

DECISIONS

COMMISSION DECISION (EU) 2016/1385

of 1 October 2014

on State aid SA.27408 (C 24/10 (ex NN 37/10, ex CP 19/09)) implemented by the authorities of Castilla-La Mancha for the deployment of digital terrestrial television in remote and less urbanised areas

(notified under document C(2014) 6846)

(Only the Spanish text is authentic)

(Text with EEA relevance)

THE EUROPEAN COMMISSION,

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

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

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

Whereas:

1. PROCEDURE

- (1) On 14 January 2009, the Commission received a complaint from Radiodifusión Digital SL (hereinafter referred to as 'Radiodifusión') and on 18 May 2009 a complaint from SES Astra S.A. (hereinafter referred to as 'Astra'). Both complaints regard an aid scheme that the Spanish authorities had adopted in relation to the switching from analogue television to digital television in remote and less urbanised areas of Spain. The contested scheme has its origin in the Law 10/2005, of 14 June 2005, on Urgent Measures for the Promotion of Digital Terrestrial Television, Liberalisation of Cable TV and Support of Pluralism ⁽¹⁾. Further legislation adopted with respect to the digital terrestrial transition process includes, amongst others: Royal Decree 944/2005 of 29 July 2005 on the approval of the National Technical Plan for Digital Terrestrial Television (hereinafter: 'National Technical Plan') ⁽²⁾; Royal Decree 945/2005 of 29 July 2005, approving the General Regulations for the delivery of the digital terrestrial television service; Order ITC/2476/2005 of 29 July 2005, approving the Technical Regulations and regulations relating to the delivery of the digital terrestrial service and Royal Decree 920/2006, of 28 July 2006, approving the General Conditions for the delivery of the radio and cable television broadcasting.
- (2) These measures concern the entire territory of Spain. However, the Commission opened two different procedures, one for all of Spain with the exception of the region of Castilla-La Mancha and one specifically for the region of Castilla-La Mancha. While the State aid measure is the same for both cases and raises the same concerns, Castilla-La Mancha features some particular issues which are of less (or no) importance to the general case. In particular, the complaint from Radiodifusión only concerns the case of Castilla-La Mancha, the regional government of Castilla-La Mancha implemented the aid scheme in a particular way, when compared to the pattern in the other regions, and in the case of Castilla-La Mancha it was necessary to carry out an in-depth assessment of an economic study.

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

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

- (3) In both cases, the Commission opened the formal investigation procedure on 29 September 2010, alleging that the State aid scheme discriminates between platform operators. The decision opening the formal investigation (hereinafter: 'opening decision') was published in the *Official Journal of the European Union* on 11 December 2010 ⁽³⁾. Comments were received from three interested parties: Radiodifusión on 11 January 2011, Abertis and SES Astra S.A. (hereinafter: 'Astra') on 4 February 2011.
- (4) On 19 January and 9 February 2011 the comments were transmitted to Spain, who was given the opportunity to react. On 18 February 2011 and 8 March 2011 the Permanent Representation of the Kingdom of Spain submitted observations of the Authorities of the Castilla-La Mancha Region (Junta de Comunidades de Castilla-La Mancha, hereinafter: 'JCCM') to third parties' comments. On 27 May 2011 and 9 August 2012 the Commission submitted requests for information to Spain, to which Spain (JCCM) replied on 10 June 2011 and 10 September 2012, respectively. On 20 August 2011 the Commission addressed a request for information to Radiodifusión who replied on 29 September 2011. On 14 October 2011, 15 November 2011 and 6 December 2012 JCCM submitted additional information on its own motion. In addition, the Commission held a meeting with Spanish and JCCM authorities on 18 May 2011.
- (5) On 15 May 2013, the JCCM provided information on the organisation of a tender for operation and maintenance aid, on 20 December 2013 it provided information on ongoing sanction procedures in Spain against Radiodifusión and its parent company INGEST and comments on ongoing discussions between the Commission and Spanish authorities regarding SA.28599. On 6 June 2014, the JCCM provided comments to demonstrate that its actions were in line with a 'market economy operator' and that it complied with EU public procurement rules. In addition, there have been several fact finding exchanges between the Commission and the JCCM.
- (6) On 20 June 2013, the Commission adopted a final negative decision on SA.28599 for the deployment of digital terrestrial television in remote and less urbanised areas in Spain (outside Castilla-La Mancha) ⁽⁴⁾.

2. DESCRIPTION OF THE MEASURE

2.1. BACKGROUND

2.1.1. The complainants

- (7) Radiodifusión is a local telecom and terrestrial television platform operator, registered with the Spanish national regulatory authority for telecommunications (*Comisión del Mercado de las Telecomunicaciones*, hereinafter: 'CMT') for the management of a public telecommunications network and for the provision of electronic communications services, in particular the provision of radio and TV broadcasting transmission services.
- (8) Radiodifusión complained that the financing schemes in Castilla-La Mancha targeted platform operators already operating a network with national coverage. In this way all alternative networks (e.g. local network operators) were excluded. According to Radiodifusión, the contested scheme would hinder both actual competition at local level and potential competition at regional and national level.
- (9) Radiodifusión also argued that the bulk of the funds invested by the region of Castilla-La Mancha were not used for upgrading existing analogue emission centres but for building new ones. Radiodifusión supported this allegation by comparing the list of municipalities receiving the funds with the list of those hosting an analogue emission centre. Approximately 80 % of the receiving municipalities were not hosting any analogue emission centre before the scheme was put in place. Radiodifusión also emphasised that the mere digitisation of the terrestrial network would not make a massive construction of additional centres necessary. The amount of funds destined to such upgrade thus would be disproportionately high.

⁽³⁾ OJ C 335, 11.12.2010, p. 8.

⁽⁴⁾ Commission Decision 2014/489/EU of 19 June 2013 on State aid SA.28599 (C 23/10 (ex NN 36/10, ex CP 163/09)) implemented by the Kingdom of Spain for the deployment of digital terrestrial television in remote and less urbanised areas (outside Castilla-La Mancha) (OJ L 217, 23.7.2014, p. 52).

- (10) From the above, Radiodifusión inferred that the actual purpose of the subsidies was not the mere digitisation of the existing network, but rather building a better and extended network allowing the incumbent operators (mainly TelecomCLM and Abertis) to compete more actively on the market for transmitting services of local broadcasters and for mobile television. Under such circumstances, Radiodifusión considered that the failure to adopt open and transparent procedures for the award of the subsidies is unjustified, as any network operator could have built the new centres. Radiodifusión therefore also points to a distortion in the market for network operators.
- (11) The second complainant is the satellite platform operator SES Astra. Set up in 1985, it was the first private satellite operator in Europe. Astra offers a comprehensive portfolio of broadcast and broadband solutions for customers in Europe and beyond. It broadcasts television and radio programmes directly to millions of homes and provides internet access and network services to public and private users.
- (12) Astra argues that the measure infringes the principle of technological neutrality as it supports only terrestrial transmission for digitisation. To demonstrate that the satellite platform would indeed be an alternative, Astra refers in particular to the case of Cantabria. In January 2008, the regional government of Cantabria had launched a tender for extension of coverage of digital television for the whole territory of Cantabria. It then selected Astra to provide free-to-air channels via its platform. However, in November 2008 that contract was terminated by the regional government. According to Astra, the authorities only terminated the contract once they had been informed that the central government would finance the upgrade of the analogue terrestrial network. In fact, a letter of the Cantabrian authorities dated 7 November 2008 explained the termination of the contract with the fact that in the meantime the central government had taken decisions relative to the extension of coverage of digital television to the totality of the Spanish territory ⁽⁵⁾. Thus, the case of Cantabria would demonstrate that, firstly, Astra could compete in that market and secondly, that the decisions of the central government made this competition impossible.

2.1.2. The sector

- (13) The case concerns the broadcasting sector. Many players are active in this sector at different level of the broadcasting services product chain.
- (14) Broadcasters are the editors of television channels who purchase or produce in-house TV contents and bundle them in channels. The channels are then provided to the public through various platforms (i.e. satellite, DTT, cable, IPTv). In Spain, broadcasting services have been qualified as a public service by the legislator and are provided both by State-owned broadcasters (RTVE) and by private broadcasters holding concessions from the State ⁽⁶⁾. These so-called 'free-to-air' (FTA) channels are provided free of charge to the viewers. In order to ensure that the population can effectively benefit from this public service, the law attaches minimum coverage obligations to both the mission entrusted to the public broadcaster and to the concessions held by the private operators. Indeed, the public broadcasters have the obligation to cover at least 98 % of the Spanish population, while private broadcasters shall cover at least 96 % of the population. In Spain, national broadcasters do not own a national broadcasting network. Therefore, they enter into agreements with platform operators to have their content transmitted and to accomplish their coverage obligations.
- (15) Hardware suppliers are manufacturers and/or installers of infrastructures and devices necessary to build the various platforms.
- (16) Platform operators (or network operators) are private or publicly controlled entities operating the infrastructure necessary to transport and broadcast the signal of the broadcasting channels. At the dawn of the television industry, the only platform available was the analogue terrestrial platform. As the technology developed, more platforms have become available on the market, namely: the satellite platform, the cable platform and, most recently, the IPTv ⁽⁷⁾, which exploits broadband connection to transmit the TV signal.

