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**Subject: State Aid SA.51080 – Spain – Audio-visual broadcasting  
transmission aid for audio-visual service providers**

Sir,

## **1. PROCEDURE**

- (1) On 11 December 2018, the Spanish authorities met the Commission. Pursuant to Article 108(3) of the Treaty on the Functioning of the European Union (hereinafter “TFEU”), on 27 March 2019, Spain notified the aid scheme subject of this decision. The Commission requested additional information on 2 April 2019. The Spanish authorities replied on 17 April 2019. The Commission requested further information on 3 June 2019. The Spanish authorities replied on 12 June 2019.

## **2. DETAILED DESCRIPTION OF THE MEASURE**

- (2) The notified measure ("the Measure") aims to compensate television audio-visual media service providers for certain costs resulting from the reallocation of spectrum use in the 694-790 MHz frequency band (the “700 MHz band”) to the use by terrestrial systems capable of providing wireless broadband electronic communications services (5G mobile services).

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## 2.1. Context

### 2.1.1. European Radio Spectrum Policy

- (3) Radio spectrum is a key but scarce public resource that is essential for some sectors and services, including television broadcasting and wireless broadband services. The radio spectrum is divided into frequency bands with conventional names designated by the International Telecommunications Union (ITU). Each frequency band presents technical characteristics that suit only to a limited number of services. Therefore, their allocations may be limited, both in terms of number of users and of period of time. This right of use benefits from special protection with regard to national administration. Indeed, the European legislation established a harmonised framework regarding spectrum authorisation procedure. It states that where Member States grant rights of use for a limited period of time, the duration shall be appropriate for the service concerned.<sup>1</sup> Furthermore, it states that only in cases of serious and repeated breaches of the conditions of the general authorisation, the rights of use or specific obligations, where measures aimed at ensuring compliance have failed, national regulatory authorities may prevent an undertaking from continuing to provide electronic communications networks or services or suspend or withdraw rights of use.<sup>2</sup>
- (4) Terrestrial television services could initially use the whole frequency band between 470 and 862 MHz. But these frequency bands present technical characteristics which are of very high-value also for wireless broadband services. Consequently, terrestrial television services have progressively been squeezed in a narrower spectrum bandwidth.
- (5) The switch to more efficient television broadcasting technologies, namely the switch from analogue to digital technologies<sup>3</sup>, resulted in the release of spectrum within the 800 MHz band (790-862 MHz). Before the switch, the entire 800 MHz band was allocated to terrestrial television services. As digital television services need less spectrum than analogue television, the switch of technologies liberated spectrum that could eventually be used for other services.
- (6) In 2010, the Commission published a decision harmonising the technical conditions of use in the 800 MHz band for wireless broadband services.<sup>4</sup> In 2012, the European Parliament and Council decided that the 800 MHz band would be allocated for use by wireless broadband services as of January 2013.<sup>5</sup> As a

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<sup>1</sup> Article 5(2) of Directive 2002/20/EC on the authorisation of electronic communications networks and services (OJ L 108, 24.04.2002, p. 21), as amended by Directive 2009/140/EC of the European Parliament and of the Council of 25 November 2009 (OJ L 337, 18.12.2009, p. 37), “Authorisation Directive”.

<sup>2</sup> Article 10 of the Authorisation Directive. The same principles are included in the European Electronic Communications Code (Directive (EU) 2018/1972 of the European Parliament and of the Council of 11 December 2018 establishing the European Electronic Communications Code).

<sup>3</sup> The Communication on the transition from analogue to digital broadcasting (from digital ‘switchover’ to analogue ‘switch-off’) of 17 September 2003 underlined the benefits of switching over to digital broadcasting. The Commission Recommendation of 28 October 2009 facilitating the release of the digital dividend in the European Union called for analogue broadcasting to be switched off by 1 January 2012 (OJ L 308, 24.11.2009, p. 24).

<sup>4</sup> Commission Decision of 6 May 2010 on harmonised technical conditions of use in the 790-862 MHz frequency band for terrestrial systems capable of providing electronic communications services in the European Union (OJ L 117, 11.05.2010, p. 95).

<sup>5</sup> Decision 243/2010 of the European Parliament and Council of 14 March 2012 establishing a multiannual radio spectrum policy programme (OJ L81, 21.03.2012, p.7).

consequence, terrestrial television services migrated to the lower band, namely the 470-790 MHz band. Also in 2012, the World Radiocommunication Conference decided that the 694-790 MHz band should be allocated as of 2015 to both broadcasting and wireless broadband services. Since then, the 470-790 MHz band is heavily used by both terrestrial television services and wireless broadband services.<sup>6</sup>

- (7) The Commission recognised in its Digital Single Market Strategy the importance of Internet and digital technologies and the opportunities they bring to the European Union in terms of innovation, growth and jobs.<sup>7</sup> The Commission also acknowledged that radio spectrum is a vital building block for the deployment of wireless broadband services. More recently, the Commission underlined the necessity of having a suitable amount of spectrum for the development of wireless broadband services like 5G.<sup>8</sup> The 5G Action Plan mentions the 694-790 MHz band as a pioneer band that is critical for 5G success.
- (8) In this context, the European Parliament and the Council, after a proposal in 2016<sup>9</sup>, decided in May 2017 that the 700 MHz frequencies will be allocated exclusively to wireless broadband services as of June 2020.<sup>10</sup> The 2017 European Parliament and Council Decision (the EPaC Decision) recognises that the spectrum in the 700 MHz band is of high value to wireless broadband services as it provides both additional capacity and universal coverage. It is hence very valuable for difficult coverage areas like rural, mountainous and insular areas as well as indoor uses.
- (9) Consequently, terrestrial television services must liberate the frequencies they currently use in the 700 MHz band and move to the lower band, the sub-700 MHz band (470-694 MHz band). However, the EPaC Decision also ensures that terrestrial television services have enough spectrum available until at least 2030.<sup>11</sup> Moreover, the EPaC Decision states that the scope of and mechanism for possible compensation for completing the transition in spectrum use, in particular for end-users, should be analysed in accordance with the relevant national provisions and should be consistent with Article 107 TFEU.<sup>12</sup>

### *2.1.2. Evolution of the Digital Dividend in Spain*

- (10) After allocation of the 470-862 MHz band for terrestrial television broadcasting services by Royal Decree of July 2005, Spain completed the switch-off of

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<sup>6</sup> Audio programme making and special events (PMSE) equipment also use that frequency band, but to a lower extent.

