

II

(Acts adopted under the EC Treaty/Euratom Treaty whose publication is not obligatory)

DECISIONS

COMMISSION

COMMISSION DECISION

of 24 January 2007

on State aid C 52/2005 (ex NN 88/2005, ex CP 101/2004) implemented by the Italian Republic for the subsidised purchase of digital decoders

(notified under document number C(2006) 6634)

(Only the Italian text is authentic)

(Text with EEA relevance)

(2007/374/EC)

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Community, and in particular Article 88(2) thereof,

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

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

Whereas:

I. PROCEDURE

(1) On 11 May 2004, the company Centro Europa 7 srl (hereinafter referred to as Europa 7) submitted a State aid complaint against Article 4(1) of Law No 350 of 24 December 2003 (2004 Finance Act). By letter dated 10 February 2005, the complainant provided further information and comments, according to which the Italian Government had refinanced the measure under Article 1 (211) of Law No 311/2004 (2005 Finance Act). The complainant called on the Commission to initiate a formal

investigation procedure. On 3 May 2005 the company Sky Italia srl (hereinafter referred to as Sky Italia) also submitted a complaint against the two Articles cited. On 22 June 2005, a meeting was held between the Commission and Sky Italia. On 31 August 2005, Sky Italia submitted further information concerning amendments to the Law of 3 May 2004 entitled 'Regulations and principles governing the set-up of the broadcasting system and RAI-Radiotelevisione italiana SpA, authorising the government to issue a consolidated broadcasting act' (known as the Gasparri law), which regulates the television sector in Italy. Finally, on 31 October 2005 Sky Italia requested the Commission — pending a decision — to order the Italian Government to suspend the measure pursuant to Article 11(1) of Council Regulation (EC) No 659/1999 laying down detailed rules for the application of Article 88 of the EC Treaty ⁽²⁾.

(2) By letters dated 13 October 2004, 21 April 2005 and 15 July 2005, the Commission submitted requests for information to the Italian Government. The information was provided on 5 November 2004, 13 May 2005 and 12 September 2005, following a short extension of the deadline. A meeting also took place between the Commission and Italy on 6 June 2005.

(3) By letters dated 20 September 2005 and 16 November 2005, Italy informed the Commission of its intention not to extend the scheme in the same form.

⁽¹⁾ OJ C 118, 19.5.2006, p. 10.

⁽²⁾ OJ L 83, 27.3.1999, p. 1. Regulation as last amended by Regulation (EC) No 1791/2006 (OJ L 363, 20.12.2006, p. 1).

(4) By letter dated 21 December 2005, the Commission informed Italy that it had decided to initiate the formal investigation procedure laid down in Article 88(2) of the EC Treaty in respect of the aid in question (hereinafter referred to as decision to initiate the procedure). The Commission decision to initiate the procedure was published in the *Official Journal of the European Union* ⁽³⁾. The Commission called on interested parties to submit their comments on the measures in question.

(5) Following the extension of the deadline, Italy responded by letter dated 13 February 2006 to the request for comments made in the decision to initiate the procedure. The Commission also received comments from the following interested parties: National Federation of Electronic and Electrotechnic Companies (ANIE) by letter dated 19 June 2006, Europa 7 by letter dated 19 June 2006, European Satellite Operator Association (ESOA) by letter dated 20 June 2006, Mediaset SpA by letter dated 20 June 2006, RAI-Radiotelevisione Italiana by letter dated 23 June 2006, and Sky Italia by letter dated 26 June). By letter dated 12 July 2006, the Commission forwarded those observations to Italy. Italy did not comment on these observations.

II. DETAILED DESCRIPTION OF THE AID

II.A. DESCRIPTION OF THE AID

(6) The subject-matter of the formal investigation procedure is Article 4(1) of Law No 350/2003 (2004 Finance Act), the interministerial Decree of 30 December 2003 on the grant for digital terrestrial television and for internet broadband access pursuant to Article 4(1) and (2) of Law No 350 of 24 December 2003 and paragraph 211 of Law No 311/2004 (2005 Finance Act).

(7) Article 4(1) of the 2004 Finance Act provides for a public grant of EUR 150 for users who purchase or rent a set up box or decoder (hereinafter referred to as decoder) capable of receiving TV signals transmitted using digital terrestrial technology and the associated interactive services, and allocates a total budget of EUR 110 million for the purpose. It should be noted that decoders which do not receive digital terrestrial signals are not entitled to the grant even if they allow the reception and utilisation of the interactive services. The Article in question states that:

'for 2004, each user of the broadcasting service who has fulfilled his obligations regarding payment of the relevant subscription fee for the year in progress and who purchases or rents a device allowing the reception, free-to-air and at no cost to the user or to the content provider, of television signals transmitted using digital terrestrial technology (T-DVB/C-DVB) and the resulting interactivity shall be entitled to a public grant of EUR 150. Award of the grant shall be made within the spending limit of EUR 110 million'.

(8) Article 4(4) specifies that: 'the grant for the purchase or rental of boxes using C-DVB technology shall be awarded only on condition that the commercial offer clearly indicates to the user the content providers with whom the owners of the cable platform have agreed terms and conditions for the cable retransmission of the signal using digital terrestrial technology'.

(9) According to Italy, the subsidy is granted to consumers for purchasing or leasing a decoder that allows the reception of a non-encrypted digital signal at no cost to the consumer and the content provider. Again according to Italy, reception of non-encrypted digital signal means the decoder's capacity to execute any interactive service provided by any broadcaster. In essence this means that the decoder must permit non-encrypted interactive functions (i.e. it must not only be interactive but it must also allow interoperability). These are decoders with an open standard for the application programming interface (API) of which the Multimedia Home Platform (MHP) is almost the sole example.

(10) Paragraph 211 of the 2005 Finance Act refinanced the measure with the same spending limit of EUR 110 million, but with a grant per decoder of EUR 70. The scheme in question ceased to apply on 1 December 2005.

(11) The measure has been successful for two reasons. Apparently, some 2 million Italian nationals have bought a subsidised decoder. This figure represents 50 % of the decoders sold up to November 2005. The other 50 % were purchased by consumers without the grant, even though the decoders were of the type eligible for it. Thanks to the economies of scale in production resulting from this increase in demand, the consumer price of interactive decoders has also decreased from EUR 300/EUR 350 to around EUR 150.

⁽³⁾ See footnote 1.

- (12) In 2006 the two measures in question were followed by a similar measure under Article 1(572) of Law No 266/2005 of 23 December 2005 (2006 Finance Act). This provides for a subsidy of EUR 90 for each decoder purchased by users in Sardinia and Valle d'Aosta between 1 December and 31 December 2005 and of EUR 70 for each decoder ⁽⁴⁾ purchased as of 1 January 2006.
- (13) Compared to the 2004/2005 measures, the 2006 Finance Act directly links the subsidy to the interoperability of decoders without *a priori* excluding non-terrestrial decoders.
- (14) In its decision of 11 May 2006, the Italian competition authority, AGCM, rejected ⁽⁵⁾ a complaint against Article 1 (572) of the 2006 Finance Act. The complaint alleged that the measure favoured companies linked to Mr Berlusconi's family. The proceeding was based on Law No 215 of 20 July 2004 on conflict of interest.

II.B. BACKGROUND

II.B.1. THE COMPLAINANTS

- (15) Europa 7 is an Italian company that has held an analogue broadcasting licence since 1999. However, it has not yet been able to operate in the analogue broadcasting market, allegedly due to the behaviour of the national authorities, which have not yet allocated the frequencies Europa 7 needs in order to broadcast.
- (16) Sky Italia is a pay-TV company that broadcasts via satellite, owned by News Corporation. It was formed as a result of News Corporation's take-over of Teletipiù SpA and Stream SpA in 2003, a merger which was approved subject to certain commitments (Case No COMP/M.2876 Newscorp/Teletipiù). As a result of the commitments given, Sky Italia was requested to give up its terrestrial activities. It cannot operate in Italy as a terrestrial network operator or terrestrial pay-TV operator.

⁽⁴⁾ The text of the law states that the subsidy is granted if direct and unrestricted reception of non-encrypted digital content and services are guaranteed and if interactive services are provided, through application programming interfaces (API) which are open and recognised as such, in accordance with the standards published in the Official Journal of the European Communities pursuant to Article 18 of Directive 2002/21/EC of the European Parliament and of the Council of 7 March 2002.

⁽⁵⁾ Measure No 15389 of 10 May 2006 of the Competition Authority (AGCM) C12 'Prime Minister –TV decoder subsidies' based on the law on conflict of interest.

II.B.2 THE CONTEXT

- (17) The measure in question must be viewed against the backdrop of the digitisation of broadcasting, which has an impact on all the currently available transmission platforms, i.e. cable, satellite and terrestrial. Digital video broadcasting can be over a terrestrial network (DVB-T) or by satellite (DVB-S) or cable (DVB-C). The prime benefit of digitisation is the increased transmission capacity on all platforms as a result of more efficient use of the radiofrequency spectrum ⁽⁶⁾, as compared to analogue broadcasting. This is particularly relevant for terrestrial TV in view of the limited availability of the frequency spectrum. Between 2002 and 2005, the Commission actively expressed its support for the digitisation of broadcasting, adopting several communications on this subject ⁽⁷⁾. In these communications the Commission also supported the diffusion of so-called 'open standards' digital technologies, i.e. technologies allowing interactivity with final consumers and interoperability through open API, i.e. the possibility for different producers and consumers to be connected together via a single technology that can be freely used by every operator in the market.

- (18) The viewing of digital programmes through the most commonly used television sets requires the use of a decoder (although some of the more modern TV sets have an integrated decoder). There are various types of digital decoders on the market, which can broadly be classified by their features and functions: (a) simple decoding of digital programmes, on either the terrestrial or satellite platform; (b) interactivity (possibility of sending information to the broadcasters); (c) conditional access (possibility of decoding pay-TV services); (d) interoperability (the possibility of using the same decoders to receive programmes from different broadcasters on the same platform). Interoperability can easily be achieved through the adoption of open standards by broadcasters and through the use of the corresponding open interfaces in decoders. Alternatively, interoperability would require the owners of non-open proprietary technologies to agree to make available the necessary technical specifications. In principle, decoders could offer various combinations of the above features; in practice, however, the most widespread categories of decoders are: (a) zappers (just the decoding function); (b) proprietary Sky decoders (interactive, with conditional access, but not open)

⁽⁶⁾ Depending on the quality of the broadcasting and the use of interactivity, the digital technique uses at most about one fifth of the frequency needed to transmit the same data in analogue mode.

⁽⁷⁾ See COM(2002)263 final: Communication from the Commission on eEurope 2005: An information society for all (OJ C 154, 29.5.2001, p. 123); COM(2003)541 final, Communication from the Commission on the transition from analogue to digital broadcasting (from digital switchover to analogue switch-off) (OJ C 96, 24.4.2004, p. 17); COM(2004)541 final, Communication from the Commission on interoperability of digital interactive television services (OJ C 123, 21.5.2005, p. 2); COM(2005)204 final: Communication from the Commission on accelerating the transition from analogue to digital broadcasting (OJ C 49, 28.2.2006, p. 23).

and (c) subsidised decoders (interactive, with conditional access and open).