⁽⁵⁾ Astra challenged the termination of the contract before a court of first instance in Santander (procedure nr. 1728/2009), which on 23 December 2011 ordered the Cantabrian authorities to indemnify Astra for the unjustified termination of the contract. The Court did not find any breach of agreement on the side of Astra that would justify the termination of the agreement. According to the Court, the decision of the Spanish central government to develop the national strategy for DTT was one of the reasons for the termination of the agreement. See judgment 000313/2011 of the Court of First Instance in Santander.

⁽⁶⁾ The concession includes the assignment of a frequency for terrestrial broadcasting.

⁽⁷⁾ Internet Protocol Television is a term to refer to distribution systems of TV and video signals through an electronic communications network using internet Protocol.

- (17) In terrestrial broadcasting, the television signal is sent from a TV studio to a transmission centre (head-end), usually belonging to and operated by a network operator. Then the signal is transported and distributed from a transmission centre (head-end) to the broadcasting centres run by a network operator (e.g. a tower). Sometimes this transport is done via satellite. At the end, the signal is broadcasted from the broadcasting centres to homes. To digitise the analogue terrestrial network, it is necessary to replace the transmitters on the ground. However, as the digital signal has a lower range than the analogue and therefore the new technology requires a more capillary network, the extension of coverage requires in some cases also the building of new transmission centres. The viewer has to be equipped with a decoder, which may already be integrated in the TV set.
- (18) In satellite broadcasting, the signal is sent to a transmission centre (head-end) and then transported to a satellite that broadcasts it to homes. As an alternative, the signal could be sent directly from a TV studio to the satellite, if the TV studio has appropriate devices. The viewer has to be equipped with a satellite dish and a decoder. To expand satellite coverage in a region, the latter ground equipment needs to be installed on the customer's premises. In terms of geographic coverage, the satellite platform could reach almost 100 % of the Spanish territory while the terrestrial platform covers about 98 %.

2.1.3. The context

- (19) The investigated measure must be examined in the context of the digitisation of broadcasting that the terrestrial, satellite and cable platforms have undergone or are currently undergoing. In comparison to analogue broadcasting, digitised broadcasting has an increased transmission capacity due to a more efficient use of the radiofrequency spectrum. This is especially relevant for terrestrial broadcasting, where the available frequency spectrum is limited and therefore broadcasting competes with mobile telecommunications for scarce bandwidth. Satellite transmission instead has the advantage of working in a completely different frequency band where there is no scarcity of frequency.
- (20) The switch-over from analogue to digital television releases a significant amount of high quality radio spectrum referred to as 'the digital dividend' which will be free for the deployment of electronic communication services. This digital dividend, and especially the frequency of 790-862 MHz ('800 MHz band'), can boost the electronic communication industry, have a major impact on competitiveness and growth and provide a wide range of social and cultural benefits ⁽⁸⁾.
- (21) The 'digital dividend' could be reaped either by switching from terrestrial to a different platform or by moving from analogue to digital terrestrial broadcasting. Also, a mixed solution combining different platforms could be envisaged ⁽⁹⁾.
- (22) However, in the case of terrestrial broadcasting, the scarcity of frequencies remains an issue even after digitisation. Shortly after the termination of the switch-over from analogue to digital TV in April 2010, the Spanish government had to relocate broadcasters from the 800 MHz band to a lower frequency band ⁽¹⁰⁾. The relocation of DTT multiplexes assigned to broadcasters led to additional costs and additional State aid, which the Commission is currently examining in a formal investigation procedure ⁽¹¹⁾.

⁽⁸⁾ The Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on transforming the digital dividend into social benefits and economic growth (COM(2009) 586) recommended that the Member States should cease using the 800 MHz band for high-power broadcasting services and fully implement the EU technical harmonisation decision by a certain date agreed at the EU level.

⁽⁹⁾ See for instance, for France Aide d'Etat N 666/2009 — Modification du régime d'aides à la TNT 111/2006, for Slovakia State aid N 671/2009 switch-over to digital TV broadcasting in Slovakia. In Spain: State aid SA.28685 (2011/NN) Reception of digital television in Cantabria. It should also be noted that in Spain in remote and less urbanised areas under investigation (so-called Area II) it was not always viable to provide TV signal via DTT platform and therefore satellite transmission was chosen in some cases, both for the transmission between the centres and for transmission to some households (in more detail see chapter 2.2.2.). For the purpose of this decision, all of these installations are still considered to be 'terrestrial'.

⁽¹⁰⁾ See Decision No 243/2012/EU of the European Parliament and of the Council of 14 March 2012 establishing a multiannual radio spectrum policy programme and in particular Article 6(4) therein (OJ L 81, 21.3.2012, p. 7).

⁽¹¹⁾ See Commission Decision SA.32619 — Compensation of damages for the liberation of digital dividend (OJ C 213, 19.7.2012, p. 41). Due to the complexity of the reorganisation of services and spectrum use, Spain asked for derogation to the date of implementation of Article 6(4) of Decision No 243/2012/EU.

- (23) With regard to TV broadcasting, terrestrial digital transmission will remain a major distribution platform for the foreseeable future, but broadband technology, as next generation networks (NGA), is likely to become an important alternative as the leading transmission technology. For the time being, however, in Spain the geographical coverage of such NGA networks is not universal.
- (24) In Spain there exist today four broadcasting platforms: DTT — digital terrestrial technology (DVB-T), satellite (DVB-S), cable (DVB-C) and IPTv. DTT is the main platform for the free-to-air public and private Spanish channels ⁽¹²⁾. The main operator of the terrestrial network is Abertis. Abertis also controls the satellite operator Hispasat. There exist as well a number of local telecommunications operators carrying DTT signals who are usually interconnected with Abertis' national network. In Castilla-La Mancha, the main regional operator is TelecomCLM ⁽¹³⁾. As for the pay TV channels, they are broadcasted mainly via satellite, cable and IPTv. Astra and Hispasat are the main satellite operators.
- (25) In order to switch from analogue to digital television, Spain adopted in the period of 2005-2008 a series of regulatory measures that concerned the terrestrial network, as described in section 2.2. They divide the Spanish territory into three distinct areas:
- (i) Area I — including the vast majority of the Spanish population, where the costs of switchover were borne by the broadcasters — 96 % of the territory for the private broadcasters, and 98 % for the public broadcasters. As the broadcasters bore the costs of the switch-over, no aid was granted for the switch-over in Area I.
 - (ii) Area II — less urbanised and remote areas covering 2,5 % of the population who in the past received public and private channels via analogue terrestrial television. However, as the switch to digital technology requires upgrading of the existing and building of new transmission centres, significant investments in the terrestrial network were necessary. Private broadcasters did not have sufficient commercial interest in providing the service in Area II and refused to bear the costs of digitisation. The Spanish authorities established therefore the investigated State aid scheme for upgrading the existing transmission centres and building of new digital ones. This process was commonly referred to as 'DTT coverage extension' (i.e. extension of coverage of DTT above what was compulsory for the commercial broadcasters).
 - (iii) Area III — where due to topography it is not possible to provide TV service via the terrestrial platform and where it is done by satellite. The transmission of Free-to-air TV signals in Area III is provided by Hispasat. The fact that the TV service is provided through satellite entails costs for the consumers who have to acquire satellite dishes and set-up boxes.

2.2. DESCRIPTION OF THE AID

2.2.1. The general measure

- (26) The investigated scheme is based on a complex system of legal provisions put in place by the Spanish central authorities as from 2005. On the basis of these provisions, State aid for the deployment of the DTT in Area II was granted in the years 2008-2009 by the Autonomous Communities and municipalities. The latter channelled the funds from the central budget and from their respective budgets to the recipients. Moreover, since 2009 ongoing aid has been granted by the Autonomous Communities for maintenance and operation of the networks in Area II.
- (27) The regulation of the transition to the digital television technology started with the adoption of Law 10/2005 of 14 June 2005. It mentions the need to promote a transition from analogue to digital terrestrial technology and required that the government take the appropriate measures to ensure the transition from analogue terrestrial to digital terrestrial television.
- (28) Following this mandate, with Royal Decree 944/2005 the Council of Ministers approved the National Technical Plan that fixed the date of the analogue switch-off in Spain for 3 April 2010 ⁽¹⁴⁾.

⁽¹²⁾ Around 26 national FTA channels and around 30 regional channels.

⁽¹³⁾ [...].

⁽¹⁴⁾ It established the obligation of private broadcasters to reach by that date 96 % of the population in their respective areas of coverage, while public broadcasters should reach 98 % of the population in their respective areas of coverage. In this Area I the broadcasters had the obligation to cover these percentages of population with the terrestrial digital television, and they had to bear the costs of digitisation themselves. Hence, no State aid was necessary.