<sup>7</sup> Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, A Digital Single Market Strategy for Europe, 6.05.2015.

<sup>8</sup> Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, 5G for Europe: An Action Plan, 14.09.2016.

<sup>9</sup> Proposal for a Decision of the European Parliament and of the Council on the use of the 470-790 MHz frequency band in the Union, 2.2.2016.

<sup>10</sup> Decision 2017/899 of the European Parliament and of the Council of 17 May 2017 on the use of the 470-790 MHz frequency band in the Union (OJ L 138, 25.05.2017, p.131).

<sup>11</sup> Article 4 of the EPaC Decision states that "Member States shall ensure availability at least until 2030 of the 470-694 MHz frequency band for the terrestrial provision of broadcasting services (...)".

<sup>12</sup> Article 6 of the EPaC Decision states that "Member States may, where appropriate and in accordance with Union law, ensure that adequate compensation for the direct cost, in particular for end-users, of the migration or reallocation of spectrum use is provided (...)".

analogue technology by April 2010. The National Technical Plan of September 2014 obliged terrestrial television service providers to vacate the 800 MHz band<sup>13</sup> and Spain completed the release of the 800 MHz band in March 2015.<sup>14</sup> That process was accompanied by two compensation measures:

- a) Subsidies for dwellers of collective buildings offsetting the costs of receiving or accessing audio-visual media services in buildings affected by the release of the digital dividend. That measure was notified and approved by the Commission in 2012.<sup>15</sup>
- b) Compensation to the public service broadcaster for the costs resulting from the simulcast of their channels during the process of releasing the 790-862MHz band.<sup>16</sup>

- (11) In compliance with Article 5 of the EPaC Decision, Spain launched a public consultation on the national roadmap between 28 November 2017 and 19 February 2018.
- (12) The national roadmap was definitively adopted on 30 June 2018. It suggested the liberation of the 700 MHz band to take place between January 2019 and March 2020.

### *2.1.3. Market description*

- (13) Television services can be transmitted via cable, satellite, internet or terrestrial signals.
- (14) In Spain, terrestrial television broadcasting has the highest penetration rate, namely 76,6% of the users. Cable and internet television follow with together 20,6% of the users. Satellite television comes last with a penetration rate of 2,8% of the users.<sup>17</sup>
- (15) Television service providers control the editorial direction over the selection and organisation of programmes and content on a channel or catalogue of programmes.<sup>18</sup> The principal purpose of television service providers is to provide programmes and content to an audience in order to inform, entertain or educate the general public. They are also aimed to broadcast commercial communication.<sup>19</sup>

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<sup>13</sup> Royal Decree 805/2014, of 19 September.

<sup>14</sup> The Commission allowed Spain to postpone the release date of two years, namely 2015 instead of 2013. According to the Spanish authorities, a delay was requested because of the difficulty to obtain from the license holders the smooth and coordinated release of the 800 MHz band.

<sup>15</sup> Decision SA.32619 – Spain, Compensation of damages for the liberation of digital dividend, Measure I, 25.04.2012.

<sup>16</sup> This measure was part of the service of general economic interest concerning public service broadcasting.

<sup>17</sup> Figures available at: [https://www.cnmec.es/sites/default/files/editor\\_contenidos/Notas%20de%20prensa/2018/20181107\\_NP\\_Trimestral\\_Audiov\\_1T\\_def.pdf](https://www.cnmec.es/sites/default/files/editor_contenidos/Notas%20de%20prensa/2018/20181107_NP_Trimestral_Audiov_1T_def.pdf)

<sup>18</sup> Article 2, 1. of General Law on Audiovisual Communication 7/2010 of 31 March, Boletín Oficial del Estado, 79/2010.

<sup>19</sup> Article 2, 2. of General Law on Audiovisual Communication 7/2010 of 31 March.

- (16) With regard to terrestrial television services, the spectrum allocation is laid down in the National Technical Plan for digital terrestrial television. The National Technical Plan sets out the radio channels<sup>20</sup> on which the eight digital multiplexes<sup>21</sup> of national and regional coverage will be operated, in each of the geographical areas<sup>22</sup> provided for in the Plan. It also specifies the capacity that each terrestrial television service provider will be able to use in the multiplex it has been assigned.
- (17) Terrestrial television service providers must apply for a licence in order to broadcast their channels (the audio-visual licence).<sup>23</sup> The current audio-visual licences, allocated in 2010, are valid at least until 2025. The audio-visual licences specify *inter alia* the area of coverage for the broadcast, the number of channels and the allocated multiplex. The audio-visual licence award entails the right to use radio electric public domain according to planning set by the State.<sup>24</sup> Indeed, in Spain, the right to use spectrum is annexed to the audio-visual licence awarded to the terrestrial television service providers.<sup>25</sup> Private television service providers holding an audio-visual licence are subject to coverage obligation of at least 96% of the population.<sup>26</sup> The State is bound by the duration of the licences and can only revoke them in case of non-respect of the obligations by the right holders, as established by European provisions (see recital (3) above).<sup>27</sup>
- (18) As holders of an audio-visual licence, terrestrial television service providers are required to manage together the multiplex they have been jointly allocated.<sup>28</sup> According to Spain, this provision obliges terrestrial television service providers to bear the costs for the functioning of the multiplex. In the case at hand, it implies that terrestrial television service providers must bear the costs incurred by the adaptation of the transmission equipment resulting from the release of the 700 MHz band.
- (19) Platform operators are private or publicly controlled entities operating for the television service providers the technological infrastructure necessary to broadcast to the public the channels produced by the broadcasters. Platforms may operate on cable, satellite, internet or terrestrial infrastructures. In terrestrial broadcasting, the television signal is sent from a television studio to a transmission centre (head-end), usually belonging to and operated by a platform operator. Then the signal is transported and distributed from that transmission centre to the broadcasting centres run by a platform operator (e.g. a tower). Lastly the signal is broadcast from the broadcasting centres to the homes. For

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<sup>20</sup> In the frequency band 470-790, the frequencies are numbered from 21 to 60. The frequencies numbered between 21 and 48 are located in the sub-700 MHz band. The frequencies numbered between 49 and 60 are located in the 700 MHz band.