- (19) In Italy there are four TV broadcasting platforms: (i) satellite, on which the main free-to-air channels are available plus Sky Italia's channels, whose programmes can be accessed via subscription or pay-per-view agreements; (ii) terrestrial hertzian TV⁽⁸⁾, on which 6 national broadcasters operated in December 2005 i.e. RAI (free-to-air), Mediaset⁽⁹⁾ (free-to-air and pay-per-view), Telecom Italia Media/La 7 (free-to-air and pay-per-view), Holland Coordinator & Service Company Italia (HCSC) which owns Prima TV/DFree, Gruppo l'Espresso and Television Broadcasting Systems (free-to-air)⁽¹⁰⁾. In addition there are almost 500 local operators on analogue terrestrial broadcasting and 78 local operators⁽¹¹⁾ on digital television; (iii) cable, on which Fastweb operates (free-to-air and pay services); and (iv) X-DSL, on which Fastweb and Telecom Italia's Rosso Alice operate (free-to-air and pay services).
- (20) Sky Italia is a satellite pay-TV and has a quasi-monopolistic position on the Italian market for pay-TV satellite broadcasting, but, as has already been pointed out, it cannot operate in Italy as a terrestrial network operator or a terrestrial pay-TV operator.
- (21) Cable hardly exists in Italy, although Fastweb, which owns a cable network and is a pay-TV operator present in some Italian cities, had acquired some 140 000 TV customers by March 2004 using fibre and DSL infrastructure.
- (22) Terrestrial continues to be the main means of television viewing in Italy, with a market penetration of some 19 million households out of a total of 22 million. The main players are the public service broadcaster (RAI) with three channels and the commercial broadcaster Mediaset, also with three channels. The two operators account for

approximately 85 % of the TV audience in Italy. In a decision of 11 March 2005, the Italian Communications Guarantee Authority (AGCOM) analysed the television market on the basis of Law No 112/2004 and concluded that the two operators held a collective dominant position on this market⁽¹²⁾ and imposed various obligations⁽¹³⁾ on the two operators in order to preserve pluralism in the market. Furthermore, on 27 June 2006 AGCOM notified the Commission of the definition of relevant markets on the terrestrial analogue television market and its assessment of significant market power, concluding that RAI and Mediaset held a collective dominant position. AGCOM did not, however, propose any measures to remedy this situation. On 27 July 2006 the Commission sent AGCOM its comments pursuant to Article 7(3) of Directive 2002/21/EC of the European Parliament and of the Council of 7 March 2002 on a regulatory framework for electronic communications networks and services (Framework Directive)⁽¹⁴⁾. The Commission broadly agreed with AGCOM's conclusions but asked for a more in-depth analysis and invited AGCOM to notify remedies as soon as possible. Finally, the Commission is currently considering a complaint alleging that Law No 112/04 regulating the switchover from analogue to digital terrestrial broadcasting technology creates entry barriers for newcomers to the TV advertising and broadcasting transmission services markets. After requesting Italy to submit its observations on the complaint and asking both Italy and the undertakings affected by the measures for information, the Commission sent a letter of formal notice to Italy on 19 July 2006 concerning the infringement of the above Directive 2002/21/EC and Directive 2002/20/EC of the European Parliament and of the Council of 7 March 2002 on the authorisation of electronic communications networks and services (Authorisation Directive)⁽¹⁵⁾, and Commission Directive 2002/77/EC of 16 September 2002 on competition in the markets for electronic communications networks and services⁽¹⁶⁾. Italy replied on 15 September 2006. The Commission subsequently received a copy of the bill to reform the Italian broadcasting legislation with a view to addressing the issues raised in the letter of formal notice. The Commission is currently examining this bill.

- (23) In June 2005, the overall digital TV penetration rate was 34,5 % of households, with some 7,3 million viewers in total. This figure includes digital terrestrial, satellite and cable/ADSL viewers. 10 % of households were digital terrestrial TV viewers and more than one third of them

⁽¹²⁾ AGCOM Decision 136/05/CONS on measures to safeguard pluralism pursuant to Law No 112 of 3 May 2004, Italian Official Gazette No 35, 11.3.2005.

⁽¹³⁾ The main obligations imposed on the two operators are: (a) to accelerate the digitalisation of the network; (b) RTI to use a different advertising licensor from Publitalia '80 for digital programmes and Publitalia '80 to introduce separate accounting for revenue from analogue TV and from digital terrestrial TV; (c) RAI to create a new programme for the general public to be transmitted in digital technology.

⁽¹⁴⁾ OJ L 108, 24.4.2002, p. 33.

⁽¹⁵⁾ OJ L 108, 24.4.2002, p. 21.

⁽¹⁶⁾ OJ L 249, 17.9.2002, p. 21.

⁽⁸⁾ For the sake of simplicity, only the term 'terrestrial' will be used hereinafter.

⁽⁹⁾ RTI manages the infrastructure but it is owned by Mediaset.

⁽¹⁰⁾ At the end of December 2005, Mediaset had acquired the analogue frequencies of EuropaTV from Holland Italia and planned to create a DVB-H channel for mobile TV. According to the Italian authorities' submission in state aid case C52/2005 of 13 May 2005 (ref. A/33952) the operators present on the market in 2005 were RAI, RTI, TI and Prima TV.

⁽¹¹⁾ Data taken from the submission of the Italian authorities in case C52/2005 of 13 May 2005 (ref. A/33952).

(0,8 million) were also viewers of pay-per-view TV content⁽¹⁷⁾. However, when this decision is published, the two types of digital TV on offer — terrestrial and satellite — are both expected to have achieved a similar number of viewers (5 million viewers for satellite and 4 million viewers for digital terrestrial).

- (24) Penetration of satellite TV is limited — around 16 % of households (4,8 million) had a parabolic antenna in June 2005. Around four-fifths of these households subscribe to Sky Italia's DTH platform (satellite) which reported about 3,3 million customers in June 2005 and an estimated 3,9 million subscribers by the end of that year. Sky Italia is therefore the third television operator in Italy⁽¹⁸⁾.
- (25) In order to fight piracy, at the end of 2004 Sky began codifying its signal with the so-called NDS proprietary technology. The owner of this technology for the Italian market is a subsidiary of the Newscorp group, i.e. Sky's parent company. This type of technology is a proprietary, closed technology because, unlike open common interface decoders, access to NDS decoders requires provision of access to the technology or to certain components of the decoders. Sky rents decoders that use this closed technology to its subscribers. When it decided to change to NDS technology, Sky replaced all its subscribers' decoders.
- (26) Digital terrestrial broadcasters, however, now use a so-called open technology, i.e. technology using open standards for interactivity. This is currently the only technology that allows simultaneous reception of all DTT channels with only one decoder — thereby replicating the current situation in the analogue mode — plus interactivity and the conditional access properties that allow the use of prepaid pay-per-view cards.
- (27) The aid measure in question is for decoders that allow the reception of digital terrestrial transmissions where interactive services are provided. Digital mode can accommodate more television channels than analogue mode within the same frequency. The advantages of using open interfaces have been explained above.
- (28) Italy started the digitisation process with Law No 66/2001 of 20 March 2001, which stipulated that the switchover to digital should be completed and transmission in analogue mode should be switched off by December 2006. As from the end of 2003 digital transmissions (T-DVB) were broadcast alongside those in analogue mode (so-called simulcast phase). Decree Law No 273 of 22 December 2005 postponed the deadline for the switch-off to 2008 and, on 30 August 2006, the Minister for Communications, Mr Gentiloni, declared that the date for the switch-off would be further postponed to 30 November 2012⁽¹⁹⁾.
- (29) In the meantime, according to Law No 112/2004 regulating the sector in Italy, only broadcasters already transmitting with analogue technology can apply for experimental digital authorisations and/or digital licences. There is no formal obligation for analogue operators to release the frequencies — which have never been reallocated or subject to a regulated sale by Italy — used for transmissions in analogue format after the switchover to digital. New entrants can only access the market via the acquisition of frequencies from operators already on the market. By December 2005, 7 multiplexes (frequency blocks containing one or more programmes) for digital terrestrial had been licensed in Italy. RAI and Mediaset have two multiplexes, while Telecom Italia/TV International, D-Free and Gruppo l'Espresso have one multiplex each. Under the Italian regulatory regime, network operators holding more than one digital licence must give access to 40 % of their bandwidth to unrelated content providers. In 2006, having acquired infrastructure and licenses from existing regional and local analogue operators, Telecom Italia and the mobile operator H3G entered the digital terrestrial market and started to set up two new multiplexes with the digitalisation of the acquired networks.
- (30) The distinction between broadcasters and network operators is not so relevant for the major Italian broadcasters in the terrestrial television sector because RAI, Mediaset, La7 and D-Free all have their own subsidiary for terrestrial transmission. It should be noted that the television market in Italy is characterised by strong vertical integration between network operators and broadcasters. The mandatory legal separation between the first two types of companies was only introduced by AGCOM with Decision 435/01/CONS of 2001 and only concerns digital television. The network operators in the satellite TV sector are not, however, integrated with the broadcasters.

⁽¹⁷⁾ Measure No 15389 of 10 May 2006 of the Competition Authority (AGCM) CI2 'Prime Minister –TV decoder subsidies'.

⁽¹⁸⁾ AGCOM's Annual Report of 30 June 2006.

⁽¹⁹⁾ See the 'news' section of the Italian Ministry of Communications' Internet site.

- (31) As regards coverage in terms of T-DVB — according to AGCOM ⁽²⁰⁾ — in 2004 more than 50 % of the population was effectively covered by at least two multiplexes and 60 % was potentially covered by three multiplexes. The market trend suggests that coverage should increase considerably. According to Italy, 85 % of households could potentially be covered by at least two multiplexes after the switchover to digital terrestrial. On the other hand, satellite broadcasting could cover virtually 100 % of the population.
- (32) As regards programmes, according to Italy, in June 2005 23 national channels and some 250 local programmes were broadcast free-to-air on digital terrestrial frequencies. Ten of these national channels were broadcast in simulcast with analogue terrestrial television (simultaneous broadcasting in analogue and digital mode). Four channels had been created specifically for digital broadcasting; the remaining channels were broadcast in simulcast with satellite transmissions.
- (33) As has already been stated, the TV market was once characterised by mass viewing of free-to-air TV in analogue terrestrial mode and by the offer of satellite pay-TV. The introduction of digital terrestrial TV and the development of cable and Internet TV are altering this pattern. For example, in January 2005 Mediaset and Telecom Italia (through LA7) launched on T-DVB a pay-TV service for premier league soccer matches based on a system of prepaid cards. At the same time, TF1 — 49 % partner in the D-Free broadcaster — indicated that it may be interested in launching pay channels on its T-DVB multiplex. The pay-TV services are made possible, with the prepaid card system, by the digital interactive technology contained in the decoders that are subsidised by the measure in question.
- (34) Total revenue from the television market in 2005 amounted to EUR 6 851 million, of which some 57 % (EUR 3 885 million) came from advertising and 21 % from the licence fee paid to the RAI and the supply of pay-TV (EUR 1 483 million and EUR 1 437 million respectively). Pay-TV revenue amounted to EUR 1 199 million from subscription fees (up by 26,4 % from 2004) and EUR 238 million from pay-per-view (up by 65 % from 2004), a considerable share of which (EUR 45 million) was revenue from the new DTT services.

II.C. GROUNDS FOR INITIATING THE PROCEDURE

- (35) In the decision to initiate the procedure, the Commission noted firstly that the measure described seemed to meet all

⁽²⁰⁾ See AGCOM's Report under Law No 43 of 24 February 2004, converting Decree-Law No 352 of 24 December 2004 on urgent measures concerning arrangements for the definitive end of the transitional regime of Law No 249 of 31 July 1997.

the criteria of Article 87(1) and could, therefore, be regarded as State aid. In particular, it discriminated between, on the one hand, incumbent terrestrial broadcasters and cable network operators already on the market and, on the other hand, satellite operators and other terrestrial broadcasters which could not operate at the time. The Commission noted that the beneficiaries receive an indirect advantage and asked the interested parties to propose methods for accurately quantifying this advantage.

- (36) The Commission also expressed doubts as to the compatibility of the aid with the EC Treaty. The case in hand seemed not to meet either the exceptions from the general prohibition on aid listed in Article 87(2) or the exception in Article 87(3)(c) of the EC Treaty. Particularly problematic, in the Commission's view, is the fact that the objective pursued by Italy — i.e. the diffusion of open standards for digital television — was reached by causing disproportionate distortion of competition and an unnecessary infringement of the principle of technological neutrality.
- (37) Lastly, the Commission initiated the formal investigation procedure in order to give the Italian Government and interested parties the opportunity to submit their comments on its provisional assessment of the measure described and to provide the Commission with any relevant information.

III. COMMENTS FROM INTERESTED PARTIES

- (38) Generally speaking, both Italy and Mediaset maintained in their comments that the measure does not constitute aid and that, if it were aid, it would be compatible. RAI states that it was forced to act within the limits imposed by its legal obligations and that it could not therefore benefit from the measure. The complainants and ESOA, on the contrary, maintained that the measure constitutes unlawful aid.

III.A. COMMENTS FROM ITALY, MEDIASET AND RAI

- (39) First, Italy and Mediaset refer to the decision by AGCOM ⁽²¹⁾ rejecting a complaint against Article 1(572) of the 2006 Finance Act, i.e. against the measure which replaces the measure in question. The complainant alleged that Article 1(572) of the 2006 Finance Act favoured

⁽²¹⁾ Decision No 21263/06 of 11 May 2006.

decoders distributed by companies linked to Mr Berlusconi's family. The procedure was based on the law on the conflict of interest involving members of Government ⁽²²⁾.

excluded T-System from the beneficiaries because it was not possible to ascertain the existence and the amount of a transfer of resources in its favour.

(40) Comments by Italy more directly related to the content of the decision to initiate the procedure are that the measure does not constitute aid because (a) the beneficiaries do not receive an advantage and (b) there is no distortion of competition. Even if it did constitute aid, the measure would be compatible under the exceptions in Articles 87(2) (a) and 87(3)(b), (c) and (d) of the EC Treaty. Italy agrees that there is no aid to decoder producers and that network operators and broadcasters have to be put on the same footing. Mediaset raises similar issues, although it sometimes uses different arguments.

