</sup>. However, the Decree does not exclude any network operators.
- (65) Nevertheless, according to the Spanish authorities, Radiodifusión could have participated on equal terms with all other network operators by digitising one of its transmission centres already carrying the public national or regional analogue television signal. For that purpose it could have entered into a cooperation agreement with the JCCM or it could have submitted offers to a municipal authority as a telecommunications operator registered in the CMT Register of Operators.

### 3.2.3. *Legal status of the complainant Radiodifusión and its non-compliance with network operators' obligations in Castile-La Mancha*

- (66) According to the JCCM, Radiodifusión is registered as a telecommunications operator in the CMT Register of Operators to provide the following services: 'Terrestrial network – Support for radio and television broadcasting services'. However, it emphasises that being listed in that Register does not suffice in terms of fulfilling its obligations as a telecommunications operator in Castile-La Mancha as set out in the relevant local Law No 8/2001. This holds in particular for the obligation for radio-communications operators to 'submit a territorial plan for network deployment that includes existing fixed stations as well as estimates of implementation and development of their entire networks ...'. So far, the JCCM is not aware of any territorial plan submitted by Radiodifusión. Furthermore, Radiodifusión is not known to share any infrastructure with another operator. As a result, the JCCM argues that Radiodifusión's claim of 60% coverage in Castile-La Mancha is groundless<sup>41</sup>.
- (67) In addition, the JCCM points out that there is a company in the group with the same shareholders as Radiodifusión, INGEST, Infraestructuras y Gestión 2002, S.L. (hereinafter 'INGEST'), with a number of proceedings pending. In all those proceedings, INGEST is charged with illegal occupation of radio spectrum reserved

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<sup>38</sup> Currently around 900 operators are listed in the Register.

<sup>39</sup> The JCCM decided to install satellite services in sparsely populated centres in Area II where there was no transmission centre or the cost of digitising the existing terrestrial infrastructure was too high. One hundred cooperation agreements were concluded with municipal authorities and led to the installation of satellite receivers in every household, which was less costly than building a new transmission centre.

<sup>40</sup> The rationale behind this exclusion was to avoid the digitisation of a centre that was already covered by the broadcasters' official DTT coverage obligation in Area I.

<sup>41</sup> 60% population coverage in the region could only be achieved (based on certain transmission parameters) with 8-12 transmission centres located in the outskirts of the main cities of the region. Radiodifusión does not have such centres. All these transmission centres apparently have, for the last 10 years, formed part of the official coverage plan for broadcasters. However, no national, regional or local public administration would consider the digitisation of such centres as they would have been already included in the official coverage plan for extending DTT in the region.

for the national DTT, which the defendant is using to broadcast the signal of local television stations. Moreover, Radiodifusión does not have authorisation to re-transmit the Radio-Televisión de Castile-La Mancha ('RTV C-LM') DTT signal.

#### 3.2.4. *Operation and maintenance*

- (68) According to the JCCM, neither TelecomCLM nor Abertis Telecom are beneficiaries of the contested measures to cover the recurrent costs associated with the operation and maintenance of the municipal terrestrial sites. The purpose of the cooperation agreements is 'to finance the infrastructure necessary to complement signal coverage extension and transmission from entities and companies licensed to provide essential television services'. Hence only the acquisition and installation of items such as radio-communications and aerial equipment or construction items are subject to financing. In Area II, the costs were borne by the municipal authorities which own these centres. The estimated cost of operation and maintenance for the initial two years for 516 centres is EUR 6.5million. As a result, from 2010 to 2015 these costs would amount to approximately EUR 15 million for 516 centres over five years (an average of EUR 29 000 per centre).

#### 3.2.5. *Exemption under the 'general infrastructure' argument*

- (69) According to the JCCM, the digitised transmission centres belonging to municipal authorities and to network operators can be considered 'general infrastructure', i.e. infrastructure open to all potential users on an equal and non –discriminatory basis. Hence the digitised infrastructure allows all users in Area II of Castile-La Mancha to receive DTT on an equal basis after the analogue switch -off.

#### 3.2.6. *Exemption under the MEIP principle*

- (70) The JCCM argues that the transfer of the public funds in question complies with the market economy investor principle (MEIP) on the basis of a market price benchmark exercise. The payments to TelecomCLM for certain services were made at market rates.
- (71) Following a comparison between the actual funding and the amount a private investor would have had to pay under normal conditions to get the same type of services, the JCCM concludes that the cooperation agreements were based on objective commercial criteria. As a result, the network operators were not better off compared with what they would have obtained under normal market conditions. They therefore did not obtain a selective advantage.

#### 3.2.7. *Exemption under Article 107(3)(a) of the Treaty*

- (72) The JCCM invokes Article 107(3)(a) of the Treaty. It argues that this provision may be applied in Area II, which did not attract the commercial interest of broadcasters and network operators. By providing DTT services and subcontracting the acquisition, installation and operation and maintenance of DTT equipment, the municipal authorities filled a gap in the market, with the consequent improvement of the living

conditions of the inhabitants of Area II and the overall economic improvement of this region of Castile-La Mancha.

### 3.2.8. *Abertis as network operator*

- (73) The JCCM disagrees with Abertis' submission that it should not be regarded as a network operator in Area II. The JCCM points out that Abertis entered into cooperation agreements with the JCCM under Decree No 347/2008 to extend DTT coverage in Area II<sup>42</sup>. Furthermore, Abertis and TelecomCLM should be regarded as network operators active in Area II because there are official analogue TV transmission centres for RTVE and/or Tele5 in the case of Abertis, and official analogue TV transmission centres for CMT in the case of TelecomCLM.
- (74) In several cases the digitised municipal equipment is located at sites owned by Abertis or TelecomCLM. In these cases, the DTT equipment belongs to the relevant municipal authorities. Abertis argues that, given the fact it is not a network operator in Area II, it cannot be deemed to be a direct beneficiary of the contested subsidies because 'the equipment is owned and operated by TelecomCLM and the other local operators'<sup>43</sup>. This JCCM considers that this statement is incorrect.

## 4. COMMENTS FROM INTERESTED PARTIES

### 4.1. Comments from Radiodifusión Digital S.L.

- (75) In its response to the Commission's opening decision, Radiodifusión observes that the Spanish authorities have not formally entrusted the beneficiaries of the aid with a task of general economic interest. Furthermore, the amount of the aid per centre appears excessive if applied only to existing centres, as stated by the Spanish authorities. In Radiodifusión's view, the aid was mainly used to set up new transmission centres throughout the region of Castile-La Mancha and to conceal unlawful aid.
- (76) Radiodifusión insists that the Castile-La Mancha authorities granted the aid without a tendering procedure and that the transfer of resources was selective because it excluded platforms based on other technologies, such as cable or satellite.
- (77) According to Radiodifusión, TelecomCLM gained decisive advantages from the contested measures. It was selected directly by the regional authorities without a competitive selection procedure. As a result, it was able to significantly increase the geographical coverage of its network into areas where nobody would have invested otherwise. TelecomCLM had further benefited from a lack of regulatory oversight because it is not under any regulatory obligation to provide access to the newly built/enhanced network. Radiodifusión points out that Decree No 347/2008 specifies that the purpose of the state aid is to create new transmission centres and not to digitise existing ones.
- (78) In Radiodifusión's opinion, the aid strengthens traditional operators in the only market segment where there is some room for competition. In particular, Abertis has allegedly

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<sup>42</sup> The JCCM provided two examples of cooperation agreements signed by Abertis.

<sup>43</sup> Paragraph 22 of Abertis Telecom's submission of 31 January 2011.

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 on new markets.