<sup>21</sup> The eight multiplexes are: RGE1, RGE2, MPE1, MPE2, MPE3, MPE4, MPE5, and MAUT. Multiplexes enable a cost-efficient distribution of television channels. Indeed, multiplexes enable the transmission of several channels on one single frequency, using hence less spectrum capacity. Before the implementation of multiplexes, every single channel was transmitted from separate transmitters and on separate frequencies. As a consequence, each multiplex carries several television channels.

<sup>22</sup> The Spanish territory is divided into 75 geographical areas.

<sup>23</sup> Article 22 of General Law on Audiovisual Communication 7/2010 of 31 March.

<sup>24</sup> Article 24 of General Law on Audiovisual Communication 7/2010 of 31 March.

<sup>25</sup> Article 39 of Royal Decree on the use of public spectrum 123/2017 of 24 February.

<sup>26</sup> Article 2 of Royal Decree 805/2014 Approving the National Technical Plan for the digital terrestrial television and regulating certain aspects of the liberation of the digital dividend.

<sup>27</sup> For instance, if the broadcasters cease emission for 15 days or more.

<sup>28</sup> Royal Decree 805/2014, Third additional provision.

broadcasters not self-supplying the signal, they contract the service with a network operator.

- (20) With regard in particular to terrestrial platforms, the platform operators must submit to the Spanish authorities their projects for the installation of radio stations for their approval.<sup>29</sup> The submitted projects must include a technical study on the planned installation.<sup>30</sup> The examination of the projects by the State authorities ensures that the projects match the national spectrum plans and requirements.

#### *2.1.4. Impact of the release of the 700 MHz band*

- (21) According to Spain, around 25% of the frequencies currently used for terrestrial television broadcasting services are impacted by the obligation to migrate to the lower band. Moreover, the process implies to re-organise the assignment of frequencies in the sub-700 MHz band. In total, 162 changes of frequencies will occur. 68 out of 75 geographical areas are affected by the release of the 700 MHz band.
- (22) The change of frequency used by a multiplex in a specific area for transmitting television services entails the change of the transmission equipment.<sup>31</sup> According to Spain, 1 143 transmitters have to change their emission frequency.

## **2.2. The Measure in detail**

- (23) **Legal basis:** the Measure rests on the draft Royal Decree regulating the direct granting of subsidies to private terrestrial television service providers at national and regional level to compensate for the costs of the changes to be made in transmission equipment to adapt to the new frequencies planned by the release process of the 700 MHz band (second digital dividend).
- (24) **Beneficiaries:** The Measure will grant aid to private terrestrial television service providers holding an audio-visual licence.<sup>32</sup>
- (25) **Eligible costs:** the Measure will compensate the costs incurred by the adaptation of the transmission systems to the new frequencies allocated in the context of the release of the 700 MHz band. The Measure only concerns transmission equipment which are:
- a) Transmitting a channel which has to be replaced by another channel which was not in service before; and
  - b) Transmitted on transmission sites through which the terrestrial television service provider complies with the coverage of obligation.
- (26) The Measure will support the following costs:
- a) costs for acquisition of technical components required for the conversion (including signal reception systems, transmitters, the radiant systems<sup>33</sup>);

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<sup>29</sup> Section 3 of Royal Decree on the use of public spectrum 123/2017 of 24 February.

<sup>30</sup> According to the information provided by the Spanish authorities, the projects must notably include a budget and a list of the equipment that are planned to be installed.

<sup>31</sup> Each multiplex functions with its own transmitter, located on different transmission sites.

<sup>32</sup> After the pre-notification, Spain informed the Commission that public service broadcasters are excluded from the scope of the Measure.

- b) costs of work for changing transmitters, radiant systems and other items of the transmission station;
  - c) costs of changing the modulator.
- (27) Some of the eligible costs will be incurred for every frequency that has to change; some of the eligible costs will be incurred only once, at the level of the transmission site, independently of the number of frequencies that have to change.
- (28) The Measure does not cover the costs related to the upgrade of transmission or compression technologies. Neither does the Measure cover simulcast costs, i.e. the costs incurred by simultaneously broadcasting television services on the old and the new frequencies.<sup>34</sup>
- (29) **Form of the aid:** The aid will take the form of direct grants.
- (30) **Amount of aid:** The aid amount depends on two elements:
- a) The number of frequency channels transmitted via the same transmission site that have to be changed.
  - b) The power of the transmitter.
- (31) For the first or only frequency channel that has to be changed, the maximum amount of aid per transmission site has been fixed as follow:

<b>Power of the transmission site</b>	<b>Maximum aid for the first or only channel (EUR)</b>
> 10 kW	125 000
1 KW < Transmitter ≤ 10 kW	50 000
100 W < Transmitter ≤ 1 kW	20 000
Transmitter < 100 W	3 000

- (32) In cases where more than one frequency channel have to be changed on the same transmission site, the maximum amounts per additional channel are as follow:

<b>Power of the transmission site</b>	<b>Maximum aid per additional channel (EUR)</b>
> 10 kW	30 000
1 KW < Transmitter ≤ 10 kW	12 500
100 W < Transmitter ≤ 1 kW	5 000
Transmitter < 100 W	500

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<sup>33</sup> The draft Royal Decree also mentions other elements as connecting hoses, connectors.