(43) Second, Mediaset maintains that terrestrial broadcasters and satellite broadcasters are not comparable companies, because the DTT operators are only required to achieve digitalisation and encourage the digital switchover in gradual stages (with simulcast and switch-off) and therefore terrestrial broadcasters are subject to specific public service obligations — with a view to ensuring the availability of terrestrial broadcasting throughout Italy — and to use open technologies. According to Mediaset, the purpose of the scheme was to facilitate the transfer from analogue to digital and to promote the development of open standards in a context where there was a legal deadline set for the compulsory transition from analogue to digital broadcasting — the so-called digital switchover — imposing burdensome costs specific to DTT operators (the cost of infrastructure for Mediaset was very high). Moreover, Media argues that contrary to what is stated in the decision to initiate the procedure, there is no protection against the entry on to the market of new competitors via the acquisition of broadcasting infrastructure (Mediaset quotes the example of H3G which entered the market by acquiring a local broadcaster) and that new entrants do not have to bear the cost of simulcast.

III.A.1. THE MEASURE IS NOT AID

III.A.1.1. *The selective advantage is not certain*

(41) Italy argues that there is no reasonable certainty that the beneficiaries had to bear the costs that are subsidised by the State with the measure in question because there is no proof that the beneficiaries subsidised the purchase of decoders by consumers. Italy argues that, contrary to the Court's judgment in the *Netherlands v Commission* case ⁽²³⁾ cited in point 30 of the decision to initiate the procedure, the beneficiaries did not even have any economic incentive to subsidise consumers because (a) they are the market incumbents and do not have any interest in completing the switchover to digital because they will then face greater competition as consumers with the digital technology will have access to many more competitors; (b) the size of the pay-per-view market was too small to compensate for a possible loss of this type and cannot be the only reason for subsidising consumers' purchase of decoders given the share of revenue from pay-per-view in 2004 and 2005; (c) the deadline set for switch-off was not sufficiently feasible, given that without a certain mass of consumers, no switch-off could take place.

(44) Similarly, RAI maintains that the Commission's position does not take into account the obligations on RAI as the public service television broadcaster, which would reduce the alleged advantages to zero. This is because (i) switchover can be done by RAI (given that it is the public service company) only if the penetration rate of DTT equals that of analogue TV; and (ii) RAI was obliged to choose its investments in the DTT sector in line with its legal obligations, and not following market criteria, since it was obliged to have two multiplexes covering at least 70 % of the population by 1 January 2005, with the aim of rapid digitalisation, helped in this by the decoder subsidies. Total costs were EUR 150 million. Given the timing of the switchover, the fact that RAI transmits only free-to-air programmes, the very small number of viewers and the non-inclusion of the cost of digitalisation in the annual licence fee for 2004, 2005 and 2006, the only costs borne by RAI are the technological costs (frequencies and infrastructure), costs which RAI would have to bear without the subsidy in question, while speeding up digitalisation did not guarantee additional revenue.

(42) Furthermore, it would be impossible to determine the amount of public resources transferred to these beneficiaries. In the case of State aid C-25/2004, which was the subject of Decision 2006/513/EC ⁽²⁴⁾ the Commission

⁽²²⁾ Law No 215 of 20 July 2004.

⁽²³⁾ Judgment of 13 June 2002 in Case C-382/99 [2002] ECR I-5163.

⁽²⁴⁾ See Commission Decision 2006/513/EC of 9 November 2005 on State aid C 25/2004: Financing of the introduction of DVB-T in Berlin-Brandenburg, Germany (OJ L 200, 22.7.2006, p. 14).

III.A.1.2. *Distortion of competition*

(45) First, Italy maintains that terrestrial and satellite operators do not compete on the same pay-TV market because they cover different market segments, namely free-to-air and pay-TV. Furthermore, pay-per-view offers started only in the second half of 2005. The separation of the two markets also holds for the network operators as confirmed by AGCOM in one of its decisions ⁽²⁵⁾, in line with the *RAI/Rami d'azienda* decision ⁽²⁶⁾ and the survey of the television sector by the Competition Authority ⁽²⁷⁾.

(46) In addition, the cost of the decoder has only a marginal impact on the consumer's choice between the two different platforms. The absence of distortion of competition is confirmed by the fact that in the first six half of 2005 Sky's subscriptions increased by 7,4 %.

(47) Similar arguments are put forward by Mediaset, which maintains that the measure is not selective because the aid is granted to consumers and that the selectivity arises from Sky's business choice to use NDS technology. This is what creates the discrimination and enables Sky to charge a subscription fee to recoup the cost of the decoders. If they so wish, all operators can use the technology that entitles them to the subsidies in question.

III.A.2. COMPATIBILITY

(48) As a general comment, Italy emphasises that the Commission acknowledges the benefits of interoperability and that the reason for excluding satellite decoders from the benefit is that when the aid measure was introduced, there were no satellite decoders that offered interoperability. Moreover, following the 2006 Finance Act, which included satellite decoders, Sky did not alter the characteristics of its decoder to benefit from the subsidy.

⁽²⁵⁾ Decision No 163/06/CONS, approval of a programme of measures to foster rational use of frequencies for broadcasting services with a view to the switchover to digital. Published on AGCOM's web site on 29 March 2006.

⁽²⁶⁾ Measure 13137, case No C/6161 of 29 April 2004.- *RAI/Rami d'azienda*.

⁽²⁷⁾ Survey No 23, opened by decision No 12056 of 29 May and closed by decision No 13770 of 16 November 2004.

III.A.2.1. *Article 87(2)(a) of the EC Treaty*

(49) Italy argues that the AGCOM figure of 50 % of households with a decoder by the end of 2006 or 2008 quoted by the Commission in point 55 of the decision to initiate the procedure ⁽²⁸⁾ is low, particularly given that the aim is to push the more expensive interactive decoders. The price reduction due to the economies of scale resulting from the subsidies would mean that poor households could also afford to buy the decoder.

III.A.2.2. *Article 87(3)(b) of the EC Treaty*

(50) The measure would foster a project of common European interest — the switchover — which is part of a transnational programme supported by various Member States, in line with existing case law (C-62/87 and C-72/87, paragraph 22). The exclusion of satellite decoders is explained in the general comment above.

III.A.2.3. *Article 87(3)(c) of the EC Treaty*III.A.2.3.a. *Well-designed aid**Coordination problem*

(51) The mere fact of a legal deadline is not enough to secure switch-off unless demand is stimulated. Consumers would not be willing to make the change-over given that the incumbent terrestrial broadcasters have no interest in subsidising their purchase of a decoder in a situation where most consumers use analogical terrestrial TV.

Subsidising consumers

(52) Subsidising consumers for digital terrestrial services is justified because they do not incur additional costs to watch free-to-air programmes, unlike in the case of satellite TV, which requires consumers to buy satellite dishes and pay a fee for the pay-TV service. In the case of cable, despite additional costs, Italy justified subsidies for decoders

⁽²⁸⁾ In point 55 of the decision to initiate the procedure, the Commission quoted a survey by AGCOM on the availability on the market of affordable decoders. AGCOM had concluded that the impact of the purchase of the decoder on the average household income with or without a public subsidy was small and that the market trend indicated that even without the aid more than 50 % of households would have a decoder by 2006 in the best-case scenario and by the beginning of 2008 in the worst-case scenario.

because these costs are not directly linked to TV services and because, in general, Italy wished to promote the development of broadband.

Increasing competition between platforms

- (53) Italy disagrees with the Commission that the measures in question have an impact on competition between platforms but considers that ultimately the new digital platform will increase competition between the different segments of the television market to the benefit of consumers.

Externalities

- (54) The Commission's argument that the incumbents already receive compensation for the switchover because digital technology allows greater transmission capacity at lower transmission costs does not take into account the true costs/benefits of the switchover, given that incumbent network operators holding more than one digital licence must give access to 40 % of their bandwidth to content providers with which they do not have ownership links.
- (55) The main beneficiaries of the switchover (the entrants) differ from those who bear the cost of the switchover (consumers and, above all, the incumbents). Incumbents are not compensated for increased competition by a cost reduction and therefore they have no incentives to switch-off. Indeed, if there is in fact any advantage, this should be seen as compensation for the costs incurred by incumbents. Mediaset puts forward the same argument.
- (56) Mediaset also argues that simply obliging terrestrial operators to bear the cost of the decoders, on top of the other switchover-related costs, would not allow it to achieve sufficient coverage and would leave Mediaset subject to free riding by other companies because consumers could use open technology decoders to watch competing channels.

Promoting innovation

- (57) When the measure was enforced, the interactivity of satellite decoders was very limited due to the use of a proprietary technology without open API standards. Italy emphasises that up to now there have been no interoperable satellite decoders on the market even after the amendments to the 2006 Finance Act. The need to promote the availability of interactive services is also highlighted by Mediaset.

III.A.2.3.b. **Avoiding unnecessary distortions of competition**

- (58) Italy stresses that the pay-per-view TV market is different from the satellite market because the two products are not the same. In any case, the aid in question helps new entrants to access the pay-TV market, which should mean increased benefits for consumers.
- (59) Mediaset maintains that there have been no unnecessary distortions of competition because (i) discrimination is simply the result of Sky's business choices; (ii) terrestrial television carries local channels, whereas 80 % of local programmes are not carried by satellite TV because local channels' revenue is not sufficient to support the cost of transmission (satellite is not comparable to free-to-air broadcasting); and (iii) there is only market failure as regards DTT decoders and not satellite decoders. This is because satellite is based on a subscription fee system and can recoup the costs of providing decoders to its own customers and because Sky, as a monopolist, is not subject to the free riding problem.

III.A.2.4. **Article 87(3)(d) of the EC Treaty**

- (60) In Decision 2006/513/EC⁽²⁹⁾, the Commission stated that the aid was not compatible under Article 87(3)(d) of the EC Treaty because it was not related to particular cultural content, nor targeted at small local operators which would otherwise be absent from the terrestrial platform. In Italy there are many terrestrial local broadcasters that broadcast a clearly identified cultural product which Italy wants to protect. Given that satellite is not well suited to providing local services — a view also shared by experts working for the Commission — satellite decoders should not be entitled to the subsidy.

III.A.3. RECOVERY

- (61) The Commission should not impose recovery of the aid when this is against a general principle of Community law. This is the case when it is clear from the outset that recovery is impossible⁽³⁰⁾. In the case at issue, it is impossible to determine which broadcaster benefited from a transfer of State resources and how much, so that the Commission should not call for recovery of the aid. Italy also argues that broadcasters had no means of opposing the subsidy so that, even if the beneficiaries had acted diligently, they could have not refused it. This type of reasoning was followed by the Commission in Decision 2006/513/EC⁽³¹⁾.

⁽²⁹⁾ See footnote 24.

⁽³⁰⁾ Case C-75/97 *Belgium v Commission* [1999] ECR I-3671.

⁽³¹⁾ See footnote 24.

III.B. COMMENTS FROM SKY ITALIA, ESOA AND EUROPA7

- (62) Sky Italia, ESOA and Europa7 agree with the Commission that the measure constitutes aid for DTT operators. Furthermore, they do not contest the preliminary conclusion that the measure does not constitute aid for producers of decoders. The two complainants, in particular, do not disagree with this conclusion, even though Sky Italia had stated the opposite in its complaints.
- (63) In its analysis, Sky Italia focuses on the alleged positive effects in favour of DTT operators, mainly Mediaset and Telecom Italia. According to Sky, at the time of the Telepiù/NewsCorp merger, the Commission had listed various barriers to the entry and expansion of DTT operators that called for remedies⁽³²⁾. Contrary to the Commission's assumptions, as a result of the subsidies, new entrants — which were in fact incumbents on the analogue TV market — brought about a rapid expansion in DTT.
- (64) The subsidies in question provided Mediaset and Telecom Italia with a threefold advantage: first, since access to DTT decoders and to DTT broadcasters are complementary, the reduced price of decoders led to increased demand for both decoders and broadcasters — indeed it is only to be expected that DTT broadcasters would install a base for their platform, just as Sky did, incurring costs that they have not yet recouped — and the subsidies helped DTT operators to convince consumers to change over to their new television offer. The measure also helped to solve the free-riding issue by creating a customer base.
- (65) Second, according to a study by the Global Equity Division of Deutsche Bank⁽³³⁾, subsidies would allow Mediaset a low risk/low cost way of entering pay-TV. Subsidies reduced the cost of financing for Mediaset and Telecom Italia: (a) directly, since in order to achieve the same effect as achieved through the subsidies, DTT companies would have had to invest EUR 100 million, i.e. half the total cost of the infrastructure investment borne by Mediaset by January 2005; and (b) indirectly, because they dispelled the uncertainty about the success of the switchover to digital.
- (66) Finally, given the 'duality' of the market, a broad consumer base that allows attractive content at reduced price also gives an advantage in the advertising market.
- (67) Sky argues that these advantages are selective in that Sky's commercial freedom was limited because its growth rate was low and, as a consequence, its capital costs increased. Sky provides figures to support the argument that the increase in DTT decoder sales — sales subsidised by the State — had a negative impact on sales of its Premium Sports package.
- (68) Similarly, Europa7 maintains that there was an advantage to broadcasters and other operators in the DTT sector. Europa7 quotes AGCM, which acknowledged that the measure has had the following effects on the market: half of the decoders were bought using the subsidy; the penetration of DTT doubled in the first half of 2005 thanks to DDT pay-TV, whereas pay satellite TV increased by only 1 percentage point.
- (69) The advantage is selective in that the subsidy did not favour access to Europa7's market, which has not yet been allocated the transmission frequencies, but simply allowed Mediaset and RAI to saturate demand and investment and extend their market power to digital TV.
- (70) Secondly, Europa7 maintains that there are no general interest reasons that justify the measure because (i) incentives for consumers to buy DTT decoders are linked to access to commercial activities; (ii) the switchover has already been delayed and (iii) although the measure is pro-competitive in the sense that it limits Sky's market power, it nonetheless helps incumbent oligopolist operators on the analogue TV market, who were granted licences.
- (71) Finally, Europa7 emphasises that recovery is the logical consequence of the elimination of the aid and that difficulties in the quantification of the aid do not justify its non-recovery. If it proved impossible to quantify exactly the amount of aid, Italy could pay compensation to competitors.