- (29) As regards Area II and III, the Twelfth Additional Provision of the National Technical Plan already provided for the possibility that the local and regional authorities extend the coverage in the range between 96 % and 100 % of the population. In this regard, the Technical Plan explicitly refers to digital *terrestrial* television (DTT) and establishes six conditions under which the local authorities could carry out such extension. Condition (e) requires that such local installation must be in conformity with the Technical Plan for digital terrestrial television.
- (30) Subsequently, on 7 September 2007, the Council of Ministers approved the National Plan for the Transition to Digital Terrestrial Television (hereinafter: 'Transition Plan')⁽¹⁵⁾ that implements the National Technical Plan. The Transition Plan divided the Spanish territory in ninety technical transition projects⁽¹⁶⁾ and established a deadline for the switch-off of analogue broadcasting for each of these projects.
- (31) On 29 February 2008, the Ministry of Industry, Energy and Tourism (hereinafter: 'MIEyT') adopted a decision aimed at improving the telecommunications infrastructures, establishing the criteria and the distribution of the funding of the actions aimed at developing the Information Society under the Plan Avanza for 2008⁽¹⁷⁾. The budget approved by this decision amounted to EUR 558 million and was partly allocated to development of broadband, and partly to digitisation of television in remote and less urbanised areas of Spain falling outside the statutory obligations of the commercial broadcasters⁽¹⁸⁾. The digitisation in those areas was commonly referred to as 'extension of coverage'. It was subsequently implemented through a series of addenda to existing framework agreements⁽¹⁹⁾ signed by MIEyT and Autonomous Communities between July and November 2008 ('the Addenda to the 2006 Framework Agreements', published in the Spanish Official Gazette separately for each Autonomous Community). The wording of these agreements in the majority of cases points to digital terrestrial technology as to the only technology to be funded. As a result of the agreements, MIEyT transferred funds to the Autonomous Communities who committed to cover the remaining costs of the operation from their budgets. These addenda also included the obligation of the local authorities to comply with the provisions of the Twelfth Additional Provision of the National Technical Plan.
- (32) In parallel, on 17 October 2008, the Council of Ministers agreed to allocate further EUR 8,72 million to extend and complete DTT coverage within the transition projects to be completed during the first half of 2009, Phase I of the Transition Plan. The funding was granted following the signing of new framework agreements between MIEyT and the Autonomous Communities as of December 2008 ('the 2008 Framework Agreements'). These agreements refer to the aforementioned financing of EUR 8,72 million and were entitled 'Framework Collaboration Agreement between the Ministry of Industry, Tourism and Trade and the Autonomous Community of [...] for the Development of the National Transition Plan to DTT'. They foresee a list of activities that will be financed by the central and regional authorities in order to reach the coverage of digital television equal to the existing analogue coverage. These activities are related to the deployment of digital terrestrial television.
- (33) On 29 May 2009, the Council of Ministers approved the criteria to distribute EUR 52 million for the funding of DTT transition actions, aimed at financing the extension of coverage of Phase II and III projects of the Transition Plan⁽²⁰⁾. The agreement of the Council of Ministers established a direct link with the Transition Plan given that it stated that 'in order to achieve the target set in the National Transition Plan to the DTT, a similar DTT coverage to that of the current terrestrial coverage with analogue technology, the financial support of the public authorities is needed' and then that 'the implementation of this cooperation will be formalized within the framework set by the National Plan for the Transition to the DTT'.
- (34) Last, between October and December 2009, addenda to the 2008 Framework Agreements (mentioned in recital 32) were published in the Spanish Official Gazette, including the funding for the coverage extension of Phases II and III of the Transition Plan. These addenda define what should be understood by 'action to extend the coverage', by making explicit reference only to the terrestrial technology (although not formally excluding other technologies)⁽²¹⁾.

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

⁽¹⁶⁾ Further classified in Phases I, II and III.

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

⁽¹⁸⁾ The decision regarding the distribution of funds to the development of broadband and to digitisation of television in Area II was left to the regional authorities.

⁽¹⁹⁾ The framework agreements were signed between MIEyT and the Autonomous Communities in 2006 within the framework of the Plan Avanza.

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

⁽²¹⁾ See, for example, Andalucía's Addendum <http://www.boe.es/boe/dias/2009/10/28/pdfs/BOE-A-2009-17108.pdf>

- (35) Following the publication of the 2008 Framework agreements and above-described addenda ⁽²²⁾, the governments of the Autonomous Communities started implementing the extension. They either organised public tenders themselves and/or charged a public undertaking with carrying out of the tender. The subsidies were partly agreed upon with MIEyT and therefore funded from the central budget, partly funded by the Autonomous Communities themselves. In certain cases the Autonomous Communities mandated the municipalities to carry out the extension.

2.2.2. Implementation of the aid measure in Castilla-La Mancha

- (36) In contrast to the majority of other Autonomous Communities, the Castilla-La Mancha authorities did not organise regional tenders for the extension of coverage of digital television. This apparently was due to time constraints, as it had to upgrade more than 400 transmission centres ⁽²³⁾. Instead, the JCCM followed a particular procedure to select telecom operators to digitise broadcasting centres, established in the Decree 347/2008 of 2 December 2008 (hereinafter: 'the Decree').
- (37) The Decree mandated the direct attribution of the funds necessary for the digitisation to the owners of the existing (analogue) emission centres. It therefore did not require any open tender procedure. The JCCM had to follow a particular procedure: (i) technical analysis of the centres providing analogue coverage at the time, (ii) analysis of the digital coverage to achieve, (iii) selection of the emission centres to digitise, (iv) identification of the owner of the emission centres, (v) proposal by the regional government to the owner of the emission centres, and (vi) adjudication of the subsidies.
- (38) The Decree was implemented accordingly. The owners of existing emission centres were directly contacted. They were informed about the requirements for benefitting from the public financing. Three different scenarios can be distinguished. First, in most cases the emission centres are owned by the municipalities which are responsible for the operation and maintenance of the centre. After having received the funding from the JCCM, on the basis of a technical and economic offer, the municipalities bought the digital equipment from Abertis or TelecomCLM and subcontracted the installation, operation and maintenance of the equipment to these two companies. Only these two companies were contacted by the authorities and only they submitted technical proposals to apply for the aid. Second, in around a quarter of cases the selected centres belong directly either to TelecomCLM or to Abertis. In these cases the two companies received the aid to upgrade their equipment. Finally, as a third category, some new emission centres had to be built. While they were publicly funded, they are now owned by TelecomCLM.
- (39) The JCCM entered into 147 collaboration agreements ('convenios') with the two operators and into 475 collaboration agreements with municipalities. About 84 % of installations covered by these 'convenios' were for DTT installations and 16 % for satellite household receivers. Satellite receivers have been used to ensure DTT channels coverage for very small villages. For that purpose, the JCCM decided to use the satellite platform of Hispasat ⁽²⁴⁾. At the end of the process, the information about the upgrading of the existing centres was published on the Town Halls' Notice Boards.
- (40) The Commission was informed that in total around EUR 46 million of public money was spent for the upgrading of transmission centres, out of which EUR 32,6 million went directly to the municipalities owning 355 broadcasting centres ⁽²⁵⁾. The collaboration agreements between JCCM and the municipalities provide that the latter are responsible to contract a selected operating company which would carry out the installation and maintenance services ⁽²⁶⁾. Different selection procedures were chosen by the individual municipalities. Some municipalities sent letters directly to TelecomCLM and Abertis and some published the information on the Notice Board of the City Hall inviting operators to present their technical proposals.

⁽²²⁾ In total more than 600 agreements — framework agreements, addenda etc. — were concluded between the authorities concerning the extension of coverage.

⁽²³⁾ The Government of Castilla-La Mancha concluded that it would not have the time necessary to organise a public tendering within the timeframe of the national Plan for the Transition to DTT. Compare: Annexes II — JCCM Internal Study on the implementation of the National plan for the Transition to DTT in Castilla La-Mancha, p. 31.

⁽²⁴⁾ Castilla-La Mancha Authority: The Implementation of the DTT Transition Plan in Castilla-La Mancha, presentation to the European Commission, 27 October 2010.

⁽²⁵⁾ Municipalities are equipment owners and they have to pay for Operation and Maintenance (O&M) cost for the first two years of operation.

⁽²⁶⁾ Collaboration Agreement between the JCCM and the Municipality of Caspueñas, p. 76.