- (79) Radiodifusión is convinced that the state aid under investigation is not proportionate. In order to comply with the proportionality requirement, the aid should apply only to remote rural areas and benefit all operators equally by imposing effective access obligations.
- (80) In its reply of 27 September 2011 to a request for information from the Commission addressing the issues of legal status raised by Spain, Radiodifusión stated that its main activity is to provide services to local audiovisual broadcasters. It provided a list of its installations which it operates in 18 municipalities in Castile-La Mancha. According to Radiodifusión, however, the same installations could be used to broadcast national and regional programmes and therefore could have been used if it had been allowed to compete for the aid

#### **4.2. Comments from Astra**

- (81) Astra considers that the measure, by selecting the terrestrial platform directly, including the ongoing aid for operation and maintenance, violates the principle of technological neutrality. Astra emphasises that satellite transmission would have been cheaper than DTT in Area II<sup>44</sup>. This had been demonstrated clearly by Astra's success in the Cantabria tender. Given its significant economies of scale, the satellite solution would have allowed even more cost savings if several regions had co-ordinated their selection of a platform in Area II. Even though, for constitutional reasons, the Spanish Government could not have obliged the regions to take account of cross-regional synergies as a condition for the granting of the funds, the regions could have done so themselves. Only by doing so could the regional governments have ensured that they were choosing the most cost-efficient solution for their taxpayers.
- (82) When comparing the different platforms, Astra considers that, apart from the direct installation cost, account should also be taken of the other positive effects which the satellite solution would have had. The transition process would have been much easier and less costly. TV audiences would have benefited from a 'simulcast' transition period during which they would have received both satellite and terrestrial channels. Given the scarcity of bandwidth in the terrestrial network and the need to free more capacity for telecom services in the future, households and broadcasters would be faced with further costs in the case of the terrestrial network. Future changes of bandwidth would require residents in Area II to adapt their aerials. Broadcasters would face more expenses from further simulcast periods. These costs would not arise if the satellite technology had been chosen.

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<sup>44</sup> Astra refers to its internal cost study submitted together with the complaint, which had been drawn up in November 2008. The study compares the cost of extending coverage using both technologies – terrestrial and satellite. The assumptions of the study differ from the ones taken on board by Spain and Abertis in various respects, for instance in relation to the cost of satellite dishes and the need to purchase external decoders to receive digital terrestrial television. The study concludes that the extension of coverage via satellite would not necessarily be more expensive than using terrestrial technology.

- (83) Astra insists that the network operators did obtain an advantage as a result of the measure. In particular, the digitisation of the network favours Abertis' commercial supply to broadcasters since the DTT network will now reach almost 100% of the population at no additional cost.
- (84) Regarding distortion of competition, Astra believes that satellite and terrestrial platforms belong to the same markets. There is no strict distinction between pay-TV and free-to-air television, at least as far as platform competition is concerned. There are already several pay-TV channels offering their signals through the DTT platform, which, apart from one, are also available via satellite.
- (85) With regard to possible advantages for the satellite platforms, Astra in particular addresses the need to ensure conditionality of access/encryption. Protecting IPRs would not pose a problem to satellite broadcasters of free-to-air channels. Such technology is already used today for many pay-TV channels on the satellite platform. Moreover, the solution proposed in Cantabria for conditional access was accepted by the Cantabrian authorities, which could decide which users to activate in order to receive the service.

### **4.3. Comments from Abertis**

#### *4.3.1. Existence of state aid*

- (86) Abertis believes that the contested measure to extend coverage in Area II does not constitute state aid under Article 107(1) of the Treaty.
- (87) First, the transfers under investigation were simply transfers from the central State intended to upgrade the transmission centres which either belong directly to the public administration or over which the administration holds rights of use. There had thus been no transfer of state resources to any undertaking: the funds remained within the state administration.
- (88) Second, Abertis underlines that the network operators did not benefit from the contested measures. Abertis cannot be considered a beneficiary since it is not a network operator in Area II and it does not operate the network used to extend DTT in Castile-La Mancha. It is TelecomCLM which owns and operates, among others, the equipment in question.
- (89) Third, with regard to technological neutrality, Abertis emphasises that the contested measure does not make competition between platforms more difficult because the marginal increase in DTT coverage in Area II does not have any economic impact in Area I. Furthermore, the digitisation of Area II does not affect the price that Abertis is able to charge for its transmission services. In fact, its prices are regulated and based on its capital and operating expenditure. With respect to TelecomCLM, the installations have become the property of the Autonomous Community of Castile-La Mancha, which also controls the regional network operator TelecomCLM.
- (90) Fourth, the contested measure did not benefit broadcasters, as they did not increase their income after the digitisation of Area II. The hardware suppliers cannot be considered indirect beneficiaries of the measure either, as the competitive structure of the market for telecommunications equipment was not affected or distorted by the mere purchase of equipment to update analogue broadcasting centres to digital technology.

- (91) Fifth, Abertis considers that the contested measure did not have any appreciable effect on competition between the network operators. Even if Radiodifusión had benefited from the measure, it would not be able to compete with Abertis at national level because the centres operated by Radiodifusión do not correspond to the centres needed for Area I, as is the case for any centre in Area II.
- (92) Sixth, if the measure is considered to be aid, in Abertis' view it would be existing aid. The deployment of broadcasting networks in Area II began in 1982 in a non-liberalised broadcasting sector. At that time, the Spanish State enjoyed 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, it maintains, the measure under investigation constitutes ongoing, existing aid.
- (93) With regard to compatibility under Article 106(2), Abertis points out that TelecomCLM and other local network operators are unlikely to ever surpass the thresholds of average annual turnover before tax of EUR 100 million during the two financial years preceding that in which the SGEI was assigned, and annual compensation for the service in question of EUR 30 million.
- (94) Further, any potential aid would be compatible with Article 107(3)(c) of the Treaty. The measures adopted by the Spanish authorities are intended to speed up the digital switchover process in Spain, which has been recognised as an objective of common interest. The aid was an appropriate instrument as DTT is the most suitable technology to provide the coverage extension<sup>45</sup>. Apart from economic reasons, Abertis also notes that broadcasters are reluctant to use satellite platforms because of 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 permits 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.

#### **4.4. Comments from broadcasters**

- (95) The broadcasters submit that the measure cannot be considered 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.
- (96) 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 of other channels. The terrestrial platform has the advantage of limited

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<sup>45</sup> 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 of using DTT technology would be some EUR 286 million in a 10-year period, whereas the total costs of using the satellite technology in the same period would amount to approximately EUR 532 million.

capacity, which for commercial free-to-air broadcasters means less competition. Moreover, they underlined the fact that they usually purchase contents only for the specific platform, in this case terrestrial. This is because terrestrial broadcasting guarantees the geographical delimitation of broadcasts, which is not the case for satellite.

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

## **5. LEGAL ASSESSMENT**

### **5.1. Legal basis of the aid**

- (98) As described in detail in section 2.2., in paragraphs (25) to (43), and set out in detail in the Decision on Case SA.28599 – digital terrestrial television in Spain<sup>46</sup>, the legal framework for the digital switch-over in Spain is a complex web 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 lay the foundations for further extension measures in Area II. These extension measures were implemented by the regional authorities, after the conclusion of several framework agreements with the central government (the 2008 Framework Agreements) and addenda in 2008 to previous 2006 Framework Agreements and in 2009 to the 2008 Framework Agreements.
- (99) As a result of the conclusion of these agreements and addenda, the regional and/or local authorities carried out a wide array of measures aimed at extending the coverage of DTT in Area II. The Commission therefore considers that the various acts adopted at central level and the agreements concluded and amended between the MIEyT 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<sup>47</sup>.
- (100) 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 DTT in

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<sup>46</sup> SA.28599 - C(2013) 3204 final, 19.6.2013

<sup>47</sup> Such guidance can be found in the relevant documents of the central government. In particular, the framework agreements signed in December 2008, entitled Framework Cooperation 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, provide for a list of activities that will be financed by the central and regional authorities in order to achieve 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 DTT technology requires the existence of transmission centres, it seems clear that the planned actions concern only 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 ‘action to extend the coverage’, making explicit reference only to terrestrial technology.