⁽³²⁾ The main barriers were: (a) a regulatory framework that would allow DTT providers to be operational only as of 2007; (b) the requirement to upgrade transmission networks at significant cost; (c) higher transmission costs for DTT than for satellite; (d) the need to roll out a large number of DTT decoders; (e) need for regulators to modify the regime applicable to national frequencies in order to implement simulcast; and (f) the risk that a significant portion of the population may not be covered by the DTT signal.

⁽³³⁾ 'Mediaset, the beautiful game', 18 January 2005.

(72) ESOA maintains that the satellite platform has been put at a disadvantage — even if it is in a better position as regards use of the frequency spectrum for TV broadcasting — and that satellite operators have borne the entire cost of the introduction of digital transmission. ESOA therefore considers that the subsidies in question, which ultimately favour DTT, are an illegal aid out of proportion to the market failure they claim to address.

III.C. COMMENTS FROM ANIE

(73) ANIE did not have specific observations on the measure in question, but it submitted the text of a complaint which ANIE itself sent to AGCM against Sky Italia for abuse of a dominant position. AGCM has not yet taken any decision.

(74) Allegedly, Sky was requested by certain producers of decoders to issue licenses for certain aspects of NDS technology for encrypting satellite signals, of which Sky has exclusive ownership and use in Italy. These licenses are essential for producing decoders with a so-called 'common interface', i.e. which can decrypt both terrestrial and satellite digital signals if NDS technology is used.

(75) In 2005 Sky started codifying its message exclusively with the NDS system. The owner of this technology for the Italian market is a subsidiary of the Newscorp group, i.e. Sky's parent company. According to Sky, the aim of this changeover to NDS is to combat piracy. This type of technology is a proprietary, closed technology because unlike common interface decoders, access to NDS decoders requires provision of access to the technology or to certain components of the decoders.

(76) Sky rents decoders containing this closed technology to its subscribers. When it decided to change to NDS technology, Sky accordingly replaced all its subscribers' decoders.

(77) Sky refuses to share its technology with producers of common interface decoders on the grounds that the final arrangement would not be sufficiently piracy-proof. According to ANIE, Sky's claims of possible piracy are unfounded and the reason it uses proprietary decoders is to defend its monopolistic position in the pay-TV market. ANIE claims that as a result of this choice, Sky can capture its customers and also limit market possibilities for the

producers of decoders and, consequently hinder technological developments in this sector⁽³⁴⁾.

III.D. REPLY BY ITALY

(78) Italy did not comment on the third parties' submissions.

IV. LEGAL ASSESSMENT

IV.A. STATE AID ASSESSMENT PURSUANT TO ARTICLE 87(1) OF THE EC TREATY

(79) The Commission has examined whether the measure in question can be characterised as State aid within the meaning of Article 87(1) of the EC 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.

IV.A.1. STATE RESOURCES

(80) The measure in question is contained in the 2004 and 2005 Finance Acts and funded from the State budget. It is therefore clearly imputable to the state and involves the use of state resources, as already stated in the decision to initiate the procedure. The Commission therefore confirms its previous assessment that this state resources criterion is met. Neither Italy nor the third parties contested this conclusion.

IV.A.2. ECONOMIC ADVANTAGE

(81) In the decision to initiate the procedure, the Commission maintained that, even if the direct beneficiaries of the grant are final consumers, the measure may benefit indirectly (i) the television broadcasters operating on digital terrestrial and cable platforms; (ii) the operators of the networks that carry the signal; and (iii) the producers of decoders.

(82) In the decision to initiate the procedure the Commission established that an indirect advantage may fall within

⁽³⁴⁾ ANIE argues that Sky's behaviour hinders technological development in that it does not allow the development of decoders using different conditional access systems or other possibilities, such as those offered by open decoders. In particular, Sky hinders the technological development of more advanced common terrestrial and satellite decoders.

Article 87(1) EC and referred to case-law in this respect ⁽³⁵⁾. As for the broadcasters using T-DVB/C-DVB, the Commission considered that the measure in question helps those broadcasters to create and develop their audience, by relieving them of a cost that they would have normally borne had they wanted to develop their digital audience in the same way and also reduces the costs that the broadcasters emitting in simulcast would normally have to bear. As for the network operators, the advantage consists of the potential increased demand that can be generated by the broadcasters using the 'privileged' platform. Finally, the Commission, after acknowledging that the selective advantage cannot be easily measured, invited all parties to provide comments on the possible quantification of, or methodology for estimating the advantage accrued to the various indirect beneficiaries of the measure.

- (83) After receiving comments from the interested parties, the Commission, for the reasons given below, remains of the opinion that the measure entails a selective advantage in favour of the terrestrial and cable pay-TV operators.

Broadcasters

- (84) In the case of broadcasters, this advantage mainly involves the possibility of developing an audience, in particular for expanding pay-per-view activities. Without the measure, the digital audience would not have developed at the same pace, unless broadcasters themselves had financed the reception costs of their own potential viewers. Developing an audience is a crucial part of the business for a pay-TV company or a broadcaster that wishes to develop its pay-TV services as the number of customers is crucial for generating revenues and for setting low prices for the pay-per-view offers. This can also be seen from the costs incurred by satellite operators in building up this client base and, once they have switched to digital technology, the further costs borne by them to keep this base ⁽³⁶⁾. For example, one of the complainants — Sky Italia — claims that it provided its subscribers with a free decoder and satellite dish.

- (85) It should also be added that the main effect of the measure was to reduce the price of decoders offering interactivity, bringing it more into line with the price of 'zappers'. The

⁽³⁵⁾ Case C-382/99 *Netherlands v Commission* [2002] ECR I-5163 and Case C-156/98 *Germany v Commission* [2000] ECR I-6857, points 24 to 28.

⁽³⁶⁾ This is not the case only in Italy. By analogy, in point 371 of its investigation on BSKyB (CA98/20/2002), the Office of Fair Trading describes the relevance of customer acquisition for BSKyB.

type of decoder being subsidised here allows consumers to take advantage of the standard free-to-air supply of channels currently available in the analogue mode and of the offer of pay-TV and interactive services by a whole range of broadcasters and content providers. Interactive services can include e-government services accessible through a 'smart card' ⁽³⁷⁾. The subsidy therefore allows consumers to enjoy a much wider offer at the same price as a previously available, much simpler decoder giving access to a smaller number of services.

- (86) Accordingly, the measure has created an incentive for consumers to switch from the analogue to the digital terrestrial mode. This has been to the advantage of broadcasters, especially as regards the services that were not available in the analogue mode. In other words, the government subsidy has allowed the T-DVB broadcasters to avoid the cost of a business practice (subsidising decoders) that is widespread on the market and instrumental in developing an audience.

- (87) The Deutsche Bank document ⁽³⁸⁾, which illustrates to investors the profit opportunities of buying Mediaset shares, indirectly confirms the relevance of this argument. The research division of Deutsche Bank demonstrates in the paper that because of its special position, favourable market conditions, its market strategy and *subsidies to consumers*, Mediaset can develop DTT as a low risk/low cost way of entering the pay-TV market.

- (88) Another advantage to incumbent terrestrial operators is that the measure allows them to consolidate their early presence on the digital terrestrial platform in terms of image branding and customer retention. This advantage refers to the new services — in particular pay-TV services — that are offered on the digital platform. The measure in question can therefore reinforce the effects of the existing legislation, i.e. the fact that the main broadcasters control network operators and that a digital licence can only be obtained in connection with an existing analogue licence. Incumbents can easily transform their analogue licences into digital ones, whereas entrants need to purchase analogue licences on the market before being able to transmit digitally. The time disadvantage suffered by new

⁽³⁷⁾ The 'smart-card' referred to here is a device that can identify the user and allows on-line transactions to be made.

⁽³⁸⁾ 'Mediaset, the beautiful game', (see footnote 33).

entrants can be further compounded by measures, like the one in question, which increase the audience of incumbents.

- (89) The above arguments do not apply to services already provided on the analogue platform and with which consumers are familiar. Moreover, early transition to the digital platform is unlikely to have increased to any significant degree the total number of viewers (analogue plus digital) for those programmes/services.
- (90) The arguments put forward by Italy and Mediaset that there is no advantage because without the State subsidy the beneficiaries would not have subsidised the purchase of decoders by consumers is not convincing. If consumers had not been willing to purchase open decoders without the subsidies in question, or if the size of the pay-per-view market were too small, the effect of granting the subsidy is precisely to create a customer base for the terrestrial broadcasters which would not have otherwise developed. If terrestrial broadcasters had not subsidised the purchase of interoperable decoders — the only decoders that currently allow pay-TV via pay-per-view with the prepaid card system — for fear of free riding by other broadcasters, this would have held up the launch of pay-TV services. The measure has therefore helped terrestrial broadcasters to overcome this externality and create a business opportunity.
- (91) Furthermore, the Commission disagrees that the beneficiaries' readiness or interest in mimicking the effects of the aid, even without the aid, are relevant criteria for deciding whether or not the measure provides an advantage. In fact, in the case in question, the advantage to the terrestrial broadcasters is simply the result of an effect of the measure. Once the measure is put in place the beneficiaries' behaviour is simply aimed at maximising profits in the situation thus created, by achieving an expansion of their business activity that would not have been possible without the subsidy. Moreover, this is clearly the case here, as according to AGCOM's Annual Report ⁽³⁹⁾ the increase in the revenue from pay-TV offers in 2005, especially for digital terrestrial pay-per-view, was very high, although still at a low level in absolute terms.
- (92) According to established case-law, the effects of the measure are decisive and relevant in determining the existence of an advantage and, in the case of indirect

beneficiaries, this was confirmed by the Court in its judgement in the case *Germany v Commission* ⁽⁴⁰⁾.

- (93) The Commission also disagrees with the other arguments put forward by Italy and the other parties that there is no advantage. First, the Commission disagrees with Italy's argument that there is no advantage because it is impossible to determine the amount of public resources transferred to the beneficiaries. In Decision 2006/513/EC ⁽⁴¹⁾ quoted by Italy, the Commission did not deny the presence of an indirect advantage in favour of certain beneficiaries (the network operators) it simply excluded them from the recovery obligation since it was not possible to establish whether there had been a transfer of State resources.
- (94) The Commission also disagrees with the arguments put forward by Mediaset and RAI which maintain that terrestrial broadcasters and satellite broadcasters are not in a comparable situation because terrestrial operators must achieve digitisation within a legal deadline and have to bear the cost of simulcast — hence the measure in question does not provide a selective advantage.
- (95) The main reason for imposing digitisation on terrestrial operators is that terrestrial transmission occupies a very high value portion of the frequency spectrum ⁽⁴²⁾. Essentially, the large amount of frequency needed for analogue transmission has created a technical barrier to entry by new competitors onto the terrestrial transmission market, which has helped preserve the duopoly of RAI and Mediaset. This intensive use of a scarce resource — the frequency spectrum — by terrestrial operators justifies the difference in the obligations that have been imposed on them compared with operators on other platforms. Broadcasters are not entitled to use the frequencies but they do expect the national regulatory authorities to allocate and assign radio frequencies on objective, transparent, non-

⁽⁴⁰⁾ Case C-156/98 (see footnote 35). In this case the indirect beneficiary would probably not have acted without the state intervention: the beneficiaries are the companies invested in by the investors that receive the fiscal advantage, and it is possible that there are cases in which such companies do not even act in order to receive the advantage. As the Court makes clear in points 25 to 28 of its judgment, a measure constitutes aid where the origin of the advantage indirectly conferred on undertakings is the renunciation by the Member State of tax revenue which it would normally have received, inasmuch as it is this renunciation which has enabled investors to take up holdings in those undertakings on conditions which are more advantageous. The fact that investors take independent decisions does not mean that the connection between the tax licence and the advantage given to the undertakings in question has been eliminated since, in economic terms, the alteration of the market conditions which gives rise to the advantage is the consequence of the public authorities' loss of tax revenue.