- (41) Under the collaboration agreement the JCCM pays for the acquisition of digital equipment, its installation and the Operation and Maintenance (O&M) for the first 2 years for each of the (digitised) emission centres. As the collaboration agreement did not oblige the operator to pay for O&M thereafter, TelecomCLM transferred the equipment to the JCCM ⁽²⁷⁾. Thereafter the JCCM became responsible to pay for the O&M of DTT equipment.
- (42) Out of the total EUR 46 million of public funds spent, the Commission was informed that at least EUR 13,5 million were transferred to platform operators: EUR 13,2 million to TelecomCLM which owns 138 of the transmission centres and around EUR 250 000 to Abertis who owns 3 of them. TelecomCLM and Abertis digitised their centres with their own equipment. In some cases, the equipment used to digitise TelecomCLM masts still belong to the public authorities. In these cases the operator does not have to pay for the use of such equipment. In addition, the total amount of funds spent in the years 2009-2011 on operation and maintenance of the digitised centres (ongoing aid) was of at least EUR 6,5 million.
- (43) However, the mere upgrading of the existing centres was not sufficient to complete coverage of the extension area. Therefore, 20 new centres were built with public funds. Without carrying out an open tender, TelecomCLM was contacted directly by the authorities and asked to execute this task. According to the information provided to the Commission, a total of EUR 2,26 million were spent for the construction of the new sites, out of which around EUR 751 000 for the construction of six centres which were later transferred to TelecomCLM. The ownership of the remaining 14 centres remained with the municipalities.
- (44) Finally, as pointed out in recital 39, where a DTT centre would be too expensive to deploy, satellite transmission has been used instead. For that purpose, 100 agreements were concluded to install satellite receptors at individual homes. Satellite receptors are part of the satellite transmission network.
- (45) As a result of the procedure, in total 622 agreements were signed by the authorities with the municipalities and operators concerned. Based on the information provided to the Commission, the amounts were distributed as follows:

(Million EUR)

	Upgrade of transmission centres	New transmission centres	Upgrading the infrastructure of municipalities ⁽¹⁾	Operation & Maintenance ⁽²⁾
TelecomCLM	13,2	2,26	32,6	To be determined
Abertis	0,25	—		To be determined
Total	13,45	2,26	32,6	At least 6,5

⁽¹⁾ To upgrade their networks, municipalities paid up to EUR 32,6 million to TelecomCLM and Abertis.

⁽²⁾ Collaboration agreements cover 2 year O&M. In the case of municipalities this amounts to EUR 4,5 million and for operators to EUR 2 million. JCCM Internal Study on the implementation of the National plan for the Transition to DTT in Castilla La-Mancha, p. 53.

2.3. GROUNDS FOR INITIATING THE PROCEDURE

- (46) In the opening decision, the Commission noted that the measure described seems to meet all the criteria of Article 107(1) TFEU and could, therefore, be regarded as State aid. The contested measure seems to entail discrimination in favour of terrestrial platform operators, in breach of the technological neutrality principle ⁽²⁸⁾. Furthermore, the contested measure seems to discriminate against platform operators which provide broadcasting transmission services to regional and local terrestrial broadcasters. This would be to the advantage of national broadcasters and platform operators.

⁽²⁷⁾ On the basis of 'DTT Equipment Transfer Agreements', as signed on 17 May 2013. This was to ensure the provision of O&M of the DTT equipment beyond the 2-year period laid down in the Collaboration Agreements. However, in the case of 3 collaboration agreements Abertis remained the owner of the DTT equipment.

⁽²⁸⁾ See in particular the judgments: *DVB-T Brandenburg*, T-21/06, Germany against Commission, [2009] ECR II-00197, paragraph (69) and *Mediaset SpA v Commission*, T-177/07, [2010] ECR II-02341.

- (47) The Commission reached the preliminary conclusion that the scheme may have created a potential or actual distortion of competition between terrestrial and satellite platforms and between terrestrial platforms themselves. It did not see any grounds on which such measures could be compatible with the internal market, since no derogation seemed to be applicable.
- (48) For additional factual details it should be referred to the opening decision which is to be considered an integral part of this Decision.

3. COMMENTS FROM SPAIN

3.1. GENERAL REMARKS

- (49) In its defence to the opening decision, Spain and the Autonomous Community of Castilla-La Mancha have put forward numerous arguments. Broadly speaking they fall into two categories. First, the Spanish authorities put forward that there would be no advantage granted to the aid recipients. Second, if one considers nevertheless that State aid has been granted, in any event it would be compatible ⁽²⁹⁾. These arguments are summarised in what follows.

3.2. ABSENCE OF AID

3.2.1. No advantage

- (50) According to the authorities of Castilla-La Mancha, the investigated measure does not contain State aid as there is no advantage to undertakings. The direct transfers of funds come from a combination of funds from the Spanish State and the Autonomous Communities to the recipients' acting in their official capacity or as public authority ⁽³⁰⁾. These contested subsidies were exclusively used to digitise 141 pre-existing analogue emission centres, and to build 6 new centres. The digitisation of the emission centres was carried out after a thorough assessment of a technical report submitted by the operators owning those centres. Only on the basis of such technical reports the Collaboration Agreement was signed with the owners of the centres ⁽³¹⁾. This 'negotiated procedure' should be regarded as open, transparent and non-discriminatory, also because of the publication on City Halls' notice boards (see recital 39).
- (51) The national authorities claim that, to the extent that platform operators received public funding, this was only for the operation and maintenance of the electronic transmission equipment owned by the municipalities. They acted as mere suppliers and installers of the technical equipment necessary to upgrade and adapt those centres, but not as platform operators ⁽³²⁾. Where they provide services in Area II after the public funding, it is only for the provision of the terrestrial TV signal as a basic and public service.
- (52) To carry out the digitisation of their networks, the 475 municipalities procured technical reports which often were carried out by platform operators. Also in this case there was no economic advantage granted to the operators.
- (53) According to the national authorities, the digitised transmitting centres owned by either TelecomCLM or Abertis Telecom existed before the granting of the contested subsidies, hence these subsidies were not used to finance the network expansion of any of the two network operators involved in the extension of the DTT coverage in Area II of CLM.

⁽²⁹⁾ In the case of Castilla-La Mancha the authorities have not argued that the measure should be considered as an SGEI. It would also not fulfil the Altmark criteria, as— among other reasons — there is no entrustment act, the beneficiaries were not selected on the basis of an open tender, nor has the authority calculated the compensation on the basis of the cost a well-run undertaking would face for delivering such services.

⁽³⁰⁾ Originally, municipalities had built and owned analogue transmitting centres over the last decades. They received the public funding for digitisation of this infrastructure.

⁽³¹⁾ Junta de Castilla-La Mancha submission to the EC (case C24/2010) — deployment of digital terrestrial television in remote and less-urbanised areas in Castilla-La Mancha, submitted on 6 June 2014.

⁽³²⁾ This, however, is in contradiction with the documents provided by Spain. For instance, article 7 of the DTT Equipment Transfer Agreement between TelecomCLM and the JCCM speaks about the DTT services provided by the operator in Area II. Moreover, as set out in recital 73, JCCM itself has argued that Abertis and TelecomCLM should be considered network operators in Area II. It is also in contradiction to the operators' activities as described in detail in recitals 113 to 120.

- (54) Public funding was granted to TelecomCLM and Abertis to digitise 141 of their own emission centres. The national authorities point out that this only happened in areas where municipalities did not own themselves a transmitting or re-transmitting centre apt for the extension of the DTT coverage. However, the national authorities claim that these investments did not grant TelecomCLM and Abertis a competitive advantage in adjacent markets such as the local television or the Digital Video Broadcasting (DV-BH) markets. The digitisation of TelecomCLM sites did not enable TelecomCLM to provide region-wide service to broadcasters nor did it increase the capillarity of its network to provide new types of services.
- (55) The network operators involved in the digitisation process of the three types of transmission centres in Area II did not have an economic advantage. In all three centres, services, like provisioning, installation and O&M of DTT equipment, have been provided at market price by the operators.

3.2.2. No distortion of competition and trade

- (56) There would be no distortion of competition and trade. Any telecoms operator listed in the CMT's Registry of Operators could act as a subcontractor of the municipalities and, therefore, be eligible for the subsidies under the Decree 347/2008. This would apply also to satellite, cable or TV operators and to all operators irrespective whether they are operating at national, regional or local level.
- (57) According to the national authorities, the selection process under consideration was transparent and was carried out in accordance with both Spanish and EU public procurement legislation. The subsidies have been made public by the regional authorities. All the DTT extension procedures were published on the City Halls' Notice Boards and letters were sent to the major network operators within the region, i.e. TelecomCLM and Abertis Telecom.
- (58) Hence the subsidies granted to municipalities would not reinforce the competitive position of a type of network operator over other competing operators. The main beneficiaries are municipalities, while network operators are simply suppliers of transmission equipment and maintenance services for a maximum period of two years. Radiodifusión was never contacted because, to date, there would be no evidence that it owns a single transmitting centre in the region.
- (59) Moreover, the Castilla-La Mancha authorities claim to have assessed carefully the satellite platform solution as an option to extend the digital coverage before issuing Decree n. 347/2008. In an internal study⁽³³⁾ two technologies for the extension — DTT and satellite — were compared. The study takes into account the criteria to grant the subsidies for the coverage of the digital signal in Area II. It includes the requirement that the transition has to be carried out without additional costs or inconvenience for citizens and to use existing infrastructure.
- (60) The study concludes that over a period of 10 years, the total costs associated to the terrestrial DTT solution would be approximately between EUR 15,2 and 17,3 million, whereas choosing a satellite technology would cost more than EUR 47 million.
- (61) The Study contains several recommendations on the most adequate methods to undertake the coverage extension of the DTT signal in those population centres of Castilla-La Mancha not covered by the official coverage plans of regional and national broadcasters. It also assessed all the implications of a satellite solution for the digital extension coverage. It concludes that satellite technology would generate investments 3 to 6 times greater than in terrestrial technology. This difference in costs stems directly from costs associated with renting the satellite transmission equipment, independently of the cost of the satellite decoder. As a result, it would be reasonable to conclude that the extension of universal DTT service to the population of Castilla-La Mancha should be realised with terrestrial DTT technology⁽³⁴⁾.