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<sup>48</sup>.

- (101) The moment when the state aid for the deployment of 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. The ongoing aid for operation and maintenance of the networks was decided at the level of the Autonomous Communities.
- (102) In the case of Castile-La Mancha, as described in detail in paragraphs (36) to (45), a different process was chosen. In contrast to the majority of other Autonomous Communities, regional tenders for the extension of coverage of digital television were not used. Instead, Decree 347/2008 of 2 December 2008 ordered the direct allocation of the funds necessary for the digitisation to the owners of the existing (analogue) transmission centres. The JCCM therefore did not use an open tender procedure but instead selected the telecom operators directly. These companies also carried out operation and maintenance tasks.
- (103) Where the transmission centres belong directly to TelecomCLM or to Abertis, these companies received the aid to upgrade their equipment. Where new transmission centres had to be built, they were publicly funded, but TelecomCLM obtained ownership. Finally, in most cases the analogue transmission centres are owned by the municipal authorities. The latter bought the digital equipment from TelecomCLM or Abertis and subcontracted the installation, operation and maintenance of the equipment to these two companies.

## **5.2. State aid assessment pursuant to Article 107(1) of the Treaty**

### *5.2.1. Existence of aid within the meaning of Article 107(1) of the Treaty*

- (104) The measure in question, including the ongoing aid for operation and maintenance, can be considered state aid within the meaning of Article 107(1) of the Treaty, which lays down the following conditions for the presence of state aid. First, there must be an intervention by the State or through state resources. Second, it must confer a selective economic advantage on the recipient. Third, it must distort or threaten to distort competition. Fourth, the intervention must be liable to affect trade between Member States.

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<sup>48</sup> In meetings with the Autonomous Communities, MIEyT expressed its objective of ensuring the transition to DTT in Area II. This is confirmed by a presentation, publicly available on Internet, and signed by MIEyT: <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 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 ...'.

### 5.2.1.1. *State resources and imputability to the State*

- (105) The measure in question originates from the system of legal acts described above, at central, regional and local level, as well as from agreements concluded between MIEyT and the authorities of Castile-La Mancha. Castile La Mancha did not contest the finding of the opening decision that the measure was financed from budgetary resources. However, the Spanish authorities insisted that it was financed both from the central budget 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, Castile-La Mancha recognised that the funds came partly from the central budget. 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.).
- (106) In these circumstances it has been established that the measure under investigation was funded directly from the state budget and from the budgets of the various municipal authorities and Autonomous Communities. The ongoing aid was not funded from the central state budget, but from the budget of the Autonomous Community.
- (107) As the measure is financed by the State, at central and regional or local level, it is imputable to the State and involves the use of state resources.

### 5.2.1.2. *Economic advantage to entities carrying out an economic activity*

- (108) Abertis, which is listed on the Spanish Stock Exchange, is an international company active in the management of toll roads and terrestrial and satellite telecommunication infrastructures. It is present in 12 countries in Europe and the Americas, with around two thirds of the Group's revenue being generated outside Spain. Abertis Telecom owns and operates telecommunications infrastructure in Spain, with a major holding in the satellite operator Hispasat (57.05%). It also owns the leading network of sites for the distribution and transmission of radio and TV signals in Spain. TelecomCLM S.A. is a regional telecommunications operator providing services in Castile-La Mancha. Its services include transport, contribution and dissemination of radio and television signals; housing equipment and radiating systems, infrastructure sharing, and integral infrastructure maintenance. The company provides services to local, regional and national operators. [...].
- (109) 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 financing, carrying out an economic activity. In Commission practice, as confirmed by the Court of Justice, the operation of television transmission networks is considered to be an economic activity<sup>49</sup>, similar to other cases involving management of infrastructure by the regional authorities<sup>50</sup>. In the case at hand, the public undertakings are registered in the CMT Register as network operators. This suggests that they provide certain services, which according to settled case practice constitutes an economic activity. A market

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<sup>49</sup> 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).

<sup>50</sup> Case T-196/04 *Ryanair Ltd v European Commission* [2007] ECR II-2379, paragraph 88.

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 Autonomous Communities, before implementing the extension of the coverage in Area II, to present its offer to them. In addition, in March 2008 Astra participated in and won a technologically neutral tender for providing digital TV in Areas II and Area III published in Cantabria. The fact that the public undertakings and municipal authorities do not receive remuneration for the services provided does not preclude the activities in question from being considered to be an economic activity<sup>51</sup>.

- (110) The Commission does not agree with Spain's argument that the operation of the terrestrial network by the Autonomous Communities, public undertakings and municipal authorities falls within the exercise of official powers as a public authority and is therefore outside the scope of Article 107 of the Treaty. 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 economic activities for the purposes of the competition rules<sup>52</sup>. Activities such as those that form part of the essential functions of the State or are connected with those functions because of their nature, their purpose and the rules to which they are subject may be regarded as falling within this exception. The Court's 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<sup>53</sup>, 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<sup>54</sup>, and standardisation activities as well as related research and development activities<sup>55</sup>.
- (111) 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 be performed only 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 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. Astra's complaint also covers the region of Castile-La Mancha, where it is interested in providing digital broadcasting services as a platform operator. Third, the deployment of the network in Area II only concerns the transmission of national and

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<sup>51</sup> 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-1311, 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.'

<sup>52</sup> Communication from the Commission on the application of the European Union State aid rules to compensation granted for the provision of services of general economic interest, OJ C 8, 11.1.2012.

<sup>53</sup> Cases C-364/92 *SAT/Eurocontrol* [1994] ECR I-43, paragraphs 19 to 30, and C-113/07 P *Selex* [2009] ECR I-2207.

<sup>54</sup> Case C-343/95 *Calì & Figli* [1997] ECR I-1547, paragraph 22.

<sup>55</sup> Case T-155/04 *Selex* [2006] ECR II-4797, paragraphs 73-82, confirmed by C-113/07 *Selex* [2009] ECR I-2307.

regional private channels<sup>56</sup>. As a result, it is concluded that the operation of the terrestrial network by the Autonomous Communities, public undertakings and municipal authorities does not fall within the exercise of official powers as a public authority.

- (112) The Commission disagrees with the JCCM that the measure is in line with the market economy investor principle (MEIP). This test considers whether a market investor would have invested in the project on the same terms and conditions as the public investor at the time when the decision to make the public investment was taken. In the present case, the public investment is the JCCM's funding of the digitisation of the terrestrial broadcasting networks of Telecom CLM and Abertis. Where the equipment remains the property of the public authorities (municipal authorities), it is operated by the former companies. The agreement with the operators does not provide for reimbursement of the funds or remuneration of the equipment owned by the public authorities. This contradicts directly the concept of a private investor who would not only require such reimbursement/remuneration but also a return on the investment itself. The public funding of the DTT network was not meant to be a profitable investment in itself. As a result, the JCCM's investment in the digitisation of the terrestrial network in Area II does not comply with the MEIP.
- (113) An economic advantage therefore exists where the operator receives public funds to digitise its own equipment or build new transmission centres. Second, where a public authority directly selects (i.e. without public tender) an operator for the provision of DTT equipment and operation and maintenance services, this does not respect market conditions. It also grants an economic advantage to the operator. Third, an economic advantage is generated for a satellite operator where the public authority finances the installation of satellite receivers for the provision of this particular operator's services.