⁽⁴¹⁾ See footnote 24.

⁽⁴²⁾ As already explained in recital 9, digital transmission is more efficient in the use of the radiofrequency spectrum.

⁽³⁹⁾ AGCOM's Annual Report, 30 June 2006.

discriminatory and proportionate criteria⁽⁴³⁾. Finally, the measure is not designed so that it is proportional to the costs of switchover. Firstly, it does not seem to the Commission that a consumer subsidy can easily be devised so that it is proportional to the costs possibly incurred by companies in the switchover process. Secondly, the burden of proof of the proportionality of the measure lies with the Member State. Italy, however, has not provided a clear estimate of the costs of switchover and nor has it given precise indications of the proportionality of the benefits derived by the broadcasters from the measure.

Network operators

(96) To the extent that broadcasting requires the use of transmission services provided by network operators, the development of digital terrestrial TV could also provide an indirect advantage to network operators. It can be considered that a broadcaster's willingness to pay for transmission services depends, *inter alia*, on the additional revenue that can be achieved through its presence on a particular platform, which, in turn, depends on the number of viewers present on that platform. Since the measure has an effect on the numbers of consumers for digital terrestrial television services, there might also be an indirect positive impact on network operators.

(97) It is not possible, however, to be certain that the measure has already influenced the choice of broadcasters as regards their presence on the various transmission platforms or to quantify the price which broadcasters would have been prepared to pay in the absence of the aid. Moreover, ownership links between broadcasters and network operators in the digital terrestrial platform means that distinguishing between the two types of beneficiaries is less relevant — a point on which Italy also agrees. If, however, the measure in question were repeated over time and consistently favoured the change-over by current analogue viewers to the digital terrestrial platform, it would affect the size of audiences on the different platforms to a point where it would also influence the choice of broadcasters as regards their presence in a given platform. Hence, a possible repetition of the measure would give the digital terrestrial network operators an advantage over the satellite network operators.

(98) Finally, there are network operators who do not simply sell transmission services to the broadcasters but market the provision of TV services directly to the public. This is the

case, for instance, with the 'triple play'⁽⁴⁴⁾ cable operator Fastweb, which is also a pay-TV provider. In this case, the network operator enjoys an advantage similar to that enjoyed by broadcasters, as described in recitals 84 to 88.

Producers of decoders

(99) As already pointed out in the decision to initiate the procedure, the indirect advantage for decoder producers is the possibility of selling a larger amount of decoders than they would have done without the measure. The effect of the subsidy is basically to make the decoders targeted by the measure cheaper for consumers. This allows the producers either to increase their sales without lowering the price of the product or to raise the price without losing customers.

IV.A.3. SELECTIVITY

(100) The advantage that the measure provides to terrestrial broadcasters and cable pay-TV operators is selective. Not all broadcasters can profit indirectly from the measure. There are broadcasters that are present only on the satellite platform, which will not be able to take advantage of the increased number of digital TV viewers brought about by the subsidy.

(101) There will also be a selective advantage for the decoder manufacturing sector.

IV.A.4. DISTORTION OF COMPETITION

(102) *Broadcasters*

(103) In the decision to initiate the procedure, the Commission considered that the advantage granted to broadcasters and operators of terrestrial networks to be detrimental to broadcasters using different technological platforms or broadcasters that cannot transmit at the moment.

(104) DTT broadcasting does not only compete with other free-to-air analogue offers but also with pay-TV: the aid allows the T-DVB and C-DVB operators to enter the pay-TV markets at a lower cost and to compete with existing operators (such as Sky Italia). This is confirmed by the conclusions of the AGCOM Report⁽⁴⁵⁾, according to which the subsidy is decisive in developing the audience of broadcasters using T-DVB and by AGCM's investigation which stresses the importance of the principle of technological neutrality⁽⁴⁶⁾.

⁽⁴⁴⁾ 'Triple play' is a marketing term for the joint provision of high-speed Internet, telephone and television services over a broadband connection.

⁽⁴⁵⁾ See point 88(d) of AGCOM's Report (see footnote 20).

⁽⁴⁶⁾ Italian Competition Authority: Conclusion of fact-finding investigation into sale of television commercials, Rome, 6 December 2004.

⁽⁴³⁾ See Article 9 of Directive 2002/21/EC of the European Parliament and of the Council of 7 March 2002 on a common regulatory framework for electronic communications networks and services (Framework Directive).

- (105) After receiving the comments from Italy and the interested parties, the Commission maintains its view that the selective advantages provided by the grant can distort competition. First, the arguments that terrestrial and satellite operators do not compete on the same pay-TV market and that the cost of the decoder has only a marginal impact on the consumer's choice between the two different platforms are disputable. Hence the conclusion implied by these arguments, i.e. that the measure does not distort competition, must be rejected.
- (106) For the application of Article 87(1) it is sufficient that aid threatens to distort competition by granting a selective advantage. Even if the pay-TV digital terrestrial offer is for the moment not comparable with the pay-TV offer available on satellite, either in terms of type of service (pay-per-view vs. monthly subscriptions) or in terms of economic size (satellite TV collected almost 95 % of revenues from subscribers in 2005), there is a certain degree of substitutability between the two. Once the digital terrestrial platform has successfully launched and established pay-TV services — also thanks to the subsidised decoders — it will be able to compete with similar services provided on alternative platforms.
- (107) This is confirmed by developments in other Member States. For example, in the UK, in the investigation into BskyB quoted above, the Office of Fair Trading came to the conclusion that live Football Association Premier League games were a single relevant market across television platforms. It is therefore clear that, depending on the state of development of pay-TV markets, the television offer on the digital terrestrial platform may be a competitor to the one on satellite.
- (108) In addition, the subsidies came at a critical point in time, i.e. when many analogue terrestrial TV viewers must face the transition to digital TV and have the choice between investing in the equipment for receiving satellite or terrestrial transmissions. By lowering the cost of the investment in the equipment for terrestrial TV (the decoder), the subsidies have a clear impact on this choice. In view of the costs of switching between platforms once the choice is made, the subsidies might also have a rather prolonged distortion effect.
- (109) It should also be recalled that, in the AGCM's measure ⁽⁴⁷⁾ in which it assessed the existence of possible conflict of interest in order to decide whether the subsidy for the decoders in question caused a conflict of interest in favour
- of companies owned by the Prime Minister, it examined the pay-TV market rather than emphasising the market separation between terrestrial and satellite television. In point 52, it stated that Mediaset, Telecom Italia, Sky and Fastweb could be considered potential competitors on the pay-TV market, despite the different type of offer by pay-TV.
- (110) Nor is the argument put forward by Italy and Mediaset that the selective nature and competition-distorting effect of the measure are the result of Sky's business choice to use NDS acceptable, because the wording of the legislation excluded satellite decoders from the measure, even if satellite operators had wanted to use decoders with the relevant open technology. Nor is it relevant that, after the amendments made to the 2006 Finance Act to allow the subsidising of all 'interoperable' decoders irrespective of the platform, Sky Italia did not switch from closed technology decoders to decoders that could be subsidised. In fact, this strategy could depend on many factors, such as previous investments by the company or opting to await the Commission's decision on the compatibility of this new measure.
- (111) Indirect confirmation that access to the pay-TV market at the reduced cost is distorting competition is given in Deutsche Bank's research (p. 18 *et seq.*), which analyses the financial scenarios for Mediaset resulting from the development of transmitting soccer matches on pay-per-view TV as a function of the customers that would not be acquired by Sky Italia affecting the growth rates of DTH pay-TV. Furthermore, the figures provided by Sky Italia — aimed at showing that the growth rate of Sky Italia subscribers is influenced by the sale of subsidised decoders — also tend to support the view that there is a degree of competition within the pay-TV market.

Network operators

- (112) The distortion of competition does not only occur at the level of broadcasters but possibly also at the level of network operators. In December 2005, there were some 4,8 million satellite TV viewers in Italy but only 3,5 million subscribers to Sky. The remaining 1,3 million viewers were therefore interested in the free-to-air offer available on satellite. This is an indication that for consumers, free-to-air satellite can be an alternative to digital terrestrial and cable TV and can equally serve the purpose of facilitating the switchover to digital TV. By excluding the satellite platform

⁽⁴⁷⁾ See footnote 5.

from the subsidies in question and by targeting them selectively at digital terrestrial and cable decoders, the measure may well push viewers towards broadcasters that use terrestrial and cable network operators rather than the satellite operators.

IV.A.5. EFFECT ON TRADE BETWEEN MEMBER STATES

(113) The broadcasting and network services markets are open to international competition. By selectively favouring certain broadcasters or network operators, competition is distorted at the expense of economic operators that could be from other Member States. The examples of satellite operators, or of one of the complainants, Sky TV, are very clear in this respect. The measure in question therefore favours certain companies with respect to competitors in the common market.

(114) The conclusion by the Commission that distortion of competition between television broadcasters and between network operators is capable of affecting trade between Member States was not challenged by any of the interested parties. The Commission therefore confirms the conclusion of the decision to initiate the procedure that the measure affects trade among Member States.

IV.A.6. CONCLUSION

(115) In summary, although the main beneficiaries derive only an indirect benefit from the measure in question, the Commission considers that the measure constitutes State aid for pay-TV operators using T-DVB, which above all allows them to create a customer base and thus provide new services and enter the pay-TV market at a low cost. This also applies to cable operators that provide pay-TV services and are therefore pay-TV operators.

(116) The Commission deems that the measure in question constitutes indirect aid because the aid scheme's main effect has been to provide an indirect advantage to those beneficiaries indicated, despite the fact that they did not have a direct link with the companies producing the subsidised good.

(117) The presence of State aid in the case at issue is not called into question by the possible application of the Altmark judgment⁽⁴⁸⁾ in respect of a possible compensation for public service costs. None of the four criteria (definition and assignment of the service of general economic interest, ex-ante determination of parameters for compensation, no overcompensation and choice of efficient provider via tender or estimate of the net additional costs of the average well-run company) is met.

(118) Therefore RAI's comment that the measure does not constitute aid for RAI because it was obliged to make specific investments in digital television because of its public service mandate cannot be accepted.

(119) As regards digital terrestrial network operators, the Commission — despite considering that the measure in question has potentially distorted competition in their favour — is not in a position to state with reasonable certainty that the advantage was already present in the period of application of the measure. It therefore concludes that these operators are not the beneficiaries of State aid under Article 87(1) EC.

(120) Finally, the Commission notes that in the decision to initiate the procedure it identified a third category of possible indirect beneficiaries of the measure in addition to television broadcasters and network operators, namely producers of decoders.

(121) In the decision to initiate the procedure, the Commission doubted that the measure constituted aid for producers of decoders, since the subsidy is granted to decoders that incorporate the MHP standard, i.e. an open API that is freely available to any manufacturer. The aid is directed at consumers who can choose from among all manufacturers' decoders; it therefore seemed that the aid did not selectively favour any type of producer of decoders on the basis of the place of production. Nor did there seem to be manufacturers that specialised in the production of the subsidised decoders and that could have been favoured over producers of other models. Furthermore, it did not appear that manufacturers of decoders competed with operators in other sectors that could not benefit from the measure. Finally, the measure being examined did not seem to seek, through its purpose or general structure, to create an advantage for manufacturers of decoders.

(122) On the other hand, the Commission notes that producers of decoders benefit from a sectoral advantage that cannot be enjoyed by other sectors of the economy and that creates a distortion in the allocation of resources in the economy. Even though none of the comments received in the context of the decision to initiate the procedure suggests the existence of aid for producers of decoders, the Commission considers that the existence of distortion of competition at their level cannot be entirely ruled out.

(123) However, the Commission also considers that, in this particular case, it is not necessary to determine whether or not the measure constitutes aid for the producers of decoders within the meaning of Article 87(1) EC. The

⁽⁴⁸⁾ Judgment of 24 July 2003 in Case C-280/00 *Altmark Trans GmbH* [2003] ECR I-7747, points 88 to 94.

indirect effect of the measure, in terms of increase in the sale of decoders, is inherent in whatever initiative the public authorities decide to take in favour of the development of digital television, even the most technologically neutral. As explained in section IV.B below, if aid to producers of decoders were present, the Commission would consider it compatible under Article 87(3)(c) EC.

would have a decoder by 2006 and in the worst-case scenario by the beginning of 2008 ⁽⁵⁰⁾.