<sup>34</sup> The Measure however subjects the aid to a period of simulcasting, from 3 to 6 months depending on the number of multi-households buildings located in the emission area. No simulcast is required in areas where less than 100 buildings are present. No simulcast is required in areas that are not part of the terrestrial television service providers' coverage obligation. Terrestrial television service providers may choose to simulcast their television programs on whatever technologies they like.

- (33) 23 high-power transmitters (>10kW) and 1 120 low-power transmitters (<10kW) will have to change equipment.
- (34) The maximum aid amount is calculated according to the costs incurred for each transmission site. However, terrestrial television service providers can only apply for a maximum aid amount which is proportionate to the occupation they have in the multiplex that gets its broadcasting frequency changed.<sup>35</sup> Aid can only be granted once to each beneficiary, for the related frequency channels in each of the geographical areas.
- (35) **Intensity and control:** The maximum aid amount is calculated on the basis of the equipment average costs. The Spanish authorities are informed of the equipment and their price thanks to the technical projects that are submitted to them for approval before the installation of radio stations (see 20 above).<sup>36</sup> The Spanish authorities have shown that the maximum aid amounts do not exceed the average cost of the equipment and the work required.<sup>37</sup>
- (36) Because the aid amounts are based on average costs, it may happen that the aid reaches 100% of the actual costs incurred. In any event, the beneficiaries will have to provide proof of expenditure and payment on the basis of invoices and costs breakdown. The managing body will assess the justification and the performance of the operation that will seek compensation. On-the-spot checks will be carried out by means of sampling. In case one of the conditions is not fulfilled, the Spanish authorities will require the reimbursement of the aid already granted or annul the aid.
- (37) **Cumulation:** The compensation cannot be cumulated with any other State aid.
- (38) **Decision-making bodies:** The Ministry for Economy and Business will be responsible for establishing the aid award procedure. The Directorate-General for Telecommunications and Information Technology will be responsible for implementing the aid award procedure and for monitoring the aid granted. The Provincial Telecommunication Inspectorate will carry out the inspections.
- (39) **Budget:** The budget of the Measure amounts to EUR 10 million.
- (40) **Duration:** The Measure will be implemented from the date of its approval by the Commission to 30 September 2020.

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<sup>35</sup> For instance, if an audio-visual media service providers occupy 50% of a digital multiplex which has to change frequency, it will only be entitled to apply for 50% of the costs. The other audio-visual media service provider occupying the same digital multiplex for the rest of the multiplex capacity will have to apply for the remaining 50%.

<sup>36</sup> The Spanish authorities have explained to the Commission that the average costs of the transmitting equipment used for the calculation of the aid amount resulted from the technical projects for installation of radio stations that are submitted for approval to the Spanish authorities.

<sup>37</sup> The Spanish authorities have shown that, while the maximum aid amounts for the first channel vary between EUR 3 000 and EUR 125 000 (depending on the power of the transmitter), the average cost of the transmitting system vary between EUR 4 124 and EUR 125 653. On top of that, an additional cost of 40% is necessary. It corresponds to, i.a., the cost of radiant systems and modulators as well as costs of work.



### 3. ASSESSMENT OF THE MEASURE

#### 3.1. Existence of aid within the meaning of Article 107 (1) of the TFEU

- (41) The Commission has examined whether the Measure in question can be qualified as State aid within the meaning of Article 107(1) of the Treaty, which provides that “*any aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods, shall, in so far as it affects trade between Member States, be incompatible with the internal market*”.
- (42) Consequently, classification as ‘State aid’ within the meaning of Article 107(1) TFEU requires that all the conditions set out in that provision are fulfilled<sup>38</sup>, namely:
- a) There must be intervention by the State or through State resources and which is imputable to the State, for an economic activity.
  - b) The intervention must confer a selective advantage on the recipient.
  - c) The intervention must be liable to affect trade between Member States.
  - d) The intervention must distort or threaten to distort competition.

##### 3.1.1. State resources and imputability for an economic activity

- (43) Broadcasting services constitute an economic activity.<sup>39</sup> Support of that activity is directly financed by the central budget, hence funded from State resources. As explained in recital (38), the central administration decides about the award of the support payments and the conditions under which that happens. Accordingly, the support is imputable to the State.

##### 3.1.2. Economic advantage

###### 3.1.2.1. Advantage to the terrestrial television service providers

- (44) In order to qualify as State aid under article 107(1) TFEU, the measure has to grant an advantage that a beneficiary would not have received under normal market conditions, in the absence of State intervention.<sup>40</sup> The advantage may take the form of a positive financial support but also any measure that mitigates the charges which are normally included in the budget of an undertaking.<sup>41</sup> Within the scope of charges which are normally included in the budget of an undertaking there are costs of undertakings arising from regulatory measures.<sup>42</sup>

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<sup>38</sup> Judgment of 21 December 2016, *Commission v Hansestadt Lübeck*, C-524/14 P, EU:C:2016:971, para. 40.

<sup>39</sup> Judgment of 1 July 2010, *M6 and TFI v Commission*, T-568/08 and T-573/08, ECLI:EU:T:2010:272, para. 123.

<sup>40</sup> Judgment of the Court of Justice of 11 July 1996, *SFEI and Others*, C-39/94, ECLI:EU:C:1996:285, para. 60; Judgment of the Court of Justice of 29 April 1999, *Spain v Commission*, C-342/96, ECLI:EU:C:1999:210, para. 41.

<sup>41</sup> Judgment of 26 April 2018, *Cellnex Telecom SA and Telecom Castilla-La Mancha SA v Commission*, C-91/17 and C-92/17 P, ECLI:EU:C:2018:284, para. 111.

<sup>42</sup> Judgment of 30 June 2016, *Belgique/Commission*, C-270/15 P, EUCLI:C:2016:489, para. 35.