*Direct beneficiaries of the aid*

- (114) As set out in paragraphs (36) and (37), the JCCM did not organise any regional tenders for the upgrading of analogue networks or for the extension of coverage of digital television. Instead, these funds were allocated directly to the municipal authorities or to existing terrestrial operators. The municipal authorities then chose operators to carry out the task without a public tender. As a result, other platform operators, whether terrestrial or other, were not properly informed of the measure and therefore could not submit a technical proposal for the upgrading of infrastructure to extend coverage of digital television in Area II in the region<sup>57</sup>.

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<sup>56</sup> 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.

<sup>57</sup> Since a local operator such as Radiodifusión was broadcasting the signal of national broadcasters, it could have applied for the regional subsidies. However no tender was organised to invite potentially interested operators to submit their offers. On the contrary, it was for the regional authorities to take the initiative, locate the transmission centres that were broadcasting the signal of national broadcasters and offer them support for digitisation. In this respect Radiodifusión pointed out that, even when it was

- (115) Abertis and TelecomCLM either received the funds for the upgrading and extension of their own network or were contracted by municipal authorities to carry out such work on that infrastructure<sup>58</sup>. In both cases, the two operators were selected without a public tender. In most cases, the municipal authorities own the DTT equipment which is attached to the operators' masts. The latter do not remunerate the municipal authorities for the use of such equipment. As set out in paragraph (39), about 16% of households in Area II are actually served by the satellite operator Hispasat. Hispasat was also directly selected without an open tender. As a result, Hispasat is a direct beneficiary of the aid granted for the installation of satellite receivers.
- (116) TelecomCLM entered directly into 133 cooperation agreements with the JCCM concerning the digitisation of its own transmission centres. This was considered necessary to carry out the DTT extension in rural areas where the population density is low and no operator showed an interest in investing. An overview of the costs incurred by TelecomCLM upon receipt of funds transferred by the JCCM shows that the former used these funds exclusively for the acquisition and installation of DTT equipment and for the subsequent maintenance of equipment for the first two-year period.
- (117) Thus, TelecomCLM and Abertis upgraded part of their existing transmission centres and 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, for example WiMax (wireless broadband standards which can provide fixed or mobile broadband). TelecomCLM used its [...] centres and several digitised centres owned by municipal authorities for the installation of the JCCM's Wimax equipment [...]<sup>59</sup>. Because of these economies of scale, the DTT network operators can obtain income from publicly financed infrastructure. [...]
- (118) The quantifiable advantage to the direct beneficiaries, TelecomCLM and Abertis, is the total amount of the funds received for the extension of coverage (including the funds received for upgrading or building new transmission centres) and, in the case of Hispasat, the total amount received for the installation of satellite receivers.
- (119) Where municipal authorities themselves acted as network operators, they received public funds to digitise the transmission centres located in their areas and to build new ones. The authorities argue that these were merely transfers of funds between different levels of the administration and that, by extending networks owned by the municipal authorities, the latter were simply complying with their administrative obligations to citizens. However, where municipal authorities act as network operators, they are carrying out an economic activity. Many of them are registered on the CMT's Register of Network Operators. Nevertheless, as the municipal authorities bought the digital equipment from Abertis or TelecomCLM and subcontracted the installation, operation and maintenance of the equipment to these two companies without a public tender, in this case, too, the latter are the direct beneficiaries of the aid.

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retransmitting the television signal, it was never approached by the public administration to discuss the possible financing of the digitisation of its network.

<sup>58</sup> Due to the DTT Equipment Transfer Agreements, in some cases the equipment acquired by Telecom CLM (with funds from the JCCM) was returned to the JCCM after two years of operation.

<sup>59</sup> [...].

- (120) The funding also includes the operation and maintenance of the network. These tasks are performed by TelecomCLM and Abertis. This is considered to be ongoing aid and the operators entrusted with the operation and maintenance of the network are the beneficiaries. Finally, in more general terms, Abertis and TelecomCLM also benefit from the exclusion of other platform operators from the market for transmitting free-to-air TV signals in Spain<sup>60</sup>.

*Indirect beneficiaries of the aid*

- (121) *Hardware suppliers.* Telecom CLM and Abertis provide telecommunications equipment and hardware in house. Since the municipal authorities purchased equipment without a public tender from the two existing terrestrial operators in Castile-La Mancha, TelecomCLM and Abertis directly benefited from the aid (see paragraph (119) above). Where the two operators bought such equipment from hardware suppliers, it was purchased on a free market. Therefore, as a result, apart from TelecomCLM and Abertis (direct beneficiaries), hardware suppliers are not considered to be beneficiaries as they did not receive a selective advantage. As in the case of digital decoders in Italy<sup>61</sup>, 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 supplying such hardware to the network operators are not different from the group of undertakings which would have participated in tenders if the scheme had been technologically neutral with regard to platform operators<sup>62</sup>. In Spain the companies which integrate, install and supply the hardware necessary for DTT extension usually offer other services too. Such equipment manufacturers, as well as telecommunications operators, may also offer terrestrial, satellite or a combination of the two<sup>63</sup>.
- (122) 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

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<sup>60</sup> As set out in paragraph (24), Abertis dominates the market for the transmission of free-to-air 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 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. See, for instance, 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.

<sup>61</sup> C52/05 - Digital decoders, Italy, OJ C 118, 19.5.2006, p. 10, and OJ L 147, 8.6.2007, p. 1.

<sup>62</sup> 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, aerials, dishes (See <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.

<sup>63</sup> The tenders in Area II for the extension of coverage often ask for turnkey solutions which require integrating, installing and supplying several equipment components (dish, aerial, 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.

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.

- (123) *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 not generate any additional revenue for them. In fact, in the light of the limited population concerned, 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*

- (124) The advantage provided by the measure to the network operators and broadcasters is selective as it concerns only the undertakings active in the terrestrial platform market. Moreover, the network operators charged with the task of extension were not selected by a tender, but by a specific procedure laid down in Decree 347/2008, whereby the authorities selected the network operators. Therefore, irrespective of whether the legislative framework at central level excluded technologies other than terrestrial from the scope of the aid, its application by the Castile-La Mancha region concerned only particular network operators.

#### 5.2.1.4. *Distortion of competition*

##### *Network operators*

- (125) By directly granting the funding to the terrestrial network operators Telecom CLM and Abertis, the Spanish authorities discriminated against all other terrestrial network operators which could have provided such services. A public tender procedure could have established whether other existing operators, such as Radiodifusión, met the requirements to provide broadcasting services to regional and national broadcasters in Area II of Castile-La Mancha. As they were not informed of the measure and were not invited to submit a proposal, these operators could not argue their case with the JCCM. As a result, the direct selection of the beneficiaries led to the exclusion of all other potential terrestrial competitors.
- (126) Where municipal authorities upgraded their own network, in some cases they directly contacted TelecomCLM or Abertis. In these cases other telecom operators were excluded from making a proposal. As set out in paragraphs (39) and (40), other municipal authorities published a short notice on their notice boards. These notices stated that a telecom operator would be selected to digitise the municipality's transmission centre, in line with Decree 347/2008. Operators had to submit a technical report. Interested operators could obtain the technical specifications at the municipal authority offices. However, publication on a notice board does not comply with technological neutrality as the notices concerned only the upgrading of existing terrestrial transmission centres. Moreover, while the notices allow any telecom

operator registered with the national regulator CMT to submit a proposal, this cannot be regarded as equivalent to a public tender. Publication on a notice board does not have the same visibility as a public tender published in an official journal. Moreover, in most cases, unlike other companies, TelecomCLM and Abertis were expressly informed in advance about the process and could therefore submit their proposal<sup>64</sup>. In short, in all the municipalities where such notices were published, either TelecomCLM or Abertis was selected.