⁽³³⁾ Dr Julián Seseña 'Extensión de la cobertura de la señal TDT en Castilla-La Mancha: Estudio comparativo socio-económico de opciones tecnológicas', September 2008, study realised for the *Junta de Comunidades de Castilla-La Mancha* (JCCM).

⁽³⁴⁾ Furthermore, the JCCM argues that a later 'ex post' comparative cost breakdown would confirm the conclusion that the terrestrial solution would outweigh the satellite one. This breakdown complements the studies previously submitted by JCCM to the Commission and would show that, even though the initial investment for the terrestrial solution was slightly higher than the satellite one, from the 4th year the terrestrial solution would have been more economically efficient than the platform offered by Astra. For that calculation the JCCM used costs assumptions presented by Astra in a Memorandum of 10 November 2011.

- (62) In addition, the Spanish government provided an in-house study into the feasibility of providing universal DTT service using DTT or satellite, carried out by the MIEyT in July 2007. The authorities consider that the study takes into account the realistic costs of using either DTT or satellite transmission. Both studies are further discussed in section 5.3.2.2.
- (63) When taking its decision to implement the DTT coverage extension in Area II of CLM, the JCCM claims to have taken into consideration only technical and economic efficiency criteria. Any network operator — terrestrial, satellite, cable, etc. — could have submitted a technical proposal, the only requirement being listed in the CMT Operator's Registry ⁽³⁵⁾. For that reason, the decision was in line with the principle of technological neutrality. This would also be confirmed by the fact that in specific cases the JCCM retained the satellite platform previously developed by Abertis, based strictly on cost-analysis criteria ⁽³⁶⁾.
- (64) Concerning the alleged discrimination of local operators, JCCM admits that according to Article 4 of the Decree broadcasters are specifically excluded (independently of their scope, whether national, regional or local) as beneficiary of the subsidies ⁽³⁷⁾. However, the Decree does not exclude any network operators.
- (65) Nevertheless, according to the Spanish authorities, Radiodifusión could have participated on equal terms with all other network operators by digitising one of its transmitting centres already carrying the public national or regional analogue television signal. For that purpose it could have entered into a Collaboration Agreement with the JCCM or it could have submitted offers to a municipality as a telecommunications operator which is registered in the CMT Operators Registry.

3.2.3. Legal Standing of the Complainant Radiodifusión and its non-compliance with Network Operators' Obligations in Castilla-La Mancha

- (66) According to the JCCM, Radiodifusión is registered as a telecommunications Operator in the CMT's Operators Registry, providing the following services: 'Terrestrial network — Supporting radio and television broadcasting services'. However, it emphasises that being listed in that Registry does not suffice to fulfil its obligations as a telecommunications operator in Castilla-La Mancha as foreseen in the relevant local Law n. 8/2001. This holds in particular for the obligation for radio-communications operators to 'submit a Territorial plan for network deployment that includes existing fixed stations as well as estimates of implementation and development of their entire networks (...)'. So far, the JCCM is not aware of any Territorial plan submitted by Radiodifusión. Furthermore, Radiodifusión is not known to share any infrastructure with another operator. As a result, JCCM argues that Radiodifusión's claim of a 60 % coverage in CLM is groundless ⁽³⁸⁾.
- (67) In addition, JCCM points out that there is a company of the group with identical shareholders as Radiodifusión, INGEST, Infraestructuras y Gestión 2002, S.L. (hereinafter 'INGEST'), with a number of pending proceedings. In all those cases, INGEST is charged with illegal occupation of radio spectrum reserved for the national DTT, which the defendant uses to broadcast the signal of local televisions. Moreover, Radiodifusión would not have an authorisation to re-transmit Radio-Televisión de Castilla-La Mancha ('RTV C-LM') DTT signal.

3.2.4. Operation and Maintenance (O&M)

- (68) According to JCCM, both TelecomCLM and Abertis Telecom are not beneficiaries of the contested measures to cover the recurrent costs associated with the O&M of the municipal terrestrial sites. The purpose of the Collaboration Agreements' is 'to finance the infrastructure necessary to complement signal coverage extension and emission from entities and companies licensed to provide essential television services'. Hence only the acquisition

⁽³⁵⁾ Currently around 900 operators are listed in the Registry.

⁽³⁶⁾ JCCM decided to implement satellite in scarcely populated centres in Area II where there was no transmitting centre or the cost of digitising the existing terrestrial infrastructure was too high. 100 Collaboration Agreements were concluded with municipalities and led to the installation of satellite receptors in each household, which was less costly than constructing a new transmitting centre.

⁽³⁷⁾ The rationale behind this exclusion was to avoid the digitisation of a centre which is already covered by the broadcasters' official DTT coverage obligation in Area I.

⁽³⁸⁾ A 60 % population coverage in the region could only be achieved (based on certain transmitting parameters) with 8-12 emission centres located in the outskirts of the main cities of the region. Radiodifusión would not have such centres. All those emission centres would take part, for the last 10 years, in the official coverage plan for broadcasters. However, no public Administration, national, regional or local, would consider the digitisation of such centres as they would have been already included in the official coverage plan for extension of DTT in the region.

and installation of elements such as radio-communications and antennae equipment or construction elements are subject to financing. In Area II, the costs were taken over by the municipalities which own those centres. The estimated costs of O&M for the initial two years for a total of 516 centres are EUR 6,5 million. As a result, for the period 2010-2015 these costs would amount to approximately EUR 15 million for 516 centres over 5 years (average of EUR 29 000 per centre).

3.2.5. Exemption under the 'General Infrastructure' argument

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

3.2.6. Exemption under the MEIP principle

- (70) JCCM puts forward that the transfer of the public funds in question complies with the market economy investor principle (MEIP) on the basis of a market benchmark pricing exercises. The payments to TelecomCLM for certain services were made at market rates.
- (71) A comparison between the actual funding with the payment a private investor would have had to make in normal conditions to get the same types of services, leads JCCM to the conclusion that the Collaboration Agreements were based on objective commercial criteria. As a result, the network operators have not been better off compared to what they would have obtained under normal market conditions. They therefore have not received a selective advantage.

3.2.7. Exemption under Article 107(3)(a) TFEU argument

- (72) JCCM invokes Article 107(3)(a) TFEU. It argues that this provision may be applied in Area II which has not attracted the commercial interest of broadcasters and network operators. The municipalities, by providing DTT services and subcontracting the acquisition, installation and O&M of DTT equipment, have filled a market gap with the subsequent improvement of the living conditions of Area II 's inhabitants and the overall economic improvement of this region of Castilla-La Mancha.

3.2.8. Abertis as network operator

- (73) JCCM disagrees with Abertis' submission that it should not be considered to be a network operator in Area II. JCCM points out that Abertis has entered into Collaboration Agreements with the JCCM under Decree n. 347/2008 to carry out the DTT coverage extension in Area II ⁽³⁹⁾. Furthermore, Abertis and TelecomCLM should be considered network operators active in Area II because there exist analogue TV official transmitting centres of RTVE and/or Tele5 in the case of Abertis, and analogue TV official transmitting centres of CMT in the case of TelecomCLM.
- (74) In several cases the digitised municipal equipment is located in sites owned by Abertis or TelecomCLM. In these cases, the DTT equipment belongs to the relevant municipalities. Abertis argues that, given the fact it is not a network operator in Area II, it cannot be deemed direct beneficiary of the contested subsidies because: 'the equipments are owned and operated by TelecomCLM and the other local operators' ⁽⁴⁰⁾. JCCM considers this statement to be wrong.

⁽³⁹⁾ The JCCM provided two examples of Collaboration Agreements signed by Abertis.

⁽⁴⁰⁾ Paragraph 22 of Abertis Telecom submission of 31 January 2011.