- (45) The Commission considers that the Measure provides relief of a typical normal regulatory cost, for the reasons stated below.
- (46) In the present case the licences of the beneficiaries foresaw validity until at least 2025. Therefore, the obligation to vacate the 700 MHz band occurs before the end of the period of validity of the licences. However, the possibility of being obliged to liberate frequencies or to undergo a modification of the licences, because of international coordination, before expiry of the right is not an occurrence that could have been unknown by the right holders. Indeed, as recalled above (10), , rights holders had to, in 2010, implement the switch-off of analogue television , and in 2014, to change frequency for liberating the 800 MHz band . Moreover, in 2012, discussion at the international level had started on the new use of the 700 MHz band by mobile services. In 2016, the European Parliament and the Council proposed a Decision on the allocation of the 700 MHz band to mobile services. This obligation to vacate the 700 MHz band is now enshrined in the 2017 EPaC Decision.
- (47) Furthermore, pursuant to Article 288 TFEU, European Decisions are binding in their entirety on their addressees, which are in the present case the Member States. Therefore, Member States are obliged to take the necessary steps to liberate, by June 2020, the 700 MHz band from terrestrial broadcasting services. As a consequence, recipients of the aid would, at some point, be obliged to liberate the 700 MHz band and to bear the costs themselves in the absence of the Measure.
- (48) Moreover, the terrestrial television services providers have the obligation to manage the multiplexes they are assigned, including supporting any costs relating to the functioning of those multiplexes (see 18 above).
- (49) In that context, the Commission considers, first, that operators are aware that they may be required to liberate frequencies before expiry of their rights. Second, that the Measure at hand helps television service providers to fulfil the obligations imposed on them by law at lower cost – to manage the multiplex they are assigned - and therefore keep their licences.
- (50) Also, the Spanish authorities recognise that the Measure is of a different nature than compensation for damages and the aid will be granted in compliance with Law 38/2003 on General Subsidies.
- (51) The Measure therefore provides relief of a typical normal regulatory cost that is normally included in the budget of the beneficiaries. The Commission concludes that the Measure confers an economic advantage within the meaning of Article 107(1) TFEU to private terrestrial television service providers.

### 3.1.2.2. Advantage to other operators

- (52) With regard to the determination of the beneficiary of a measure, it is established that “*consideration needs to be given not only to the immediate recipient of the subsidy, but also the effects of the subsidy extending beyond that relationship*”.<sup>43</sup>

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<sup>43</sup> Opinion of Advocate General Lenz of 23 May 1996, *Ijssel-Vliet*, C-311/94, ECLI: EU:C:1996:209, para. 9.

This means that the beneficiary of the Measure can be any entity which actually benefits from it.<sup>44</sup>

- (53) In the case at hand, terrestrial platform operators are considered to benefit from the Measure. First (a), because the equipment replaced typically belongs to them. Second (b), because if the terrestrial television service providers were not willing to pay for the replacement of equipment, they would lose their rights to use the 700 MHz band, which would affect the platform operators' business.
- a) The equipment that is getting replaced typically does not belong to the terrestrial television service providers but to the terrestrial platform operators. The type of equipment that is compensated by the Measure and the level of aid are based on information provided by the terrestrial platform operators in the context of installation of radio stations (see above recital (20)). As the initial equipment installation is carried out by the platform operators, it is reasonable to think that the Measure actually concerns platform operators' equipment.<sup>45</sup> Consequently, platform operators benefit from a change of their equipment that allows them to carry on their activity, meaning the transmission of broadcasting signals in the new frequency band.
- b) Terrestrial television service providers have the legal obligation to support the costs of replacement of the equipment by virtue of their obligation to manage the multiplex. However, would the broadcasters not be willing to pay for the replacement, they could lose their licences and change for another platform like satellite. In that situation, platform operators would probably not remain with an old equipment (700 MHz transmission equipment) that cannot be used anymore. They would have to find alternatives allowing them to continue their activities (finding new clients, replacing their equipment, etc.).
- (54) By compensating for the costs of the technical replacement occurring on their network, the aid granted to broadcasters under the Measure alleviates the costs that the platform operators should otherwise bear to replace the equipment, either for broadcasting services (for the new holders of sub-700 MHz licences) or for other services. Ultimately, the terrestrial platform operators could also stop providing infrastructure services, which would affect the continuity of terrestrial television services.

### 3.1.2.3. Conclusion on the existence of an advantage

- (55) For the reasons mentioned above, it is considered that the pecuniary consequences resulting from the migration of the 700 MHz band are included in the budget of undertakings active in the market of digital terrestrial television. The Commission considers that broadcasters and terrestrial platform operators are benefiting from an advantage resulting from the Measure. The Commission considers that the Measure constitutes an advantage within the meaning of Article 107(1) TFEU.

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<sup>44</sup> Judgment of 21 March 1991, *Italy v Commission*, C-303/88, ECLI:EU:C:1991:136, para. 57.

<sup>45</sup> The Spanish authorities recognized that the infrastructure being changed belonged to the platform operators during the meeting held on 11 December 2018.

### 3.1.3. Selectivity of the advantage

- (56) In accordance with Article 107(1) TFEU, to be considered State aid, a measure must be specific or selective in that it favours only certain undertakings or the production of certain goods.
- (57) The beneficiaries of the Measure are undertakings in the sector of audio-visual media services, which broadcast their services via the terrestrial technology as compared to competing operators, such as satellite, cable or IPTV.
- (58) In *Belgium v Commission*<sup>46</sup>, the ECJ compared the costs of operators in the bovine sector for BSE screening tests with costs which undertakings in other sectors are also obliged to perform to place their products on the market. The Court stated: "*It is clear [...] that the situation of operators in the bovine sector was implicitly but necessarily compared to that of all the undertakings which, like them, are subject to inspections which they are required to perform before placing their products on the market*". It furthermore confirmed that "*the tests which [the operators] were required to perform before placing their products on the market or trading in them were provided free of charge, whereas undertakings in other sectors were unable to avail themselves of that possibility*".
- (59) The Court confirmed that even if BSE screening tests were specifically designed for the bovine sector which differed from tests that other sectors had to bear, the relief of these costs were regulatory costs that are typical for any producer of goods that are subject to tests.
- (60) The Measure at hand allows terrestrial television service providers to fulfil the obligations imposed on them by law – to provide television services and to bear the costs resulting from the management of the multiplexes – and therefore to keep their licences. In the absence of the Measure, the terrestrial television service providers would also be obliged, at some point in time, due to the entry into force of the EPaC Decision, to fulfil the obligation of providing the broadcasting service with continuity and therefore to bear all the costs derived from their licences. Moreover, the Measure enables platform operators to carry on with their terrestrial television transmission activities with continuity.
- (61) The EPaC Decision sets out a common schedule for the repurposing of the 700 MHz band for mobile services by June 2020 and asks Member States to ensure the availability of the 470-694 MHz frequency band for terrestrial provision of broadcasting services.
- (62) Although it appears that the economic operators that are directly affected by the obligation to liberate the 700 MHz band from terrestrial broadcasting services are the terrestrial television operators, also other economic operators offering broadcasting services with other technologies are subject to comparable regulatory constraints. Satellite operators for example are also subject to spectrum legislation and the obligation to obtain a frequency assignment and possibly re-assignment. Accordingly, the Commission concludes that the Measure is selective.