- (127) Spain and Abertis claim that DTT and satellite are two different markets. DTT is the main platform for free-to-air terrestrial television, whereas the number of players 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. A large number of satellite television 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 stress in addition 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 ones, are not interested in switching to this platform.
- (128) For several reasons set out in the Decision, it is concluded that terrestrial and satellite platforms operate in the same market.
- (129) First, in 2008 Astra competed for the extension of digital television coverage in Cantabria and won the tender. In 2008 Astra held a series of meetings with the Autonomous Communities and presented its offer to broadcast digital television channels which until then had been broadcast via the terrestrial platform. Even though the contract with Cantabria was later terminated by the authorities, the fact that the satellite operator was interested in providing services in competition with the terrestrial platform suggests that there is a possibility for satellite operators to provide similar services.
- (130) Second, the satellite operator Hispasat (Abertis' subsidiary) provides services in some parts of Area II<sup>65</sup> and the satellite platform is exclusively used in Area III. Other Member States also use satellite services to provide the more remote areas of their country with free-to-air channels<sup>66</sup>.
- (131) Third, several public and private channels distributed via the terrestrial platform are also broadcast via satellite platforms, including Astra itself<sup>67</sup>. Fourth, some of the regional channels are available or were available in the recent past via the satellite platform, which contradicts the statement that the regional broadcasters are not interested in satellite.
- (132) Fifth, some broadcasters declared a preference for terrestrial transmission because they had acquired rights to broadcast content only for the terrestrial platform. This,

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<sup>64</sup> The Castile-La Mancha authorities could not provide an example of a bid submitted by another telecom operator. Some bids had been provided by 'telecom installers', but they were excluded on the basis that they were not registered as telecom operators.

<sup>65</sup> Hispasat provides these services in support of the DTT network in Area II.

<sup>66</sup> France, for example.

<sup>67</sup> For example, Antena 3, la Cuatro, Telecinco, La Sexta, La Siete, Teleduarte, TVE, La2, Canal 24 horas.

however, does not imply 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. Further, if a satellite platform is selected on the basis of a public tender, a ‘must carry obligation’ could be imposed on broadcasters. The ‘must carry obligation’ was imposed on broadcasters for Area III when the satellite platform was selected.

- (133) Finally, according to data from May 2010<sup>68</sup>, DTT coverage in Spain amounts to 98.85% of the population while only 93.5% of 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 are subscribed to pay-TV via satellite.
- (134) In conclusion, because of competition between satellite and terrestrial broadcasting platforms, the measure for the deployment, operation and maintenance of DTT in Area II entails a distortion of competition between the two platforms.
- (135) Finally, it should be noted that other platforms, especially IPTV, are also at a disadvantage because of the measure. Although broadband has not yet reached the whole of Area II, it is very likely that in the future it will extend its coverage significantly. It is possible that a mix of technologies would have been more efficient to achieve coverage of Area II. In this case the other platforms could have contributed to the objective and they could have benefited from the aid measure.

#### 5.2.1.5. *Effect on trade*

- (136) 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 compared with other undertakings competing in intra-Community trade, the latter must be regarded as affected by that aid’<sup>69</sup>.
- (137) 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 one of the complainants, Astra. Astra, based in another Member State (Luxembourg), would have bid for the provision of a digital network in the region of Castile-La Mancha if a technologically neutral tender had been organised. The measure therefore affects trade between Member States.

#### 5.2.2. *Conclusions on the existence of aid*

- (138) In view of the arguments put forward above, the Commission considers that the measure fulfils the criteria laid down in Article 107(1) of the Treaty. Under these circumstances, the measure must be considered state aid within the meaning of Article 107(1) of the Treaty.

### 5.3. **Compatibility assessment**

- (139) The Commission actively supports the transition from analogue to digital broadcasting. The advantages of the digital switchover were underlined in the Action

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<sup>68</sup> Analysis of the television market submitted by Spain in the notification of the measure: Compensation for damages for the liberation of the digital dividend in Spain, SA.32619 (2011/N).

<sup>69</sup> Case T-55/99 *Confederación Española de Transporte de Mercancías (CETM) v Commission of the European Communities* [2000] ECR II-3207.

Plan eEurope 2005 and in the two Communications relating to the digital switchover<sup>70</sup>. The Commission also recognises that the digital switchover could be delayed if left entirely to market forces.

- (140) Member States may use aid to overcome a specific market failure or to ensure social or regional cohesion<sup>71</sup>. In these cases, however, it must be shown each time 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<sup>72</sup> provides that, in the specific area of digitisation, public intervention would be justified under two conditions: first, where general interests are at stake and second, in the event of 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.
- (141) 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.
- (142) If left to the market, there is a risk that not all parts of the population can benefit from the advantages of digital television, given their disadvantaged social situation. With respect to this social cohesion problem, Member States may want to ensure that all citizens have access to digital television once analogue TV is switched off. Since the digital switch-over entails costs for consumers and 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.
- (143) The Commission applied the state aid rules in this sector in several state aid decisions, based on the Communications on the digital switch-over<sup>73</sup>. 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<sup>74</sup>. Such funding may, however, be granted only if it does not

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<sup>70</sup> 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’.

<sup>71</sup> See ‘Less and better targeted state aid: a roadmap for state aid reform 2005-2009’, COM(2005) 107 final.

<sup>72</sup> See footnote 70, COM(2003) 541 final.

<sup>73</sup> 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 North Rhine-Westphalia, OJ L 236, 3.9.2008, p. 10; SA.28685 Captación de Televisión Digital en Cantabria – Spain, OJ C 119, 24.4.2012.

<sup>74</sup> See paragraph 132 of the Commission Decision C25/04 Introduction of digital terrestrial television (DVB-T) in Berlin-Brandenburg – Germany (OJ L 200, 22.7.2006, p. 14).

entail an unnecessary distortion between technologies or companies and is limited to the minimum necessary.

### 5.3.1. *Legal bases for assessing the compatibility of the envisaged measure*

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

### 5.3.2. *Article 107(3)(c) of the Treaty*

- (145) In order for the aid to be compatible under Article 107(3)(c) of the Treaty, 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 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 proportionate, 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?

### 5.3.2.1. *Objective of common interest*

- (146) The national aid scheme, as implemented by the JCCM for Castile-La Mancha, is aimed at accelerating the digital switch-over process in Spain and ensuring continuity of TV reception for residents of certain remote and rural areas. In this respect, the measure is targeted to allow people living in those areas to watch television and to exercise their constitutional right to access information. As already mentioned in paragraph (139), the Commission has recognised the importance and the benefits of the digital transmission in the Action Plan *eEurope 2005*<sup>75</sup> as well as in its two Communications on the transition from analogue to digital broadcasting<sup>76</sup>. In its Communication *i2010 – A European Information Society for growth and employment*<sup>77</sup>, the Commission pointed out that the planned switch-off of analogue terrestrial television by 2012 would improve access to spectrum in Europe. As digital

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<sup>75</sup> COM(2002) 263 final, *eEurope 2005: An information society for all*.

<sup>76</sup> COM(2003) 541 final, Communication 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.

<sup>77</sup> COM(2005) 541 final, 1 June 2005.

broadcasting uses spectrum more efficiently, it frees up spectrum capacity for other users, such as new broadcasting and mobile telephony services, which will in turn stimulate innovation and growth in the TV and electronic communications industries.

- (147) The Commission is therefore of the opinion that the measure is targeted at a well-defined objective of common interest.

#### 5.3.2.2. *Well-designed aid*

##### *Market failure*

- (148) 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). 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.

- (149) As already stated in the opening decision, the Commission recognises that there is market failure in that the broadcasters are unwilling to bear the additional costs of extending 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 digital coverage is left entirely to market forces and that public intervention can be beneficial through financial support to individuals.