4. COMMENTS FROM INTERESTED PARTIES

4.1. COMMENTS FROM RADIODIFUSIÓN DIGITAL SL

- (75) In its response to the Commission's opening decision, Radiodifusión observes that the Spanish Authorities have not formally entrusted the beneficiaries of the aid with a mission of general economic interest. Furthermore, the amount of the aid per centre would appear excessive if applied only to existing centres, as purported by the Spanish Authorities. In Radiodifusión's view, the aid was mainly used to set up new emission centres throughout the region of Castilla-La Mancha and to conceal an illegal aid.
- (76) Radiodifusión insists that the Authorities of Castilla-La Mancha granted the aid without any tendering procedures and the transfer of resources has been selective because it excluded platforms based on other technologies, such as cable or satellite.
- (77) According to Radiodifusión, TelecomCLM has gained decisive advantages from the contested measures. It was selected directly by the regional authorities without any competitive selection procedure. As a result, it could significantly increase the geographical coverage of its network into areas where nobody would have invested otherwise. TelecomCLM would further benefit from a lack of regulatory oversight because it is not under any regulatory obligation to provide access to the newly built/enhanced network. Radiodifusión points out that Decree n. 347/2008 would specify that the objective of the State aid is to create new emission centres and not to digitise existing ones.
- (78) In Radiodifusión's opinion, the aid strengthens traditional operators in the only market segment where there is some room for competition. In particular, allegedly Abertis has been able to reinforce its monopoly position, and to actually use public funding to develop a new and denser network which will enable it to compete on new markets.
- (79) Radiodifusión is convinced that the investigated State aid is not proportional. To be in line with the proportionality requirement, the aid should apply only to remote rural areas and benefit all operators equally by imposing effective access obligations.
- (80) In its reply of 27 September 2011 to a request for information from the Commission, addressing the issues of legal standing raised by Spain, Radiodifusión declared that its main activity is to provide services to local audiovisual broadcasters. It provided a list of its installations which it operates in 18 municipalities in Castilla-La Mancha. According to Radiodifusión, the same installations could be used to broadcast national and regional broadcasting and therefore could have been used if it had been allowed to compete for the aid

4.2. COMMENTS FROM ASTRA

- (81) By selecting directly the terrestrial platform, Astra considers that the measure, including the ongoing aid for O&M, violates the principle of technological neutrality. It emphasises that satellite transmission would have been cheaper than DTT in Area II ⁽⁴¹⁾. This had been demonstrated clearly by Astra's success in the Cantabria tender. Given its significant economies of scale, the satellite solution would have allowed even more cost savings if several regions had coordinated their selection of a platform in Area II. Even if for constitutional reasons the Spanish government could not have imposed that cross-regional synergies be taken into account as a condition for the granting of the funds, the regions could have done so themselves. Only by doing so the regional governments could have ensured that they would choose the most cost-efficient solution for their taxpayers.
- (82) When comparing the different platforms, apart from direct installation cost, according to Astra one should also take into account further positive effects which the satellite solution would have had. The transition process would have been much easier and less costly. TV audience would have benefited from a 'simulcast' transition

⁽⁴¹⁾ Astra refers to its internal cost study submitted together with the complaint, carried out in November 2008. The study compares the costs of extension of coverage using both technologies — terrestrial and satellite. The assumptions of the study differ from the ones carried out by Spain and Abertis in various respects, amongst others concerning the costs of satellite antenna and necessity of purchase of an external set-up box for the reception of digital terrestrial TV. The study concludes that the extension of coverage via satellite would not be more expensive than using the terrestrial technology.

period of receiving both satellite and terrestrial channels. Given the scarcity of bandwidth in the terrestrial network and the need to free more capacity for telecom services in the future, in the case of the terrestrial network further cost would arise to households and broadcasters. Future changes of bandwidth would require residents in Area II to adapt their antennae. Broadcasters would face more expenses from further simulcast periods. No such cost would arise if the satellite technology had been chosen directly.

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

4.3. COMMENTS FROM ABERTIS

4.3.1. Presence of State aid

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

- (92) Sixth, if one considers this to be aid, in Abertis' view it would be existing aid. The deployment of broadcasting networks in Area II commenced in a non-liberalised broadcasting sector in 1982. At that time, the Spanish State held a legal monopoly in the market for terrestrial broadcasting. Public funds are now used to finance the installation, maintenance and operation of the local networks in Area II put in place prior to the liberalisation of this sector. Therefore, the investigated measure would be an ongoing, existing aid.
- (93) With regard to compatibility, in relation to Article 106(2), Abertis points out that TelecomCLM and other local network operators are unlikely to ever surpass the thresholds of average annual turnover before tax of EUR 100 million during the two financial years preceding that in which the SGEI was assigned, and annual compensation for the service in question of EUR 30 million.
- (94) Further, any potential aid would be compatible with Article 107(3)(c) TFEU. The measures adopted by the Spanish authorities aim at the acceleration of the digital switchover process in Spain, which has been recognised as an objective of common interest. The aid was an appropriate instrument as DTT is the most suitable technology to provide the coverage extension⁽⁴²⁾. Apart from economic reasons, Abertis also notes that broadcasters are reluctant to use satellite platforms, which is due to the constraints faced by broadcasters when acquiring content rights for their free-to-air programmes. In most cases they only acquire the right to broadcast the contents over a specific platform, namely DTT, as this technology allows targeted transmission and geographical limitations. Moreover, the measures are proportionate since they cover only the costs strictly necessary for the switchover from analogue to digital television services in Area II.

4.4. COMMENTS FROM BROADCASTERS

- (95) The broadcasters submit that the measure cannot be considered State aid because a financial advantage has not been granted to any company, and especially not to broadcasters. The measures have not increased the audience of broadcasters in relation to when they broadcasted in analogue. Moreover, the residents in the extended coverage areas, i.e. rural, remote and sparsely populated areas, have no impact on the advertising market and are not part of the broadcasters' target audience. In these circumstances the private operators did not increase the fees for advertisement due to the extension.
- (96) The broadcasters also expressed the view that they do not have an interest in migrating to satellite platform, where their programmes would face competition from hundreds other channels. The terrestrial platform has its advantage of limited capacity, which for commercial free-to-air broadcasters means less competition. Moreover, they underlined the fact that they usually purchase contents for the specific — terrestrial — platform only. This is because terrestrial broadcasting guarantees the geographical delimitation of broadcasts, which is not the case for satellite.
- (97) Broadcasters also insisted that after assignment of the Cantabrian tender to Astra, they informed the Cantabrian authorities that they would oppose to satellite broadcasting, as they had acquired rights to broadcast the contents only via the terrestrial platform.

5. LEGAL ASSESSMENT

5.1. LEGAL BASIS OF THE AID

- (98) As described in detail above in section 2.2 at recitals 26 to 44 and set out in detail in decision on case SA.28599 — digital terrestrial television in Spain⁽⁴³⁾, the legal framework for the digital switch-over in Spain is a complex net of various acts issued both by the central government and the regional and even local authorities over a period of four years. The National Technical Plan of 2005 and the Transition Plan of 2007 regulate mainly the transition to DTT in Area I but they also set the basis for further extension measures in Area II. These extension measures were implemented by the regional authorities, after conclusion of several framework agreements with the central government (the 2008 Framework Agreements) and addenda in 2008 to previous 2006 Framework Agreements and in 2009 to the 2008 Framework Agreements.

⁽⁴²⁾ Abertis refers to its own cost study conducted in January 2010 to compare the respective costs of using DTT and satellite technology to provide digital television services in Area II. According to this study, the overall cost for using DTT technology would represent about EUR 286 million in a 10-year period, whereas the total costs of using the satellite technology in the same period would amount to approximately EUR 532 million.

⁽⁴³⁾ SA.28599 — C(2013)3204 final of 19 June 2013.

- (99) As a result of the conclusion of these agreements and addenda, the regional and/or local authorities carried out a wide array of measures aiming at extending the coverage of DTT in Area II. The Commission therefore considers that the various acts taken at the central level and the agreements concluded and amended between the MIEyT and the Autonomous Communities constitute the basis of the aid scheme for the extension of coverage in Area II. These acts and agreements guided the Autonomous Communities towards measures, which were not technologically neutral ⁽⁴⁴⁾.
- (100) While the National Technical Plan regulates the switch-over to DTT in Area I, it also provides a mandate to local authorities to establish, in cooperation with the Autonomous Communities, additional transmission centres necessary to ensure reception of the DTT in the Area II. Thus, at that point in time the central government already foresaw the extension of DTT coverage. The mandate contained in the principal legal act regulating the switch-over to digital television only refers to the terrestrial platform. In practice, the Autonomous Communities have therefore executed the central government's guidelines on the extension of DTT ⁽⁴⁵⁾.
- (101) The moment when the State aid for the deployment of the DTT in Area II was effectively disbursed was marked by the transfer of funds from the central and regional authorities to the beneficiaries. This happened over a period of time depending on the Autonomous Community. As for the ongoing aid for operation and maintenance of the networks, this was decided at the level of the Autonomous Communities.
- (102) In the case of Castilla-La Mancha, as described in detail in recitals 36 to 45, a different process was chosen. In contrast to the majority of other Autonomous Communities, no regional tenders for the extension of coverage of digital television were used. Instead, the Decree 347/2008 of 2 December 2008 mandated the direct attribution of the funds necessary for the digitisation to the owners of the existing (analogue) emission centres. The JCCM therefore did not use any open tender procedure but instead selected the telecom operators directly. These companies also carried out operation and maintenance tasks.
- (103) Where the emission centres belong directly to TelecomCLM or to Abertis, these companies received the aid to upgrade their own equipment. Where new emission centres had to be built, they were publicly funded, but TelecomCLM obtained the ownership. Finally, in most cases the analogue emission centres are owned by the municipalities. The latter bought the digital equipment from TelecomCLM or Abertis and subcontracted the installation, operation and maintenance of the equipment to these two companies.

5.2. STATE AID ASSESSMENT PURSUANT TO ARTICLE 107(1) TFEU

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

- (104) The measure in question, including the ongoing aid for operation and maintenance, can be characterised as State aid within the meaning of Article 107(1) TFEU, 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.