IV.B. COMPATIBILITY ASSESSMENT

(124) In the decision to initiate the procedure, the Commission expressed doubts as to whether the measure in question is an aid measure compatible with the single market on the basis of Article 87(2)(a), Article 86(2) and Article 87(3)(c), after having excluded the application of the three exceptions in Article 87 of the EC Treaty to the case in point. In their comments, however, Italy and Mediaset put forward arguments to counter the Commission's objections in the decision to initiate the procedure, stating that the measure is compatible on the basis of Article 87(2)(a) and Article 87(3)(c) and Italy stressed that, in its view, the exceptions provided for in Article 87(3)(b) and Article 87(3)(d) apply in the present case. After receiving the comments of Italy and the interested parties, the Commission maintains its view that the aid in object is not compatible with the common market, for the reasons set out below in this Decision.

(126) The argument by Italy that the AGCOM figure of 50 % of households with a decoder by the end of 2006 or 2008 is low given the higher cost of interoperable decoders does not change the Commission's assessment, since Italy has not presented any argument to prove that the aid is designed only for the population groups that need it, nor that the entire population needs this aid.

(127) Likewise, the argument that the measure would have an indirect effect on poor households as a result of the economies of scale brought about by a reduction in prices cannot be accepted by the Commission for two reasons. First, the exceptions to the general rule of incompatibility of the aid with the common market must be interpreted narrowly. The same holds for the notion of aid of a social character, which must be interpreted as aid solely and directly for the disadvantaged sections of the population. Second, accepting the argument proposed by Italy would be tantamount to accepting the argument that aid given to the entire population has a social character as it would also help the population groups in need of the aid. Adopting this approach would imply accepting that all indirect aid provided via consumers or investors is compatible aid, thereby circumventing the restrictive nature of the exceptions from the general ban on State aid.

(128) In short, it seems that the measure does not have a social character and that the exception on the basis of Article 87(2)(a) EC is not applicable.

IV.B.1. ARTICLE 87 (2) (A)

(125) In the decision to initiate the procedure, the Commission had argued that the term 'social character' should be interpreted narrowly and that therefore, according to Commission practice, this term refers to aid addressing the needs of underprivileged population groups and referred to the example of the Guidelines on State aid in the aviation sector ⁽⁴⁹⁾, section III.3, where aid with a social character must in principle only cover specific categories of passengers. The Commission argued that in the case of this measure, the law does not contain any reference to the social or economic status of the beneficiary. It referred to AGCOM's survey on the availability on the market of decoders at an affordable price which seemed to suggest that not the whole population is in need of the aid in order to switch to digital TV — the market trend was such that in the best-case scenario more than 50 % of households

IV.B.2 ARTICLE 87(3)(B) OF THE EC TREATY

(129) In the decision to initiate the procedure, the Commission considered that the exception provided for in Article 87(3)(b) did not apply to the aid in question. Yet, in its submissions Italy argues that as the switchover is a project of common European interest as part of a transnational programme backed by various Member States, the waiver in Article 87(b)(3) should apply in line with the Court of Justice ruling in *Exécutif régional wallon and SA Glaverbel v Commission* ⁽⁵¹⁾.

⁽⁵⁰⁾ See AGCOM's Report, points 50 to 56.

⁽⁵¹⁾ Judgment of 8 March 1988 in joined cases C 62/87 and C 72/87 *Exécutif régional wallon and SA Glaverbel v Commission* [1988] ECR I-1573.

⁽⁴⁹⁾ OJ C 350 1994, p. 5. See Section III.3.

(130) In these two cases, the Walloon regional government supported Glaverbel, a company investing in high technology areas such as the development of thin-layer photovoltaic cells, which was part of the European programme for research and development in information technologies (ESPRIT). On this basis, the Walloon regional government stated that the aid was compatible in line with the exception provided for by Article 87(3)(b). The ESPRIT programme was set up by the European Community. The Court maintained that the Commission had exercised its discretion on the matter and that the parties had not proven that the measure contributed to a project of common European interest.

(131) In this case, the Commission does not consider that the steps taken by Italy to promote the sale of decoders qualify for the exception provided for by Article 87(3)(b). The measure is an individual initiative of a Member State, which, as explained further on in this Decision, causes an unnecessary distortion of competition. It cannot be seen as part of a well-identified project agreed or coordinated with other Member States in such a way as to exclude adverse effects on trade and competition and to ensure a common European interest. As regards the comment by Italy that there is Community interest in completing the switchover and that an increasing number of Member States support such an aim, this argument will be addressed in the following section, which discusses the possible grounds for compatibility under Article 87(3)(c).

IV.B.3 ARTICLE 87(3)(C) OF THE EC TREATY

(132) In the decision to initiate the procedure the Commission stated that it was not convinced that the aid to broadcasters could be deemed compatible under Article 87(3)(c) EC. The Commission maintains this opinion even after having received the comments of the interested parties.

(133) In order for aid to be compatible under Article 87(3)(c) it must pursue an objective of common interest in a necessary and proportionate way. In particular, the measure should be assessed in the light of the following questions:

(a) Is the aid measure aimed at a well-defined objective of common interest?

(b) 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:

(i) is the aid measure an appropriate instrument, i.e. are there other, better placed instruments?

(ii) is there an incentive effect, i.e. does the aid change the behaviour of firms?

(iii) is the aid measure proportional, i.e. could the same change in behaviour be obtained with less aid?

(c) Are the distortions of competition and effect on trade limited, so that the overall balance is positive?

IV.B.3.1. *Objective of common interest*

(134) In the decision to initiate the procedure the Commission maintained that the digital switchover has great advantages — a more efficient frequency spectrum usage and increased transmission possibilities — leading to new and better quality services and to wider consumer choice. Accordingly, in the decision to initiate the procedure the Commission considered that the transition from analogue to digital broadcasting and the diffusion of open standards for interactivity were to be considered objectives of common interest. Italy agreed with the Commission in its submission. Europa7, however, reiterated comments which had been made by Sky Italia in its complaint and stressed that there was no general interest at stake because, at present, the purchase of digital decoders was linked to purely commercial activities and that the benefit from the switchover had already been put off to 2012.

(135) The Commission disagrees with Europa7. First, as it stated in the decision to initiate the procedure, the Commission actively supports the digital switchover and it has underlined these advantages in the eEurope 2005 Action Plan, in the two communications on the digital switchover⁽⁵²⁾ and its communication 'e2010 — A European Information Society for growth and employment'⁽⁵³⁾. Regulation should neither impose nor discriminate in favour of the use of a particular digital platform — i.e. it should respect the so-called principle of 'technological neutrality' but, as stated in Directive 2002/21/EC⁽⁵⁴⁾, intervention targeting at correcting market failures that are specific to one platform can be envisaged. In the end, the platforms that offer the greatest benefit to consumers should prevail.

⁽⁵²⁾ COM(2003)541 final and COM(2005)204 final, (see footnote 7).

⁽⁵³⁾ Communication from the Commission to the Council, the European Parliament, the Economic and Social Committee and the Committee of the Regions, COM(2005)229 final, 1 June 2005.

⁽⁵⁴⁾ See footnote 14. See recital 18.

(136) In the communication on interoperability of digital interactive television services⁽⁵⁵⁾ the Commission also stresses the relevance of 'interactivity' and 'interoperability'. The communication states that 'the Commission seeks to ensure that European citizens benefit from a growing range of interactive DTV services, available on an increasing number of transmission platforms'. Indeed, interactive TV adds another layer of functionality to digital television (DTV) beyond video which could be exploited in the future not only for commercial purposes but also to implement e-government functions for the share of the population with most difficulties with informatics.

(137) In the communications, the Commission also stresses that the lack of interoperability (covering both technical interoperability and access issues) and possible constraints on consumer choice could affect the free flow of information, media pluralism and cultural diversity. These concerns could be summarised as follows. Consumers would be unable to buy a standardised, universal receiver able to receive all free-to-air and pay-TV interactive services and could be locked into using more costly receivers containing proprietary APIs. Broadcasters would face obstacles in developing and delivering interactive services because they would have to negotiate with vertically-integrated network operators, in control of proprietary API technologies. Open APIs facilitate interoperability, i.e. portability of interactive content between delivery mechanisms with full functionality of the content intact. The Commission also emphasises that the MHP standard is currently the most advanced open API standard in Europe and that the Commission will take additional measures to promote the voluntary adoption of this standard. One way of reducing the additional costs to consumers of equipment incorporating standard execution engines such as MHP is to subsidise purchases at the level of the consumer. It concludes that the Member States may therefore offer consumer subsidies.

(138) Second, even if many of these benefits — in particular the benefits not linked to commercial activities — are for the future, this is not a reason to believe that the measure will not contribute to achieving an objective of common interest. Nor does the Commission believe that the fact that the only observable benefits are currently linked to commercial activities implies that no objective of common interest is involved. Indeed, benefits for consumers are not only an essential part of any competition policy, but also a positive consequence of government intervention, and increasing consumers' well-being can very well be part of the definition of common interest.

(139) Therefore the Commission holds its view that the measure is aimed at a well-defined objective of common interest.

IV.B.3.2. *Well-designed aid*

(140) In the decision to initiate the procedure the Commission recognised that the switchover may be hindered by certain market failures and problems of social cohesion so that, in principle, consumer subsidies are an acceptable way of promoting the switchover, provided they respect the principle of technological neutrality.

(141) The Commission expressed its preliminary view on the measure in question as regards the possible types⁽⁵⁶⁾ of market failure or social problems and also, in particular, the markets related to broadcasters, namely:

- (a) The development of digital terrestrial broadcasting may be hampered by a coordination problem between market players.
- (b) The measure is compensation for consumers that need to update their analogue equipment.
- (c) The presence of market power may prevent the market from achieving the full benefits of competition between operators.
- (d) The switchover may have positive externalities due to better use of the frequency spectrum.
- (e) The measure promotes innovation and development of new services, a particular type of externality.

(142) As regards these points, first it should be assessed whether these are true market failures that prevent the market from achieving economic efficiency. Second, whether State aid is the appropriate remedy to correct them and, third, if the aid granted is the minimum necessary to achieve the objective.

The coordination problem

(143) In the decision to initiate the procedure the Commission acknowledged that the coordination problem between market players may in principle represent a 'market failure' because broadcasters need to agree on common dates for the switchover in order to minimise the costs of parallel

⁽⁵⁵⁾ See COM (2004) 541 (see footnote 7).

⁽⁵⁶⁾ See also Commission final Decision 2006/513/EC (see footnote 24).

transmission, particularly as the frequency spectrum is insufficient to transmit analogue and digital TV signals in parallel (so-called simulcast phase). Consumers might not be willing to shift to the digital platform until it can carry a large number of broadcasters. Accordingly, broadcasters might want to wait for other operators before moving to the digital platform. Without coordination among operators, this approach might delay the switchover. It is therefore worth limiting the length of the simulcast phase and achieving simultaneous switchover of broadcasters.

(144) However, the Commission considers that the measure is not the appropriate instrument for targeting such a market failure. Indeed, the existence of a mandatory deadline for switchover — 31 December 2006 at the time the measure was implemented — already seems sufficient to help broadcasters plan a coordinated transition to the new platform and consumers to adapt to the new transmission technology. Subsidies to consumers may increase demand for DTT services but do not specifically address the issue of coordination between market players.

(145) On the first aspect, Italy commented that the existence of a binding deadline is insufficient to secure switch-off in the absence of demand stimulus because consumers not interested in pay-TV would not be willing, given that the incumbent terrestrial broadcasters have no interest in subsidising consumers' purchase of the decoder in this situation. Consequently, given the competitive situation of the incumbents in the analogue terrestrial sector and the fact that consumers mostly used analogue terrestrial TV, no operator had any incentive to start the digitisation process.

(146) The Commission maintains its opinion that the existence of a legislative deadline is a sufficient instrument to solve the market failure due to the need for coordination. As the Italian authorities had taken the decision to start the switchover process and had set a statutory deadline for switch-off of the analogue mode, incumbent broadcasters had to take this as an established fact and, as a consequence, had to develop new commercial strategies. Possible difficulties arising from low demand have to be assessed as a separate issue and not linked to the need for coordination between market players.

(147) In any event, the Commission considers that, given the huge size of the terrestrial TV market in Italy, the risk that a critical mass of consumers is not reached — sufficient to justify investment in digital terrestrial — is not so great that commercial operators could not cope with it.

Compensation for consumers

(148) In the decision to initiate the procedure the Commission maintained that offering compensation to consumers that need to update their analogue equipment is a necessary step for a smooth switchover process. Although this argument justifies aid to consumers, it does not justify the discrimination between the terrestrial and the satellite platforms because there is no need to guide consumers towards one digital platform, as is the case with this measure.

(149) In its submissions Italy simply reiterated the previous argument that the measure contains the requirement that decoders must allow the reception of free-to-air television at no cost to the user, which would already exclude the satellite platform from the benefits of the measure because the main satellite operator, Sky Italia, requires a fee to access its programmes.