##### *Technological neutrality*

- (150) In digital switchover cases, the principle of technological neutrality is well enshrined in several Commission decisions<sup>78</sup>. It has been upheld by the General Court and the Court of Justice<sup>79</sup>.
- (151) The choice of technology should normally be established by a technologically neutral tender, as happened in other Member States<sup>80</sup>. Carrying out a tendering procedure may be costly or may delay the implementation of the project. In some cases such a procedure may not be justified if it can be established *ex ante* that only one particular technology or one particular provider can provide the requested services. Choosing a particular technology may therefore be acceptable if the choice is justified by the findings of a preliminary study. Such a study would have to look into pricing and

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<sup>78</sup> See footnote 58.

<sup>79</sup> Cases T-8/06 *FAB Fernsehen aus Berlin GmbH v Commission* [2009] ECR II-4293; C-544/09 P - *Germany v Commission*, judgment of 15 September 2011, not yet published; T-177/07, *Mediaset SpA v Commission* [2010] ECR II-2341, and C-403/10 P *Mediaset SpA v Commission*, judgment of 28 July 2011, not yet published.

<sup>80</sup> See footnote 7.

quality criteria. As the decision to pick a certain technology would prevent competition from other suppliers presenting their product and pricing proposals, the findings of the study would have to be unequivocal and robust.

- (152) The Commission has recognised in the past that a study could be the basis for selecting a particular technological solution<sup>81</sup>. However, the burden of proof lies with the Member State, which must demonstrate that the findings of the study are sufficiently robust and that the study was carried out in the most independent manner<sup>82</sup>.
- (153) In this regard, several studies have been proposed by the Spanish authorities and by Abertis which are discussed below.

#### *Cost studies*

- (154) The Castile-La Mancha authorities have argued that the measure under investigation was targeted at digital terrestrial broadcasting on the basis of the findings of an ex ante study carried out before the adoption of the Decree. The ‘Comparative Socio-Economic Study’<sup>83</sup>, as summarised in paragraphs (59) to (61), concluded that the terrestrial solution would be the most cost-efficient solution.
- (155) The starting point of the study is the quantification of the population for which a technological choice could be made. Most of Castile-La Mancha belongs to Area I, where the switch-over to DTT had already happened. In certain cases, Area I and Area II overlap. For technical reasons, the study argues that in these areas (which are already partly equipped with DTT) only the extension of DTT should be considered. When comparing the satellite and DTT options, the study therefore looks at only about 9.8% of the population. Second, the author of the study considers that, among this subgroup, part of the population receives in addition a regional television service via the terrestrial platform. Without further assessment it concludes that, for these services, ‘it would be more logical to make the population adopt different modes of reception’. Finally, an alternative technology would have to be considered for 2.85% of the population, or 57 510 inhabitants in 689 villages.
- (156) The study first produces an estimate of the total cost of the satellite platform – including the cost of installing decoders, assumptions based on market data concerning the rental cost of a satellite transponder, and the operation and maintenance costs over 10 years – and then compares it with the estimated total cost of the terrestrial platform. In the latter it includes the cost of installing decoders and terrestrial transmitters, and the operation and maintenance costs over 10 years. In the end, the total cost would be between EUR 47 672 550 and EUR 97 646 800 for the satellite solution, and between EUR 15 136 550 and EUR 17 224 350 for the terrestrial solution.

#### *Assessment*

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<sup>81</sup> For instance, 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.

<sup>82</sup> The UK chose DTT for the provision of local television on the basis of an ex ante study carried out by its regulator OFCOM and on the basis of 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 Television in the UK.

<sup>83</sup> See footnote 36.

- (157) At the time, the authorities had the choice either to organise a technologically neutral tender or, on the basis of such a cost study, to pre-select one particular technology. Thus, the authorities had to decide whether it would be worth inviting potential competitors to tender. If an open tendering procedure had been carried out, the agency could have chosen between different bids, including possible discounts offered by bidders. On the other hand, dispensing with such a tendering procedure may be justified if the study demonstrates that, taking into account all possible discounts which could be envisaged from potential bidders, the satellite technology was clearly more expensive or did not fulfil essential qualitative requirements. As the study is necessary merely to justify dispensing with the tender, it would be necessary to demonstrate a significant cost difference between the two platforms and the robustness of such a result.
- (158) The study falls far short of meeting these requirements. First, following a request for information sent by the Commission in 2011, the authorities had to make corrections to the data used in the study. The corrections resulted in an increase in the costs of transmission centres of about 65%, as well as in the number of transmission centres that were actually needed to guarantee the expected coverage. The JCCM argued that, even with these new figures, the outcome of the comparison between terrestrial and satellite transmission technologies would not change. In fact, however, when taking these new figures into account, the cost advantage of the DTT technology was reduced, or, in some scenarios, even turned into a cost advantage for the satellite solution. This already shows that the results of the study were not robust. These flaws should have been evident to the authorities at the time if they had exercised sufficient diligence.
- (159) As regards the cost calculation, the study takes the wrong approach when calculating the cost of satellite transmission. It assumes that the municipal authorities would rent satellite transponder capacity from the satellite platform and operate the satellite connection itself. The calculation is therefore based on published (2008) rental prices for satellite transponder capacity. As these prices are for individual connections, they do not take into account any quantity discounts or possible price negotiations. Furthermore, in the case of an open tender, as demonstrated in relation to Cantabria, the satellite operator would itself take part as a competitor. Its bid would be based on a completely different price calculation. If the contract covers all of Area II in Castile-La Mancha, it can be expected that such a bid would include significant price discounts for capacity compared with individual rental prices.
- (160) Moreover, the approach in the study wrongly leads to conclusions that go against the satellite option<sup>84</sup>:
- Calculations should be based on the net present value (NPV) of recurrent costs instead of using simply the total<sup>85</sup>;

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<sup>84</sup> There are several other flaws in the study. For instance, it does not provide sufficient justification as to why only 2.85% of the population of Castile-La Mancha are taken into consideration. This assumption has an impact on the cost-effectiveness of the two platforms.

<sup>85</sup> The NPV takes into account whether payments are made today or in the future (future revenue/expenditure is discounted). Simply by introducing a rather conservative discount rate of 4%, the gap between terrestrial and satellite costs shrinks.

- the study neglects the exponential growth in the need for (and related costs of) new DTT transmission centres due to the remoteness of the last villages to be covered and considers instead a linear expansion;
- the study calculates yearly operation and maintenance costs of 3% of the equipment costs, while the authorities themselves state that ‘costs for two years of operation and maintenance are estimated at 20% of the equipment cost’ (i.e. 10% per year).

(161) As a result, the cost calculation for DTT appears overly optimistic. This conclusion is backed up by a comparison of the study’s estimated cost for DTT roll-out with the money actually spent thereafter. The study estimates that the maximum cost of DTT deployment would be about EUR 15-17 million. However, the Castile-La Mancha authorities subsequently spent EUR 46 million for the DTT upgrade (plus expenditure for the installation of satellite receivers when in fact it turned out that DTT was not economically feasible).

#### *Conclusion*

(162) The estimates in the study are not robust. By using Castile-La Mancha’s own (although updated) figures, the initial cost advantage of the DTT network was reduced, or in some scenarios, even turned into an advantage for the satellite platform<sup>86</sup>. The study does not take into account the possibility of discounts offered by a satellite operator in a competitive tender procedure. On the basis of the above considerations, the study does not, therefore, provide sufficient evidence to justify the ex-ante choice of the DTT technology and the absence of an open tendering procedure.