⁽⁴⁴⁾ Such guidance can be found in the relevant documents of the Central government. In particular, the framework agreements signed in December 2008, entitled *Framework Collaboration Agreement between the Ministry of Industry, Tourism and Trade and the Autonomous Community of [...] for the Development of the National Transition Plan to DTT*, foresee a list of activities that will be financed by the central and regional authorities in order to reach the coverage of digital television equal to the existing analogue coverage. On the one hand they refer to existing transmission centres upgraded by broadcasters (DTT centres deployed in Area I) and, on the other hand, to 'coverage extensions' — additional centres that will need to be deployed in order to ensure the same penetration of digital television. Given that only the DTT technology requires existence of transmission centres, it seems clear that the actions foreseen concern only the DTT technology. Further, the addenda to the 2008 Framework Agreements signed between October and December 2009 refer to funding for the coverage extension. They define what should be understood by 'action to extend the coverage', by making explicit reference only to the terrestrial technology.

⁽⁴⁵⁾ In meetings with the Autonomous Communities, MIEyT expressed its objective to ensure the transition to DTT also in Area II. This is confirmed by a presentation, publicly available on Internet, and signed by MIEyT. <http://www.fenitel.es/asamblea08/PONENCIAS/4SETSI.pdf>. It is also confirmed by statements from Autonomous Communities to the Commission's request for information. In their replies, the Autonomous Communities explicitly refer to the National Transition Plan adopted by Royal Decree 944/2005 and to the Plan Avanza. See, for example, the reply from Extremadura: 'Conforme a lo dispuesto (...) del Real Decreto 944/2005 (...) por el que se aprueba el Plan técnico nacional de la televisión digital terrestre, en la cual se recoge la iniciativa local en la extensión de la cobertura de la TDT....'.

5.2.1.1. State resources and State imputability

- (105) The measure in question originates from the system of legal acts described above, issued both at the central as well as at regional or local levels, as well as from agreements concluded between MIEyT and the authorities of Castilla-La Mancha. Castilla La Mancha did not contest the finding of the opening decision that the measure was financed from budgetary resources. It insisted, however, that it was financed both from the central, as well as from the regional and municipal budgets. It also expressed the view that the measure in question was actually a mere transfer of funds between different administrations. As such, Castilla-La Mancha recognised that the funds originate partly in the central budget. Further, the measure was not a mere transfer of funds between administrations, as ultimately the funds were used for the deployment of the DTT network by entities carrying out an economic activity (as explained in section 5.2.1.2).
- (106) In these circumstances it has been established that the investigated measure was funded directly from the budget of the State and from the budgets of the particular region and municipalities. Ongoing aid was not funded from the central State budget, but it comes from the budget of the Autonomous Community.
- (107) As the measure is financed by the State, at the central and the regional or local level, it is imputable to the State and involves the use of state resources.

5.2.1.2. Economic advantage to entities carrying out an economic activity

- (108) Abertis, listed on the Spanish Stock Exchange, is an international company active in the management of toll roads and terrestrial and satellite telecommunication infrastructures. It is present in 12 countries in Europe and the Americas, with around two thirds of the Group's revenue being generated outside Spain. Abertis telecom owns and operates a telecommunications infrastructure in Spain. It also has the leading network of sites for the distribution and broadcast of radio and TV signals in Spain. TelecomCLM, S.A. is a regional telecommunication operator providing services in Castilla-La Mancha. Its services include transport, contribution, and diffusion of signals of radio and television; housing of equipment and radiating systems; infrastructure sharing; and integral infrastructure maintenance. The company provides services to the local, autonomic, and national operators. [...].
- (109) The measure in question entails a transfer of State resources to certain undertakings. Although the concept of an undertaking is not defined by the Treaty, it refers to any natural or legal person, regardless of its legal status and its financing, who carries out an economic activity. In the practice of the Commission, as confirmed by the Courts, operation of television transmission networks is considered to be an economic activity⁽⁴⁶⁾, similarly as in other cases involving management of infrastructure by the regional authorities⁽⁴⁷⁾. In the case at hand, the public undertakings are registered in the register of the CMT as network operators. This suggests that they provide certain services, which according to the settled case practice constitutes an economic activity. A market exists if other operators would be willing or able to provide the service in question, which is the case. For instance, Astra held several meetings with Autonomous Communities before the implementation of the extension of the coverage in Area II to present them its offer. In addition, in March 2008 Astra participated in and won a technologically neutral tender for providing digital TV in Area II and Area III published in Cantabria. The fact that the public undertakings and municipalities do not receive remuneration for the provided services does not discard the qualification of the activities in question as an economic activity⁽⁴⁸⁾.
- (110) The Commission does not agree with the argument of Spain that operation of the terrestrial network by the Autonomous Communities, public undertakings and municipalities falls within the exercise of official powers as a public authority and therefore falls outside the scope of Article 107 TFEU. It has been recognised that the

⁽⁴⁶⁾ Commission decisions: N 622/2003 Digitalisierungsfonds Austria, C25/2004 DVB-T Berlin Brandenburg (paragraph (62)), C34/2006 DVB-T North-Rhine Westphalia (paragraph (83)), C52/2005 Mediaset (paragraph (96)).

⁽⁴⁷⁾ Case T-196/04 Ryanair Ltd v European Commission, [2007] ECR II-2379, paragraph (88).

⁽⁴⁸⁾ See Joined Cases T-443/08 and T-455/08: *Freistaat Sachsen and Land Sachsen-Anhalt (T-443/08) and Mitteldeutsche Flughafen AG and Flughafen Leipzig-Halle GmbH (T-455/08) v European Commission*, [2011] ECR II-01311, paragraph (115), where the Court states: 'The fact that an activity is not engaged in by private operators or that it is unprofitable are irrelevant criteria in regard to the classification of that activity as an economic activity (...).'

activities linked to the exercise of State prerogatives by the State itself or by authorities functioning within the limits of their public authority do not constitute economic activities for the purposes of competition rules ⁽⁴⁹⁾. Such activities are those that form part of the essential functions of the State or are connected with those functions by their nature, their aim and the rules to which they are subject may be regarded as falling within this exception. The Courts' case-law has provided several examples of activities that fall within this category, thus establishing a dividing line between pure State activities and the commercial activities a State entity may engage in. This list includes activities related to the army or the police, the maintenance and improvement of air navigation safety, air traffic control ⁽⁵⁰⁾; the anti-pollution surveillance which is a task in the public interest that forms part of the essential functions of the State as regards the protection of the environment in maritime areas ⁽⁵¹⁾ and standardisation activities as well as related research and development activities ⁽⁵²⁾.

- (111) In this light, the Commission is of the opinion that in the present case the operation of the terrestrial broadcasting network does not fall within the State's obligations or prerogatives nor is it a typical activity that could only be performed by the State. The services under consideration are not typically those of a public authority and are in themselves economic in nature, which is evidenced by the fact that several undertakings are active on the market in the Area I. Second, a private undertaking, not dependent on any public authorities — namely Astra (as evidenced by its presence as a bidder in the 2008 tender in Cantabria) — was interested in providing this service in Area II. Astra's complaint also covers the region of Castilla-La Mancha, where it is interested in providing digital broadcasting services as a platform operator. Third, the deployment of the network in Area II only concerns the transmission of national and regional private channels ⁽⁵³⁾. As a result, it is concluded that the operation of the terrestrial network by the Autonomous Communities, public undertakings and municipalities does not fall within the exercise of official powers as a public authority.
- (112) The Commission disagrees with JCCM that the measure is in line with the Market Economy Investor Principle (MEIP). This test considers whether a market investor would have invested in the project on the same terms and conditions as the public investor at the time when the decision to make the public investment was taken. In the current case, the public investment is the JCCM's funding of the digitisation of terrestrial broadcasting networks of Telecom CLM and Abertis. Where the equipment remains the ownership of the public authorities (municipalities), it is operated by the former companies. The agreement with the operators does not provide for a reimbursement of the funds or for a remuneration of the equipment owned by the public authorities. This contradicts directly the concept of a private investor who would not only require such reimbursement/remuneration but in addition also a return on the investment itself. The public funding of the DTT network was not meant to be a profitable investment by itself. As a result, the JCCM's investment in the digitisation of the terrestrial network in Area II does not fulfil the MEIP.
- (113) An economic advantage therefore exists where the operator receives public funds to digitise its own equipment or build new emission centres. Second, where a public authority directly selects (i.e. without public tender) an operator for the provision of DTT equipment and O&M services, this is not done on market terms. This also grants an economic advantage to the operator.

Direct beneficiaries of the aid

- (114) As set out in recitals 36 and 37, JCCM did not organise any regional tender for the upgrading of analogue networks or for the extension of coverage of digital television. Instead, these funds were attributed directly to the municipalities or to existing terrestrial operators. Municipalities then chose operators to carry out the task without public tender. As a result, other platform operators, whether terrestrial or other, were not properly

⁽⁴⁹⁾ Communication from the Commission on the application of the European Union State aid rules to compensation granted for the provision of services of general economic interest (OJ C 8, 11.1.2012, p. 4).

⁽⁵⁰⁾ Case C-364/92, SAT/Eurocontrol, [1994] paragraphs 19 to 30, ECR I-43, C-113/07 P, Selex, [2009], ECR I-2207.