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<sup>46</sup> Judgement of 30 June 2016, *Belgium v. Commission*, C-270/15 P, ECLI:EU:C:2016:489, para.50.

### 3.1.4. Distortion of competition and effect on intra-Union trade

- (63) State measures fall within the scope of Article 107(1) of the Treaty in so far as they distort or threaten to distort competition and affect trade between Member States. According to the case law of Union Courts, the concept of “effect on trade between Member States” is linked to the notion of distortion of competition and both are often inextricably linked. In this regard, the Court has stated that “*In particular, where State financial aid strengthens the position of an undertaking as compared with other undertakings competing in intra-Community trade, the latter must be regarded as affected by that aid*”.<sup>47</sup>
- (64) As explained above, the Measure favours the terrestrial television service providers and platform operators. These operators compete with other alternative providers (satellite, cable, IPTV) and they are active at international level.<sup>48</sup> The Commission considers that the television audio-visual media services sector is open to competition within the EU<sup>49</sup>.
- (65) Therefore, the Measure may result in distortions of competition between terrestrial television operators operating in Spain and benefiting from the Measure compared to other providers which would not benefit from it. Therefore, the Measure may distort competition in the internal market and may affect intra-Union trade.

### 3.1.5. Conclusion on the existence of aid

- (66) On account of the preceding considerations, the Measure fulfils the criteria laid down in Article 107(1) of the Treaty and constitutes State aid within the meaning of that Article.

## 3.2. Compatibility of the aid

- (67) Article 107(3)(c) of the Treaty states that “*aid to facilitate the development of certain economic activities or of certain economic areas, where such aid does not adversely affect trading conditions to an extent contrary to the common interest*” may be considered to be compatible with the internal market.
- (68) In order for the aid to be compatible with the internal market under Article 107(3)(c), the Commission balances the positive and negative effects of the aid. In applying the balancing test, the Commission assesses the following questions:
- 1) Is the aid measure aimed at a well-defined objective of common interest?
  - 2) Is the aid well designed to deliver the objective of common interest (i.e. does the proposed aid address a market failure or other objective)? In particular:
    - a) Is the aid measure an appropriate instrument, i.e. are there other, better placed instruments?

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<sup>47</sup> Judgment of 4 April 2001, *Regione Friuli Venezia Giulia v Commission*, T-288/97, ECLI:EU:T:2001:115, para. 41.

<sup>48</sup> See for instance the Mavise database, showing the availability of international channels in Spain: <http://mavise.obs.coe.int/country?id=12>

<sup>49</sup> Commission decision of 24 January 2007, on the State aid implemented by the Italian Republic for the subsidised purchase of digital decoders, para. 113.

- b) Is the aid necessary, is there an incentive effect, i.e. does the aid change the behaviour of firms?
  - c) Is the aid measure proportional, i.e. could the same change in behaviour be obtained with less aid?
- 3) Are the distortions of competition and effect on trade limited so that the overall balance is positive?
  - 4) Does the Measure comply with the transparency obligations?

### 3.2.1. *Aid aimed at a well-defined objective of common interest*

- (69) In its Communication of 6 May 2015 entitled 'A Digital Single Market Strategy for Europe'<sup>50</sup>, the Commission recognised the importance of the 700 MHz frequency band for ensuring the provision of high quality broadband services. It further stressed the need for a coordinated release of that frequency band while ensuring the specific needs of broadcasting services distribution.
- (70) On 14 September 2016, the Commission adopted the Gigabit Communication<sup>51</sup> which states the objective of 5G coverage of all urban areas and all major terrestrial transport paths for 2025. In order to achieve this goal, the Commission acknowledged the necessity of rapid availability of new spectrum, like the 700 MHz band for 5G coverage in rural areas and indoor use in cities.
- (71) Effective and coordinated management of spectrum has been deemed a condition for the industrial shift to 5G, which will create a favourable environment for electronic communications networks and services to develop, thus maximising the growth potential of the digital economy. In that context, it is considered that the 470-790 MHz frequency band represents an opportunity for the development of those new digital services, but it is currently shared across the Union between digital terrestrial television services and mobile services.
- (72) The EPaC Decision provides a coordinated approach for the efficient use of the 470-794 MHz frequency band. As described above (see recital (8)), the objective of the Decision is to vacate the 700 MHz band from the terrestrial television services and PMSE, which will migrate to the sub-700 MHz band, in order to allow the use of the 700 MHz band by mobile services.
- (73) The EPaC Decision names also another objective of the Union. It states in recital 20 that Member States should ensure continuity for the television broadcasting services that vacate the 700 MHz band. More specifically, Article 4 of that decision states that "Member States shall ensure availability at least until 2030 of the 470-694 MHz frequency band for the terrestrial provision of broadcasting services".

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<sup>50</sup> Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, 'A Digital Single Market Strategy for Europe, 6 May 2015, {SWD(2015) 100 final}, COM(2015) 192 final.

<sup>51</sup> Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, Connectivity for a Competitive Digital Single Market - Towards a European Gigabit Society, 14 September 2016, {SWD(2016) 300 final}, COM(2016) 587 final.