#### *Other cost studies*

(163) The Spanish Government provided an in-house study into the feasibility of providing a universal DTT service using DTT or satellite, carried out by the Ministry of Industry, Tourism and Trade (MIEyT) in July 2007. However, that study was not made available to the Autonomous Communities, for instance Castile-La Mancha, and it was used only as an internal document. In any case, the Commission considers that the *ex-ante* study provided by the Spanish authorities, as referred to in paragraph 62, does not demonstrate the superiority of the terrestrial platform over satellite. On the contrary, the study considers that a mix of technologies is more realistic, comprising a combination of 70% satellite and 30% terrestrial transmission<sup>87</sup> for Area II. Moreover, the study concludes that the choice of a particular technological solution for the extension of coverage should be analysed on a region-by-region basis, taking into account the specific topographic and demographic features of every region. Instead of

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<sup>86</sup> If the updated figures are taken into account, according to the Commission’s own calculations, there is a shift in both cost scenarios, with an optimistic estimate of EUR 36 466 648 for the satellite mode and EUR 60 542 411 for the terrestrial mode, and a pessimistic estimate of EUR 56 760 211 for the satellite mode and EUR 65 155 166 for the terrestrial mode. These calculations are based on three elements which complemented the Castille-La Mancha study: (1) the consideration of the NPV approach to recurrent costs over a 10-year horizon, (2) the number of new transmission sites to guarantee the expected additional coverage and (3) the corrected level of operation and maintenance costs. The distinction between ‘optimistic’ and ‘pessimistic’ scenarios follows from the original Castille-La Mancha study.

<sup>87</sup> It distinguishes 15% terrestrial transmission including additional equipment to eliminate the echo and 15% terrestrial with echo (page 34 of the study).

suggesting an ex ante choice of a particular technology, this conclusion instead advocates the need to organise a technologically neutral tender to determine which platform is more suitable in the particular case of Castile-La Mancha.

- (164) Concerning the two cost studies submitted by Abertis, it should be noted that they were carried out in 2010, long after the measures under investigation were put into effect. Irrespective of whether they could be considered sufficiently independent and robust, the fact that they came after the contested measures means that they cannot be used to justify the Spanish Government's selection of DTT technology and to dismiss a technologically neutral tender. The Commission also received cost estimates provided by Astra which demonstrate that satellite technology is more cost-effective. They were not taken into account for the same reasons.
- (165) As concluded in paragraph (162) in relation to the Castile-La Mancha study, other studies do not lead to the conclusion either that the terrestrial digital platform is, in terms of quality or price, superior to other technological solutions. They therefore do not justify the fact that the JCCM refrained from organising an open tendering procedure.

*Appropriateness and proportionality of the measure*

- (166) For a number of reasons, the measure cannot be considered appropriate.
- (167) By granting the aid directly to the established DTT operators TelecomCLM and Abertis, the measure does not consider alternative solutions that could have been more cost-efficient or could have provided a better-quality solution. As discussed in the previous section, there is no justification for ruling out a satellite platform. The fact that some households in Area II receive free-to-air channels via satellite demonstrates that terrestrial technology is not always the most efficient and appropriate platform. It is also noted that satellite transmission has also been the choice used for digital TV in other Member States, even in areas where the terrestrial solution was also possible<sup>88</sup>. Moreover, the fact that Astra competed and won the technologically neutral tender for extension of digital television coverage in Cantabria suggests, at least, that the satellite platform can provide this service<sup>89</sup>.
- (168) Further, the various cost studies compare only DTT and satellite platforms. They do not consider alternative technological solutions such as cable networks and IPTV. While the latter cannot cover the entire territory, a technology mix which includes such platforms as well as DTT and satellite transmission could have been more efficient.
- (169) The measure is also not appropriate because it discriminates between DTT operators themselves. By directly selecting the established DTT operators TelecomCLM and Abertis, the measure does not investigate whether other DTT operators, such as Radiodifusión could have made a less expensive or qualitatively better offer.
- (170) Moreover, as satellite transmission is already used for 16% of households in Area II in Castile-La Mancha, the authorities have not provided any justification to explain why Hispasat, which is controlled by Abertis, was chosen for the provision of such services without an open tender.

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<sup>88</sup> For example, France, UK, Italy, Slovakia.

<sup>89</sup> As further underlined by the judgment of the national court. See footnote 5.

- (171) The appropriateness of pre-selecting the DTT operators is further called into question by capacity constraints on the DTT platform. 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 800 MHz band frequencies to telecommunication operators in order to comply with Decision No 243/2012/EU. As a result, it was necessary to transfer broadcasts to other channels located below 790 MHz by 1 January 2014 at the latest. As this creates additional costs, on 5 November 2011 Spain notified two measures for households and broadcasters with a budget of between EUR 600 million and EUR 800 million in Area I (no measure has yet been notified for Area II)<sup>90</sup>. These costs would not have arisen if other platforms (IPTV, cable or satellite) had been chosen. A further frequency shift to free more capacity for the future mobile LTE technology, generating similar costs, is expected in the coming years.
- (172) Moreover, it has been pointed out that 4G mobile frequencies interfere with DTT signals and households need to buy costly filters to protect their DTT signal from the LTE waves<sup>91</sup>. It cannot be excluded that similar interference is a more general problem undermining the future appropriateness of terrestrial broadcasting, especially in the context of wider roll-out of NGA networks.
- (173) Spain put forward two other arguments explaining why satellite transmission would be more expensive than DTT. First, in their agreements with content providers, broadcasters have territorial restrictions. To ensure such conditional access would be more expensive for satellite technology. Second, 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, the satellite technology would still be cheaper even if it had to enter into separate agreements with each of the Spanish regions. As for regional broadcasting, Astra maintains that the Spanish Government's figure of 1 380 channels is hugely inflated<sup>92</sup>. Again, according to its own calculations, the satellite option would be cheaper even if regional and local channels were included.
- (174) In conclusion, the Commission considers that the measure under investigation did not respect the principle of technological neutrality. As explained above, the measure is not proportionate and it is not an appropriate instrument for ensuring the coverage of free-to-air channels for the residents of Area II of Castile-La Mancha.

*Operation and maintenance of the networks*

- (175) Concerning the ongoing financing granted for operation and maintenance of the subsidised digital terrestrial and satellite 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.
- (176) Any future aid for operation and maintenance has to be notified and has to respect the principle of technological neutrality.

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<sup>90</sup> See Commission Decision opening the investigation in case SA.32619 Compensation of damages for the liberation of the digital dividend, OJ C 213, 19.7.2012.

<sup>91</sup> <http://stakeholders.ofcom.org.uk/consultations/second-coexistence-consultation/>.

<sup>92</sup> According to Astra's estimates, the total number of local channels currently broadcasting is less than 415.

### 5.3.2.3. *Avoiding unnecessary distortions*

- (177) 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 the Treaty*

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

### 5.3.3. *Article 106(2) of the Treaty*

- (179) The Article 106(2) exception applies to state compensation for the cost of providing a public service. The national (or regional) authorities must define the SGEI clearly and entrust it to a particular undertaking.
- (180) In the course of the formal procedure, the Spanish authorities did not put forward arguments or evidence as to why the measure should be declared compatible on the basis of Article 106(2) of the Treaty.
- (181) For Article 106(2) of the Treaty to apply, the national (or regional) authorities must define the SGEI clearly and entrust it to a particular undertaking. No act entrusting the SGEI for the deployment of the DTT has been laid down in Spanish law or handed down by the authorities. In the first place, under Spanish law, the operation of a terrestrial network is not a public service. The Law on Telecommunications of 1998<sup>93</sup> states that telecommunication services, including the operation of networks supporting radio and television, are services of general interest but do not have the status of public services<sup>94</sup>. The same definition can be found in the Law on Telecommunications currently in force<sup>95</sup>. The transmission services for broadcasting television, i.e. the transport of signals through the telecommunications networks, are regarded as telecommunication services and as such are services of general interest but not a public service.<sup>96</sup>
- (182) Furthermore, the provisions of the Law on Telecommunications are technologically neutral. Telecommunications is defined as the transmission of signals through any telecom network, without reference to the terrestrial network in particular<sup>97</sup>. Moreover,

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<sup>93</sup> Law 11/1998, of 24 April, General Telecommunications Act.