(150) However, the Commission notes that a free-to-air offer is also available on satellite to consumers without a subscription to Sky. In addition, there seem to be no reasons to exclude from the subsidy consumers that choose to switch to digital services offered on a subscription basis. Indeed, Italy itself accepts this approach when granting the subsidy to consumers on the cable platform, which requires a subscription.

(151) If the no-cost requirement has to be interpreted as an additional cost necessary for receiving the free-to-air channels compared to the costs already paid by the consumer to receive other services provided by the broadcaster, then also subscribers to satellite TV do not bear additional costs in order to watch free-to-air TV. On the other hand, if the provision is interpreted as meaning that the consumer must bear no cost at all in order to receive free-to-air channels, it is unclear why the subsidy is given to decoders of other platforms which require payment of a subscription fee for certain telecom and internet services.

(152) Italy considers that the differential treatment between S-DVB and C-DVB can be justified by the current policy of encouraging the diffusion of broadband. The Commission cannot accept this argument because support for broadband cannot justify distortion between broadcasters and any possible aid to broadband has to be duly considered and assessed on its own merits.

Strengthening of competition between the different distribution platforms

- (153) In the decision to initiate the procedure, the Commission recalled that aid is not an appropriate instrument to target lack of competition and that providing an aid measure to the terrestrial technology because Sky Italia enjoys a monopolistic position on the satellite broadcasting market and the pay-TV market is not a valid argument for compatibility.
- (154) The Commission emphasises that the commitments required in the context of News Corporation's acquisition of control of Telepiù and Stream already address competition concerns. Indeed, the fact that it is impossible, in particular for Sky, to acquire rights on all platforms for the transmission of live football events clearly favours the other pay-TV operators, including digital terrestrial broadcasters.

Existence of externalities

- (155) In the decision to initiate the procedure the Commission argued that incumbent analogue broadcasters were already being favoured in the switchover process because the digital licences were granted automatically and without any State compensation to network operators connected to the broadcasters. Although they had to provide part of their radiofrequencies to third parties, broadcasters were guaranteed 60 % of the transmission capacities. Furthermore, the digital technology allows broadcasters greater transmission capacity at lower costs. These elements seemed sufficient to compensate broadcasters for the costs of digital switchover.
- (156) Italy and Mediaset hold that this argument does not take into account the true costs/benefits of the switchover, considering that the main beneficiaries of the switchover (the entrants) differ from those who bear the cost of the switchover (consumers and, especially, the incumbents). Cost reduction does not compensate incumbents for increased competition given that they are obliged to release 40 % of their capacity to independent producers. Therefore, incumbents do not have incentives to switch-off and, if there is any advantage to analogue broadcasters, this should

be considered as compensation for the costs incurred by incumbents.

- (157) The Commission considers that the above argument is based on an incorrect assumption, namely that the losses that incumbents with market power may suffer as a result of increased competition in the market should be compensated for. A mandatory switchover or a reallocation of frequencies that provides room for new entrants is a legitimate regulatory intervention that does not call for compensation, in particular bearing in mind that previous licences have been awarded without competitive bidding or a time limit. Accordingly, the loss of revenue suffered by incumbent broadcasters should not be taken into account in determining the costs of switchover.
- (158) Another argument put forward by Mediaset is that if it were to finance the cost of open-technology decoders itself, it would be subject to free-riding by competitors as consumers could also watch other channels via the decoders financed by Mediaset.
- (159) The Commission does not completely reject this argument, although it considers that broadcasters might have an interest in providing a wider offer to viewers — also including competitors' channels. This is particularly true in the case of the Italian market, where consumers are used to viewing free-to-air TV and where with the subsidised open decoders it is possible to replicate, using the new digital technology, the framework that currently exists for analogue technology (with the addition of pay-TV). In this context it is only to be expected for the main broadcasters to bear the cost of subsidising the purchase of decoders and to suffer some 'free-riding' ⁽⁵⁷⁾.
- (160) In any event, the Commission accepts that the State might intervene to stimulate demand to help broadcasters cope with the costs of the switchover, in view of the externalities

⁽⁵⁷⁾ It is the Commission's belief that, given the particular situation of strong vertical integration of the Italian TV market, the risks referred to by the parties are not very great, at least for certain operators. This view held by the Commission seems to be shared by certain financial operators. Indeed, Deutsche Bank in its study quoted above states 'Surely the risk is that ... Mediaset is helping undermine its own terrestrial franchise... we believe that... as analogue TV will be switched off, it is far more sensible to capitalise on the opportunity created by the technological pay-TV hardware vacuum arising due largely to Italy's unique broadcasting infrastructure. We suspect Mediaset and RAI will jointly continue to dominate audience shares in DTT... Given their control of access to DTT customers for new entrant channels seeking to join their multiplexes, we believe their control of the competitive landscape is assured'.

involved and the possible free-riding issues. However, it considers that these arguments cannot justify the fact that the aid is selectively aimed at terrestrial TV and excludes the competing satellite platform.

Promoting innovation

(161) In its submission prior to the decision to initiate the procedure, Italy stated that the digital technology will serve to promote innovation by offering interactivity (the possibility for the user to 'dialogue' with the system) and interoperability (the possibility for the user to access all broadcasters via one decoder).

(162) Already in the decision to initiate the procedure the Commission acknowledged that the measure brought the price of interactive decoders into line with that of simpler models without interactive services (zappers).

(163) However, in its comments on the decision to initiate the procedure, Italy did not provide valid reasons for excluding the satellite mode from the measure and instead simply repeated that when the measure was enforced, the interactivity of satellite decoders was very limited due to the use of a proprietary technology without open API standards.

(164) The Commission believes that these arguments are not a valid reason for considering that the aid to digital terrestrial broadcasters offering pay-TV services and cable pay-TV operators is compatible, for the following reasons. First, technically it was possible to put on the market decoders with advanced interactive capacities for the free-to-air satellite viewers. By excluding, *a priori*, satellite decoders, the measure probably hampered the diffusion of high-quality satellite decoders. Second, Sky Italia launched its conversion to a technology with closed standards during 2004 and up to the beginning of 2005. It cannot be ruled out that Sky Italia would have made a different choice if the aid measure had also included satellite.

(165) Hence the Commission remains of the opinion that the exclusion of the satellite platform, based on the argument that at the time the first measure was adopted satellite used only 'non-interoperable' decoders, does not seem to take into account that satellite operators could have been willing and able to provide 'interoperability' in order to benefit from the measure.

IV.B.3.3. *Avoiding unnecessary distortions*

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

(167) The Commission has explained in section IV.A.3 'Distortion of competition' why it believes that such distortion exists, contrary to the claims made by Italy and Mediaset. Moreover, as stated in the decision to initiate the procedure, the fact that satellite operators are explicitly excluded from the aid measure is unnecessary. It also has the effect of distorting competition on the pay-TV market where some of the beneficiaries are incumbent operators on the very concentrated market of terrestrial analogue TV and can rely on very large audiences.

(168) An unnecessary distortion of competition does not, however, exist in the case of producers of decoders. The measure promotes technological development in the form of higher-performance decoders with standards available to all producers. Any producer of decoders willing to engage in such production can gain from the advantage, including producers located in other Member States. While it is true that the measure will alter the normal allocation of resources in the market by stimulating the demand for decoders, this is an inherent and inevitable effect of any public policy in favour of digitisation — even the most technologically neutral. Therefore it cannot be said that the measure introduces unnecessary distortions to competition as far as producers of decoders are concerned.

IV.B.3.4. *Conclusion on Article 87(3)(c) of the EC Treaty*

(169) Article 87(3)(c) requires there to be a balance between positive developments allowed by a given measure and its negative effects on competition. In the present context, it seems that digital switchover and interoperability are objectives of common interest, which, in the presence of externalities caused by the switchover and cohesion problems related to the obligation imposed on consumers to switch to digital television, can, in principle, justify aid in the form of a consumer subsidy.

(170) The measure, however, has certain characteristics that are neither necessary nor proportional and create unnecessary distortion in favour of the incumbent terrestrial television broadcasters, on a market seemingly characterised by a strict oligopoly where these distortions can have a considerable impact on competition.

(171) Accordingly, the Commission considers that the aid to digital terrestrial broadcasters that offer pay-TV services and cable pay-TV operators cannot be deemed compatible under Article 87(3)(c) of the EC Treaty. The Commission also considers that the measure in favour of producers of decoders, if it were indeed aid, would be compatible under Article 87(3)(c) of the EC Treaty.

IV.B.4. ARTICLE 87(3)(D) OF THE EC TREATY

(172) Italy states that, given the presence of many terrestrial local broadcasters that the Italian government wishes to protect, the measure is compatible on the basis of the exception in Article 87(3)(d) of the EC Treaty because of its positive effects on cultural diversity. Given that satellite is not well suited to providing local services, satellite decoders should not be entitled to the subsidy.

(173) The Commission considers that this argument by Italy cannot be accepted. The measure is not targeted specifically at promoting cultural objectives, nor at enhancing cultural diversity by favouring only local operators which, without the aid, would not be present on the market. It is a measure in favour of terrestrial broadcasters and cable pay-TV operators in general. Therefore, given the restrictive applicability of the exceptions, the Commission cannot accept that a large-scale measure with wide-reaching impact can be justified by the positive effects on local broadcasters.

IV.B.5. ARTICLE 86(2) OF THE EC TREATY

(174) The Commission considers that the Article 86(2) exception that can apply to State compensation for the costs of providing a public service cannot be invoked in this case. The Member State has not clearly defined and imposed public service obligations for which the measure would constitute proportional compensation. In fact, the measure is also of benefit to the normal commercial activities of various operators that do not provide a public service.

(175) Even in the case of the public service broadcaster RAI, if there were public service obligations in relation to investments in digital TV, the cost of these investments should have been clearly identified so as to allow an appropriate level of compensation.

IV.B.6. CONCLUSION ON THE COMPATIBILITY ASSESSMENT

(176) It is therefore concluded that the aid to digital terrestrial broadcasters offering pay-TV services and cable pay-TV operators does not qualify for any of the exceptions provided for in the Treaty and is therefore not compatible with the common market.

IV.C. CONCLUSION OF LEGAL ASSESSMENT

(177) The Commission concludes that the subsidy granted by Italy to digital terrestrial broadcasters offering pay-TV services and cable pay-TV operators for the purchase of decoders capable of receiving programmes broadcast using digital terrestrial technology constitutes aid within the meaning of Article 87(1) EC. The aid is not compatible with the common market. It was not notified to the Commission by the Member State as required by Article 88 (3) of the EC Treaty and was unlawfully put into effect without Commission authorisation. It must therefore be recovered from the digital terrestrial broadcasters offering pay-TV services and from the cable pay-TV operators involved.

(178) The Commission also concludes that no aid has to be recovered from producers of decoders.

V. ELIMINATION OF THE AID

V.A. NEED TO ELIMINATE THE AID

(179) According to the Court of Justice's established case-law, the Commission is competent to decide that the State concerned must abolish or alter aid⁽⁵⁸⁾ when it has found that it is incompatible with the common 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 common market is designed to re-establish the previously existing situation⁽⁵⁹⁾. In this context, the Court has established that that 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 the payment of the aid is restored⁽⁶⁰⁾.

(180) Following that case-law, Article 14(1) of Regulation (EC) No 659/99⁽⁶¹⁾ laid down that: 'where negative decisions are taken in respect of unlawful aid, the Commission shall decide that the Member State concerned shall take all

⁽⁵⁸⁾ Case C-70/72 *Commission v Germany* [1973] ECR-813, point 13.

⁽⁵⁹⁾ Joined Cases C-278/92, C-279/92 and C-280/92 *Spain v Commission* [1994] ECR I-4103, point 75.

⁽⁶⁰⁾ Case C-75/97 *Belgium v Commission* [1999] ECR I-3671, points 64 and 65.

⁽⁶¹⁾ See footnote 2.

necessary measures to recover the aid from the beneficiary [...]. The Commission shall not require recovery of the aid if this would be contrary to a general principle of Community law.'

(181) In its submission, Italy argued that the Commission should not impose recovery because this would be against a general principle of law:

(a) According to Italy, ordering recovery would be against the principle of protection of legitimate expectations since even if diligent, the broadcasters could not refuse the aid or oppose it in any way. Italy argues that the same logic was applied in Decision 2006/513/EC⁽⁶²⁾.

(b) In addition, according to Italy, it was clear that recovery was impossible from the outset⁽⁶³⁾. Italy argues that in this case it is impossible to determine which broadcaster benefited from the measure and by how much, so that the Commission should not require recovery.