- (74) The Measure at hand has the same objective as the EPaC Decision. It is therefore aimed at a well-defined objective of common interest.

3.2.2. *Aid well designed to deliver the objective of common interest*

3.2.2.1. Market failure

- (75) Only where market forces alone, in the absence of aid, would not be able to reach an efficient outcome, a market failure can be considered to exist. In this case, State intervention may correct the market failure and allow reaching the common interest goal.
- (76) To assess whether the Measure aims to achieve the objective of common interest, the market failures hampering that achievement must be identified. With regard to spectrum use, a market failure may arise, for instance, where market players are unwilling to agree on a common timetable to free the frequencies (coordination problem). It may also arise where market players do not take into account the positive effects of liberation of the frequency band for society as a whole, because they do not have the right incentives to do so (positive externalities).
- (77) State intervention is necessary in the present case, as the allocation and use of terrestrial frequencies is not subject to market forces but fully regulated. Furthermore, the terrestrial television service providers have no market incentive to liberate a certain part of the spectrum and move to another part of it for the benefit of other operators. Migration of the former entails costs but does not offer new possibilities for their activities.
- (78) Currently the terrestrial television service providers are not yet legally obliged to liberate the 700 MHz band. They have a concession lasting until 2025 or 2030, and Member States are not obliged to switch before June 2020 (or even 2022 in some circumstances). Furthermore, the Measure does not provide nor intend to provide and improvement of the activities carried out by the beneficiaries. In view of this, the terrestrial television service providers have neither a legal nor a commercial incentive to give up the respective band before June 2020.
- (79) Consequently, the Commission considers that market failure exists in the present case as market players would not enter into the planned migration project by themselves. Market players are not even entitled to arrange such reallocation on their own initiative. It is however possible that they rather try to block that process by initiating court procedures.

3.2.2.2. Appropriate instrument and incentive effect

- (80) The Measure enables the smooth and coordinated release of the 700 MHz band. It ensures the agreement of the right holders to return their licences in exchange for new licences and compensation of the costs directly resulting from the vacation of the 700 MHz band.
- (81) Right holders are in principle entitled to use their licences as agreed at the moment of their award until their end of validity (see recital (3) above). Modification of running licences may have significant consequences for their holders, which have planned their investment according to the licences validity. The importance of legal certainty, regulatory predictability and investment stability are core principles for viable telecommunications regulatory framework

and market, and modification may only happen in limited situation. Furthermore, the European provisions impose the release of the 700 MHz band only by June 2020.

- (82) The Measure constitutes a trade-off between right holders and the State limited only to the technical impacts suffered by right holders. It is only aiming at ensuring the status quo with regard to the terrestrial television operators' activities.
- (83) Moreover, the EPaC Decision itself alludes to the possibility of Member States offering compensation of the direct cost of migration and reallocation (see recital (9) above). In the proposed Measure, only the direct costs would be compensated.
- (84) The Measure is therefore appropriate.
- (85) As regards the incentive effect, the Measure accelerates the migration and conversion of the terrestrial television transmission from the 700 MHz band to the sub-700 MHz frequency band. There is no legal obligation for right holders to give up their frequency licences before Spain is obliged by the EPaC Decision to have the 700 MHz band liberated for use by mobile services by June 2020. The Measure aims at ensuring that that liberation will have been completed ideally before June 2020 without interruption of the services.
- (86) The terrestrial television service providers have no commercial incentive to liberate a certain part of the spectrum and move to another part of it for the benefit of mobile telephony operators. The migration does not provide any technical improvement that could incentivise them to complete the transition on their own.
- (87) It is important for the EU that Member States engage with the relevant undertakings, in order to allow the EU wide simultaneous introduction of 5G mobile services from 2020. In order to reach the objective, Member States need to be able to start the assignment of 5G licences during 2019; they need to be able to give reliable dates to the telecommunication operators, to which they sell the licences. Delays in the availability of the frequencies may lead to damages claims or at least delayed payments of the licence fees.
- (88) There is also an interest in the joint smooth transition because frequency assignments have to be coordinated between neighbouring countries in order to avoid conflicting programme transmissions. Delay in one country could thus block migration in other Member States.
- (89) Moreover, with the voluntary and compensated release of the 700 MHz band, terrestrial television operators allow starting the rollout of 5G mobile networks already before the date where it would have been obligatory for Member States to mandate such a migration. The shift to 5G will significantly increase the growth potential of the digital economy and for the development of new digital services. The increasing economic and social importance of the digital economy makes enhanced wireless mobile network capacity imperative.<sup>52</sup> The Commission has underlined the importance of rapid availability of the 700 MHz band.

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<sup>52</sup> See recitals 9 and 10 of the EPaC Decision.



- (90) In light of the above, it can be concluded that the Measure will ensure the continuous functioning of the terrestrial television services.
- (91) In conclusion, the Commission finds that the Measure, in the form of an aid for the direct costs resulting from the migration of frequency, is an appropriate instrument to vacate the 700 MHz band and has an incentive effect.

#### 3.2.2.3. Proportionality

- (92) The aid is limited to cover part of the direct costs that are necessary for adapting the technical equipment needed for completing the frequency conversion. Spain demonstrated that the aid amounts, even though they are based on the average costs of the equipment, are in principle below the total amount of the costs incurred. The aid amount actually granted will be checked against invoices and inspection will be organised. That guarantees that over-compensation is excluded. The Spanish authorities will ensure that expenditure that can be shared between the beneficiaries at the level of the transmission site, and which does not depend on the number of frequencies that have to change, is compensated only once. No other cost that is not directly linked to implementation of the frequency shift will be compensated.
- (93) Furthermore, the transmission platform operators will not obtain any other direct or indirect benefit from the spectrum migration to which they agreed that would offset the costs they incur as a result of that exercise.
- (94) Hence, the Commission finds that the Measure is proportionate to the objective pursued.