<sup>94</sup> These include services related to public defence, civil protection and operation of the telephone network.

<sup>95</sup> Law 32/2003, of 3 November, General Telecommunications Act.

<sup>96</sup> Article 2(1) of that Law states that: ‘Telecommunications services are services of general interest provided under the rules of free competition’.

<sup>97</sup> Annex II to Law 32/2003 contains precise, technologically neutral, definitions of ‘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: transmission systems and, where applicable, switching or routing equipment and other resources, including network elements which are not active, which permit the conveyance of signals by wire, radio, optical or other electromagnetic means, including satellite networks, fixed (circuit-switched and packet-switched, including internet) and mobile terrestrial networks, electricity cable systems, to the

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

- (183) Even if the public broadcasting service is considered to be a public service, 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.
- (184) It is concluded that, under Spanish law, the operation of terrestrial networks does not have the status of a public service. Furthermore, the Spanish authorities have not clearly defined the operation of a terrestrial platform as a public service and consequently they have not entrusted the provision of such a public service to a particular platform operator.
- (185) Moreover, the Spanish authorities have not put forward any evidence of an act entrusting a service to the two beneficiaries, Abertis and TelecomCLM.
- (186) The Article 106(2) exception applying to state compensation for the cost of providing a public service cannot, therefore, be relied on in this case.

#### 5.3.4. *Existing aid*

- (187) Abertis suggests that the deployment of the terrestrial broadcasting network in Area II was financed almost entirely by the Spanish Autonomous Communities 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 should therefore be considered existing aid.
- (188) 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 therefore served only the needs of the public broadcaster which, 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.
- (189) Since then the legislation and the technology have 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 measure under investigation cannot be regarded as an alteration of a purely formal or administrative nature. It is rather an alteration affecting the actual substance of the original scheme and is therefore to be considered a new aid

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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'.

scheme<sup>98</sup>. In any case, the switch from analogue to digital TV has become possible only due to recent technological advances and is therefore a new phenomenon. The Spanish authorities should therefore have notified this new aid.

#### **5.4. Conclusion**

- (190) It is considered that the financing granted by Spain, the Regional Government of Castile-La Mancha and the municipal authorities 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) of the Treaty. The aid is not compatible with the common market. Furthermore, the aid was not notified to the Commission as required by Article 108(3) of the Treaty and was unlawfully put into effect without Commission authorisation. It must therefore be recovered from the terrestrial network operators.
- (191) 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) of the Treaty and was unlawfully put into effect without Commission authorisation. It must therefore be recovered from the operators.
- (192) Any future state aid for maintenance and operation must be notified and must respect the principle of technological neutrality.

### **6. RECOVERY**

#### **6.1. Need to eliminate the aid**

- (193) According to the Treaty 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<sup>99</sup> 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 regarded by the Commission as being incompatible with the internal market is designed to re-establish the previously existing situation<sup>100</sup>. 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 which it had enjoyed over its competitors on the market, and the situation prior to payment of the aid is restored<sup>101</sup>.
- (194) In accordance with that case-law, Article 14 of Regulation (EC) No 659/1999<sup>102</sup> 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’.
- (195) Thus, given that the financing of upgrade and digitisation of the terrestrial platform and subsequent maintenance and operation granted in Spain since 2008-2009 is

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<sup>98</sup> Cases T-195/01 and T-207/01 *Gibraltar* [2002] ECR II-2309, paragraphs 109-111.

<sup>99</sup> Case C-70/72 *Commission v Germany* [1973] ECR 813, paragraph 13.

<sup>100</sup> Joined Cases C-278/92, C-279/92 and C-280/92 *Spain v Commission* [1994] ECR I-4103, paragraph 75.

<sup>101</sup> Case C-75/97 *Belgium v Commission* [1999] ECR I-30671 paragraphs 64-65.

<sup>102</sup> OJ L 83, 27.3.1999, p. 1.

unlawful 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**

- (196) TelecomCLM and Abertis are the direct beneficiaries of the aid. All amounts referred to in the paragraphs below are based on the information provided to the Commission. As set out in paragraph (42), TelecomCLM and Abertis received EUR 13.2 million and EUR 250 000, respectively, for the upgrading of their own transmission centres. In addition, without a public tender, TelecomCLM was selected to build new transmission centres for the municipal authorities and six which have become its own property (EUR 2.26 million).
- (197) Where the municipal authorities remain the owners of the DTT equipment, they have bought it from either TelecomCLM or Abertis. As these companies were selected directly (i.e. without a public tender) to supply the digital equipment and/or to provide operation and maintenance services, they are direct beneficiaries in this case too. In fact, public funding of about EUR 32.6 million was provided to these two companies without a public tender<sup>103</sup>.
- (198) Where aid was granted for the use of satellite services in Area II of Castile-La Mancha, Hispasat was directly designated by the authorities. According to paragraph (44), 100 agreements were concluded for the installation of satellite receivers. They are exclusively used for the provision of Hispasat's services. The aid is the total amount spent for such equipment (EUR 1.6 million).
- (199) The unlawful and incompatible aid must be recovered from TelecomCLM, Abertis and Hispasat.
- (200) The ongoing aid is for the maintenance and operation of DTT and satellite networks. The operators of these networks are the beneficiaries of such maintenance and operating aid. TelecomCLM and Abertis received EUR 6.5 million for the period 2009-2011. The aid, and any further aid paid subsequently, must therefore be recovered from those network operators.
- (201) In the cases where the individual beneficiaries received funding not exceeding the thresholds specified in 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<sup>104</sup>, that funding is not considered to be state aid if all the conditions set by that Regulation are fulfilled, and is not subject to recovery.
- (202) Recovery must 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 must bear interest until actual recovery.

## **7. CONCLUSION**

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<sup>103</sup> If, in individual cases, Spain can demonstrate that a public tendering procedure took place for the supply of equipment, this amount would be excluded from recovery.

<sup>104</sup> O J L 379, 28.12.2006.

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 Castile-La Mancha in breach of Article 108(3) of the Treaty. The aid, including the (ongoing) aid for operation and maintenance, must be recovered from the platform operators which are the direct beneficiaries. This includes municipal authorities where they act as platform operators,

HAS ADOPTED THIS DECISION:

### **Article 1**

The state aid granted to the operators of the terrestrial television platform, Telecom CLM and Abertis, for the upgrading of the transmission centres, for building new transmission centres and for the supply of digital services and/or operation and maintenance in Area II of Castile-La Mancha, unlawfully put into effect by Spain in breach of Article 108(3) of the Treaty, is incompatible with the internal market.

The state aid granted for the installation of satellite receivers for the transmission of Hispasat signals in Area II of Castile-La Mancha, unlawfully put into effect by Spain in breach of Article 108(3) of the Treaty, is incompatible with the internal market.

### **Article 2**

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 Telecom CLM, Abertis and Hispasat.
2. The sums to be recovered shall bear interest from the date on which they were made available to the beneficiaries until the date of their actual 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.

### **Article 4**

1. The 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 its notification.
3. Within two months following notification of this Decision, Spain shall submit the following information to the Commission:
  - (a) for the beneficiaries referred to in Article 1, the total amount of aid received by each one;
  - (b) the total amount (principal and interest) to be recovered from each beneficiary;

(c) a detailed description of the measures already taken and planned to comply with this Decision;

(d) documents proving 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 the aid granted under the scheme referred to in Article 1 has been fully recovered. At the Commission's request, it shall immediately submit information on the measures already adopted and planned 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, 1 October 2014

For the Commission

*Joaquín ALMUNIA*  
Vice-President

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#### Notice

If this 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 have agreed 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 Registry  
B-1049 Brussels

Fax No: +32 22961242

**Information on 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 repaid(°)	
			Principal	Recovery interest

(°) Millions of national currency