(182) In the case at issue the Commission considers that no general principle of Community law stands in the way of recovery. In particular, as to legitimate expectations, the Court of Justice stated that: 'in view of the mandatory nature of the supervision of State aid by the Commission under Article 87 of the Treaty, undertakings to which an aid has been granted cannot, in principle, entertain a legitimate expectation that the aid is lawful unless it has been granted in compliance with the procedure laid down in that Article. A diligent operator should normally be able to determine whether that procedure has been followed'⁽⁶⁴⁾. It is only in cases where the recipient can rely 'on exceptional circumstances on the basis of which it had legitimately assumed the aid to be lawful' that it can decline to refund that aid⁽⁶⁵⁾.

(183) The aid in question was granted without prior notification. In addition, the existence of exceptional circumstances cannot be established in this case since there is no element that could lead the recipient company to believe that it was entitled to assume, on the basis of specific facts or Commission assurances, that a benefit accorded to it by the public authorities was not to be regarded as aid.

(184) As regards the impossibility for beneficiaries to 'refuse' the aid, the Commission notes that if such an argument were to be accepted, Member States would be able to grant indirect aid via consumers without there being any possibility for the Commission to restore normal

competitive conditions. The Commission also points out that the reference to Decision 2006/513/EC⁽⁶⁶⁾ does not seem relevant because in that instance the Commission decided that the measure could be annulled by recovering all the aid from the direct beneficiaries and that is precisely what it did. The question of whether aid could be 'refused' was not raised. In addition, it should be noted that in the *Germany v Commission*⁽⁶⁷⁾ case, the Commission ordered the recovery of aid paid out to investors who had acquired shares of companies situated in the new German *Länder* and West Berlin, and this recovery order was confirmed by the Court.

(185) Italy has also argued that recovery is impossible since it is not possible to establish which broadcaster benefited from a transfer of State resources and how much the transfer amounted to.

(186) It is correct that the Commission may not impose an obligation whose implementation from the outset would be impossible in objective and absolute terms. The Commission acknowledges that due to the facts of the case, it may be somewhat more difficult than in other cases to establish the amount of State resources that actually went to the recipients of the aid. Nevertheless, the Commission considers that it is not impossible to quantify the benefit conferred on the recipients of the aid.

(187) The Commission is therefore of the opinion that there are not sufficient grounds to release the Member State from its obligation to abolish the measure and re-establish the conditions of competition.

V.B. STATE AID RECIPIENTS

(188) In the present case, the State paid a subsidy to private individuals for the purchase of certain decoders. However, neither the consumers nor the producers of decoders can be deemed to have benefited from State aid within the meaning of Article 87(1) of the EC Treaty. As the Court has explained, the recovery of the aid must be from the actual recipients — in this case, digital terrestrial broadcasters offering pay-TV services and cable pay-TV operators⁽⁶⁸⁾.

(189) Following the points made in sections IV.A.2 and IV.A.3 on the assessment of the existence of a selective advantage and the distortion of competition, the Commission is of the opinion that the main advantages of the measure are the creation of a customer base for the introduction of new

⁽⁶²⁾ See footnote 24.

⁽⁶³⁾ Italy is referring to case C-75/97.

⁽⁶⁴⁾ Case C-169/95 *Spain v Commission* [1997] ECR I-135, point 51.

⁽⁶⁵⁾ Case C 5/89 *Commission v Germany (BUG-Alutechnik)* [1990] ECR I-3437, points 13 and 14.

⁽⁶⁶⁾ See footnote 24.

⁽⁶⁷⁾ Case C-156/98 *Germany v Commission*, (see footnote 35).

⁽⁶⁸⁾ Case C-303/88 *Italy v Commission* [1991] ECR I-1433, point 57.

digital services, in particular pay-per-view activities, and an increased number of customers for the cable operators.

190. The Commission therefore calls for recovery of the aid from digital terrestrial broadcasters offering pay-TV services and cable pay-TV operators.

V.C. QUANTIFICATION OF THE AID TO BE RECOVERED

- (191) As regards establishing what should be recovered from broadcasters, the Commission acknowledges that accurately calculating the amount of State resources that has actually benefited the recipients is fairly complex. This is because not only was the aid granted indirectly via the consumers but also it was linked to the equipment needed to receive the broadcasters' services rather than the services themselves.

- (192) However, according to the case-law of the Court of Justice, no provision of Community law requires the Commission, when ordering the recovery of aid declared incompatible with the common market, to fix the exact amount of the aid to be recovered. It is sufficient for the Commission's decision to include information enabling the recipient to work out himself, without overmuch difficulty, that amount⁽⁶⁹⁾.

- (193) The Commission therefore considers that it is worth giving some guidelines on how the advantage should be quantified. In its view, because of the special characteristics of this case, a suitable method would be to determine the amount of additional profits generated by the new digital services and pay-TV or pay-per-view offers as a result of the measure in question

- (194) It should be recalled that in the decision to initiate the procedure the Commission invited interested parties to provide an estimate of the size of the advantage or at least to provide a method that the Commission could follow to quantify precisely the selective advantage enjoyed by the recipients. However, no comments were forthcoming and only Sky Italia provided a tentative list of the possible effects of the aid but no precise method for calculating the amount to be recovered.

- (195) The Commission considers that the additional profits can be estimated as the proportion of profits generated by the number of additional viewers of the pay-per-view offer and of the new digital channels that resulted from adoption of the State aid measure.

- (196) As a first step, therefore, an estimate of the number of additional terrestrial and cable pay-TV viewers is needed.

Since a significant percentage of eligible consumers did not take advantage of the subsidy and since those who did could have been influenced by other considerations than the subsidy, the number of viewers whose decisions were affected by the subsidy is not equal to the total number of viewers who acquired a decoder using the subsidy.

- (197) Determining how consumer behaviour was affected by the subsidy calls for a consumer demand model and an estimate of the relative importance of the different drivers of this demand. The influence of the price of pay-TV services (including the equipment) on consumers' choice will then provide an indication of the effect of the subsidy.

- (198) The first stage of the analysis is to define consumer choice models from among the main alternatives available. Italian consumers of analogue terrestrial television in 2004 and 2005 could choose between the following four options:

- (a) remain in the analogue terrestrial platform and postpone switching to digital;
- (b) switch to digital satellite TV, with or without purchasing pay-TV services;
- (c) switch to digital terrestrial TV, with or without purchasing pay-TV services;
- (d) switch to cable TV, with or without purchasing pay-TV services.

- (199) Pay-TV on the terrestrial, cable and satellite platforms are paying options that provide premium content to viewers. Consumers with no interest in pay-TV switch to digital TV mainly for technical reasons since in 2004 and 2005 the free-to-air offer is richer in digital than in analogue mode but not substantially different. The choice of these consumers is not affected by the subsidy, and, accordingly, they should be excluded from the calculation.

- (200) There were, however, a number of consumers who were interested in premium content (pay-TV) and who had to choose between the two available digital terrestrial providers (Mediaset, Telecom Italia), the satellite provider, and Fastweb. For those consumers, the subsidy may have had an impact on their choice.

- (201) The Commission considers that the difference between the offers provided by Fastweb, a triple play operator, and the other pay-TV providers will have to be taken into account

⁽⁶⁹⁾ See, in particular, Case C-480/98 *Spain v Commission* [2000] ECR I-8717, point 25, and Case C-415/03 *Commission v Greece* [2005] ECR I-3875, point 39.

in order to estimate the number of consumers that chose Fastweb just because of the subsidy.

(202) Another group of consumers that may have been affected by the subsidy is the group of marginal consumers of pay-TV, i.e. people with a slight preference for premium content who could have been led into purchasing this content by promotions and special offers. The subsidy may have increased digital terrestrial providers' access to this demand.

(203) For example, a discrete choice demand model⁽⁷⁰⁾ could estimate the impact of different factors such as programme content and price on the choices of different types of consumers. The Commission will need Italy's help to establish an exact model because a model is dependent on the availability and characteristics of the data. By estimating the impact of different factors, such as programme content and price on the choices of different types of consumers, the discrete choice demand model could be used to estimate the number of additional consumers who choose pay-per-view just because of the subsidy and hence exclude from the calculation the other share of consumers who account for the new demand in 2004-2005.

(204) Once an estimate has been made of the number of additional users of terrestrial pay-TV or pay-per-view offers, the second step is to estimate the average revenue per user (ARPU) for 2004 and 2005. This requires an estimate of the total number of users of pay-TV or pay-per-view services. Dividing the overall revenues from pay-TV services by the total number of users gives the ARPU.

(205) The ARPU multiplied by the estimated number of additional users gives the additional revenues generated by the aid measure. The additional costs of servicing these users⁽⁷¹⁾ must be subtracted from this number in order to obtain the amount to be recovered. The Commission expects the additional costs to be relatively low, given that the incremental costs of transmission are negligible and that fixed costs should not be included in the calculation.

V.D. IMPLEMENTATION OF THE DECISION

(206) As stated by the European Court of Justice, a Member State encountering unforeseen or unforeseeable difficulties or perceiving consequences overlooked by the Commission may submit those problems for consideration by the Commission, together with proposals for suitable amendments. In such a case, the Commission and the Member State concerned must work together in good faith with a

view to overcoming the difficulties whilst fully observing the EC Treaty provisions⁽⁷²⁾.

(207) The Commission therefore invites Italy to submit to the Commission for consideration any problem that it may meet in implementing this Decision.

(208) Therefore the Commission:

HAS ADOPTED THIS DECISION:

Article 1

The scheme which the Italian Republic has unlawfully implemented for digital terrestrial broadcasters offering pay-TV services and cable pay-TV operators constitutes State aid which is incompatible with the common market.

Article 2

1. The Italian Republic shall take all necessary measures to recover from the beneficiaries the aid defined in Article 1.

2. Recovery shall be effected without delay and in accordance with the procedures of national law provided that they allow the immediate and effective implementation of the Decision. The sums to be recovered shall include interest from the date on which the aid was at the disposal of the beneficiaries until the date of its recovery.

3. The interest to be recovered under paragraph 2 shall be calculated in accordance with the procedure laid down in Articles 9 and 11 of Commission Regulation (EC) No 794/2004 of 21 April 2004 implementing Council Regulation (EC) No 659/1999 laying down detailed rules for the application of Article 93 of the EC Treaty⁽⁷³⁾.

Article 3

The Italian Republic shall inform the Commission, within two months of notification of this Decision, of the measures taken to comply with it. It will provide this information using the questionnaire attached to this Decision.

The Italian Republic shall submit within the same period of time referred to in the first paragraph the documents giving evidence that the recovery proceedings have been initiated against the beneficiaries of the unlawfully granted and incompatible aid.

⁽⁷⁰⁾ These models are widely used in academic literature to assess issues relating to consumer choice. Many advanced graduate-level books on econometrics contain an introduction to these models. See for example W. Greene (2000), *Econometric Analysis*, fourth ed., Prentice Hall, Upper Saddle River, NJ or G.S. Maddala, *Limited Dependent Variables and Qualitative Variables in Econometrics*, Cambridge University Press, 1983.

⁽⁷¹⁾ These are often referred to as 'avoidable costs', i.e. costs that would have been avoided in the scenario where no additional viewer was induced by the subsidy.

⁽⁷²⁾ Case C 94/87 *Commission v Germany* [1989] ECR-I-175, point 9; Case C-348/93 *Commission v Italy* [1995] ECR-I-673, point 17.

⁽⁷³⁾ OJ L 140, 30.4.2004, p. 1.

Article 4

This Decision is addressed to the Italian Republic.

Done at Brussels, 24 January 2007.

For the Commission
Neelie KROES
Member of the Commission

ANNEX

**Information regarding the implementation of Commission Decision C(2006)6634 on State aid scheme C 52/2005
(ex NN 88/2005, ex CP 101/2004) — Italy: subsidy for digital decoders**

1. Calculation of the amount to be recovered

- 1.1. Please provide the following details regarding the amount of unlawful State aid that has been put at the disposal of the recipient:

Date(s) of payment ⁽¹⁾	Amount of aid ⁽²⁾	Currency	Identity of recipient

⁽¹⁾ Date or dates on which the aid or individual instalments of aid were put at the disposal of the recipient (if the measure consists of several instalments and reimbursements, use separate rows).

⁽²⁾ Amount of aid put at the disposal of the recipient, in gross grant equivalent.

Comments:

- 1.2. Please explain in detail how the interest payable on the amount to be recovered will be calculated.

2. Recovery measures planned or already taken

- 2.1. Please describe in detail what measures have been taken and what measures are planned to bring about the immediate and effective recovery of the aid. Please also explain what alternative measures exist in national law to bring about recovery. Where relevant, please indicate the legal basis for the measures taken or planned.
- 2.2. By what date will the recovery of the aid be completed?

3. Recovery already effected

- 3.1. Please provide the following details of aid that has been recovered from the recipient:

Date(s) ⁽³⁾	Amount of aid repaid	Currency	Identity of recipient

⁽³⁾ Date or dates on which the aid was repaid.

- 3.2. Please attach supporting documents for the repayments shown in the table at point 3.1.