#### 3.2.3. *Limited negative impacts*

- (95) Compensation will only be granted for part of the direct costs strictly necessary for the implementation of the objective of the liberation of the 700 MHz band by terrestrial television services in Spain. The other broadcasting technologies (IPTV, cable or satellite) are not as such affected by the decision taken by the Council and Parliament to move terrestrial television service providers out of a certain transmission corridor which they currently occupy. Thus, only that technology is affected, while Member States agreed at the same time that it should still be maintained. In the absence of over-compensation, the operators which are active in several Member States do not benefit from funding that would allow them to strengthen their financial position with regard to activities in other Member States.
- (96) In Spain, the spectrum reassignment does as such also not lead to a technology change; so it will not lead to an improvement of the quality of the terrestrial television signal and its competitive position in comparison with other technology. The aim of the Measure is not to offer additional financial means to the normal operation of terrestrial television service providers. It is just covering part of the costs which arise due to State measures reorganising the spectrum. The Measure just ensures maintaining the status quo ante.
- (97) Terrestrial television service providers are the only companies that can effectively support the objective of freeing the 700 MHz band in favour of mobile

communications. They are the only operators that have frequency usage rights in the relevant frequency range.

- (98) Even though the Measure does not support simulcast costs, it does subject its granting to the compliance with a certain period of parallel transmission (see recital (28)). However, this obligation can be fulfilled on any platform. It is not required from the terrestrial television service providers to simulcast on the terrestrial network, which may imply construction of transitional equipment. Hence, the Measure is not designed in such a way that unduly favours terrestrial television operators.
- (99) Moreover, the proposed scheme treats equally all firms which are affected by the planned liberation of that band. It does not introduce distinctions between operators which would not be justified by their respective characteristics. This is unlike the context of the switch from analogue to digital television which affected also the competing transmission technologies of cable and satellite.<sup>53</sup> As a consequence, the competitive balance between the various platform operators is not affected to a degree that would not be justified by the objectives pursued by the EPaC Decision.
- (100) Accordingly, there is no negative impact on trading conditions contrary to the common interest.

#### 3.2.4. *Transparency*

- (101) The Spanish authorities have committed to publish the text of the Measure as well as the information related to the beneficiaries of any aid that exceeds EUR 500 000. Therefore, the Measure complies with the transparency requirements.

#### 3.2.5. *Deggendorf principle*

- (102) The Commission must take into account all relevant factors when it assesses the compatibility of a new aid scheme with the internal market. In that context, the Commission has the power to take into consideration *i.a.* the fact that earlier aid, declared unlawful, has not been repaid.<sup>54</sup> This principle is known as the Deggendorf principle.
- (103) In the context of the Measure, the Commission identifies one State aid scheme that has been declared incompatible with the internal market and includes a recovery obligation. It is the following aid scheme:
- State aid SA.27408 (C 24/2010) (ex NN37/2010, ex CP 19/2009) implemented by the authorities of Castile-La Mancha for the deployment

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<sup>53</sup> For that reason, the Commission had found it a discriminating violation of the principle of technological neutrality that only digital terrestrial television and not also cable or satellite transmission came into the benefit of support for simulcasting (Commission decision of 9 November 2005 in case C25/2004, DVB-T Berlin-Brandenburg, confirmed by the Court of Justice in judgment of 15 September 2011, Case C-544/09 *Germany v Commission*).

<sup>54</sup> Judgment of 11 February 2009, T-25/07, *Iride et Iride Energia / Commission*, ECLI:EU:T:2009:33, para. 103.

of digital terrestrial television in remote and less urbanised areas in Castile-La Mancha, Commission Decision of 1.10.2014.<sup>55</sup>

- (104) Article 3 of the Decision SA.27408 requires Spain to recover the incompatible aid granted under the scheme covered by the Decision from Telecom CLM and Abertis. Telecom CLM and Abertis are operators of the terrestrial television platform. According to the information available, this has not been completed.
- (105) As explained above (recital (55)), the Measure constitutes an advantage for the terrestrial platform operators. According to the Deggendorf principle, the Commission considers that no aid which would benefit to one of the undertakings having received illegal and incompatible aid and subject to a recovery order may be granted until such aid, including principal and interests, has been fully recovered and paid into a blocked account. This obligation applies for the beneficiaries identified in Decision SA.27408. It also applies for the beneficiaries identified in any subsequent Decision finding illegal and incompatible aid, including where the aid granted in the context of the present Measure has not yet been fully disbursed.
- (106) The Commission acknowledges that the Spanish authorities have recovered the full amount of incompatible aid identified in Decision SA.27408 from Abertis, now denominated Cellnex. The Spanish authorities have provided supporting documents in that regard on 12 June 2019.
- (107) Furthermore, according to the Spanish authorities, Telecom CLM will not benefit from the present Measure, since it does not provide neither transport nor distribution of television service over the terrestrial network to any of the terrestrial television service providers included in the present Measure. Consequently, the Measure may not be used with regard to replacement of the equipment owned by Telecom CLM, unless the incompatible aid identified in Decision SA.27408 has been fully recovered.
- (108) Finally, the Commission takes note of the commitment from the Spanish authorities to suspend payment of aid under the present scheme to any other undertaking that has been declared recipient of illegal and incompatible aid until such aid, including principal and interests, has been fully recovered.

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<sup>55</sup> The Decision is final since 20 September 2018, date of the latest judgment of the European Court of Justice in case C-114/17P, *Spain / Commission*, ECLI:EU:C:2018:753.

#### 4. CONCLUSION

- (109) The Commission has accordingly decided not to raise objections to the aid on the grounds that it is compatible with the internal market pursuant to Article 107 (3) (c) of the Treaty on the Functioning of the European Union

If this letter contains confidential information which should not be disclosed to third parties, please inform the Commission within fifteen working days of the date of receipt. If the Commission does not receive a reasoned request by that deadline, you will be deemed to agree to the disclosure to third parties and to the publication of the full text of the letter in the authentic language on the Internet site: <http://ec.europa.eu/competition/elojade/isef/index.cfm>.

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Yours faithfully  
For the Commission

Margrethe VESTAGER  
Member of the Commission