⁽⁵¹⁾ Case C-343/95, Cali & Figli, [1997], ECR I-1547, paragraph 22.

⁽⁵²⁾ Case T-155/04 Selex, [2006] ECR II-4797, paragraphs 73-82, confirmed by C-113/07, Selex [2009], ECR I-2307.

⁽⁵³⁾ As set out in section 2.1.3 public broadcasters have a 98 % coverage obligation and therefore had to cover Area II by their own means. Moreover, the national public TV channels of RTVE and regional public channels are broadcasted via a different network. While private broadcasters use the Single Frequency Network (SFN) signal, public broadcasters use the Red Global Española (RGE) network. As a result of these differences, the terrestrial facilities require different equipment for each of the two networks.

informed of the measure and therefore could not have made a technical proposal for the upgrading of infrastructure for the extension of coverage of digital television in Area II in the region ⁽⁵⁴⁾.

- (115) Abertis and TelecomCLM either received the funds for the upgrading and extension of their own network, or they were contracted by municipalities to carry out such work on the latter's infrastructure ⁽⁵⁵⁾. In both cases, the two operators were selected without public tender. In most cases, the municipalities own the DTT equipment which is attached to the operators' masts. The latter do not remunerate the municipalities for the use of such equipment.
- (116) TelecomCLM entered directly into 133 Collaboration Agreements with the JCCM aimed at the digitisation of its own emission centres. This was considered necessary to carry out the DTT extension in rural areas where the population density is low and no operator has shown interest to invest. An overview of the costs incurred by TelecomCLM upon the receipt of funds transferred by the JCCM shows that the former used these funds exclusively for the acquisition, installation of DTT equipment and for the subsequent maintenance of equipment for the first 2 year period.
- (117) Thus, TelecomCLM and Abertis upgraded part of their existing broadcasting centres and are now in a position to operate the DTT network in Area II due to the public subsidy. They can also use the new infrastructure to provide other services, for example WiMax (wireless broadband standards which can provide fix or mobile broadband). TelecomCLM used its centres [...] and several digitised centres owned by municipalities for the installation of the JCCM's WiMax equipment [...] ⁽⁵⁶⁾. Due to these economies of scope, the DTT network operators have opportunities to raise income from the publicly financed infrastructure. [...].
- (118) The quantifiable advantage to the direct beneficiaries TelecomCLM and Abertis is the total amount of the funds received for the extension of coverage (including the funds received for the upgrading or building of new transmission centres).
- (119) Where municipalities act themselves as network operators, they received public funds to digitise the transmission centres located in their areas and to build new ones. The authorities argue that these were merely transfers of funds between different levels of administration and that, by extending municipality owned networks, the municipalities simply carried out their administrative obligations towards the inhabitants. However, where municipalities act as network operators they carry out an economic activity. Many of them are registered on the CMT's list of network operators. Nevertheless, as the municipalities bought the digital equipment from Abertis or TelecomCLM and subcontracted the installation, operation and maintenance of the equipment to these two companies without public tender, also in this case the latter are the direct beneficiaries of the aid.
- (120) The funding also includes the operation and maintenance (O&M) of the network. These tasks are performed by TelecomCLM and Abertis. This is considered ongoing aid and the operators, charged with the operation and maintenance of the network, are considered to be the beneficiaries. Finally, in more general terms, Abertis and TelecomCLM also benefit from the exclusion of another platform operator from entering the market of transmitting free to air TV signals in Spain ⁽⁵⁷⁾.

⁽⁵⁴⁾ To the extent that a local operator as Radiodifusión broadcasted the signal of national broadcasters, it might have been eligible for the regional subsidies. However there was no tender foreseen to invite the potentially interested operators to submit their offers. To the contrary — it was up to the regional authorities to take the initiative, locate the emission centres that were broadcasting the signal of national broadcasters and offer them support for the digitisation. In this respect Radiodifusión has put forward that even though it did broadcast the television signal, it had never been approached by the public administration to discuss the possible financing of the digitisation of its network.

⁽⁵⁵⁾ Due to the DTT Equipment Transfer Agreements, in some cases the equipment acquired by TelecomCLM (with funds from the JCCM) was returned to the JCCM after 2 years of operation.

⁽⁵⁶⁾ [...].

⁽⁵⁷⁾ As set out in recital 24, Abertis dominates the market for the transmission of free to air TV signals on the terrestrial platform in Area I and via its subsidiary Hispasat in Area III. By extending the reach of digital terrestrial TV to Area II, the provision of nation-wide free to air TV signals remains under Abertis' control. The entry of Astra in Area II could generate more platform competition also in Area I and III in the future. By way of analogy, there exists ample literature, which demonstrates the benefits in terms of lowering prices and increasing quality of service when satellite entered the TV market in the US. Prior to satellite entry, cable firms had enjoyed monopoly power in local geographic areas. Compare for instance: Chenghuan Sean Chu, the effect of satellite entry on cable television prices and product quality, RAND Journal of Economics Vol. 41, No 4, Winter 2010 pp. 730-764.

Indirect beneficiaries of the aid

- (121) *Hardware suppliers.* TelecomCLM and Abertis provide equipment and hardware in-house. To the extent municipalities purchased equipment without a public tender from the two existing terrestrial operators in Castilla-La Mancha, TelecomCLM and Abertis directly benefited from the aid (see recital 119 above). Where the two operators have bought such equipment from hardware suppliers, such equipment was purchased on a free market. Therefore, as a result, apart from TelecomCLM and Abertis (direct beneficiaries), hardware suppliers are not considered to be beneficiaries as they did not receive a selective advantage. Similar to the case of digital decoders in Italy ⁽⁵⁸⁾, it has not been possible to draw a distinction between different categories of producers of various types of digital infrastructure because producers should be able to produce any type of equipment. The companies supplying such hardware to the network operators are not different from the group of undertakings who would have participated in tenders if the scheme had been technologically neutral with regard to platform operators ⁽⁵⁹⁾. In Spain the companies, which integrate, install and supply the hardware necessary for DTT extension usually also offer other services. Such equipment manufacturers but also telecommunications operators may also offer terrestrial, satellite or a mix of terrestrial and satellite solutions ⁽⁶⁰⁾.
- (122) The measure in question does not seek, through its object or general structure, to create an advantage for manufacturers. Indeed, any public policy in favour of digitisation (even the most technologically neutral) would favour producers of digital equipment. In the case of equipment manufacturers, the fact that they benefitted from an increase in sales due to the measure can therefore be considered to be a mechanical side-effect. As a matter of principle, any State aid has a trickle-down effect on suppliers to the State aid recipient. This, however, does not necessarily create a selective advantage for such suppliers. Hardware suppliers were not targeted by the aid and therefore did not benefit from a targeted indirect effect.
- (123) *Broadcasters.* Spain has sufficiently demonstrated that the terrestrial broadcasters did not receive any advantage following the extension of the coverage. In contrast to Area I, the broadcasters refused to pay for the digitisation in Area II as this would not generate any additional revenue for them. In fact, in the light of the limited population at stake, which does not seem to be the commercial target of the advertisers, following the extension to Area II, broadcasters could not significantly raise advertising fees. Therefore, the terrestrial broadcasters are not indirect beneficiaries of the investigated measure.

5.2.1.3. *Selectivity*

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

5.2.1.4. *Distortion of competition*

Network operators

- (125) By directly granting the funding to the terrestrial network operators TelecomCLM and Abertis, the Spanish authorities have discriminated against any other terrestrial network operator which could have provided such services. Whether existing operators, as Radiodifusión, would qualify to provide broadcasting services to regional and national broadcasters in Area II of Castilla-La Mancha could have been established in a public tender. As they were not informed about the measure and they were not invited to present their proposal, such operators could not argue their case with the JCCM. As a result, the direct selection of the beneficiaries led to the exclusion of any other potential terrestrial competitor.

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

⁽⁵⁹⁾ As a few examples for companies which have won tenders: *Tredess* is a manufacturer of digital transmission equipment belonging to the Teledes Group which manufactures also digital satellite TV receivers, antennas, dishes (Compare: <http://www.tredess.com> and <http://www.televes.es>) Similar: *Mier* (<http://www.mier.es>), *Elecnor* (<http://www.elecnor.es/es/negocios/infraestructuras/telecomunicaciones/>) *Itelsis*, *BTESA*, *Axion*, *Retegal*, *Itelazpi*, *TelecomCLM*.

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

- (126) Where municipalities upgraded their own network, in some cases they directly contacted TelecomCLM or Abertis. In these cases other telecom operators were excluded from making a proposal. As set out in recitals 39 and 40, other municipalities published a short notice on their Notice Boards. These publications inform that a telecom operator is selected to digitise the emission centre of the municipality, in line with decree 347/2008. The operator should present a 'memoria técnica'. Interested operators could obtain the technical specifications in the secretariat of the municipality. However, the publication of the Notice board does not respect the technological neutrality, as the notices were destined only for the upgrading of the existing terrestrial emission centre. Moreover, while the notices allow any telecom operator registered with the national regulator CMT to make a proposal, these publications cannot be considered equivalent to a public tender. A publication on the Notice Board does not create the same visibility as a public tender published in an official journal. Moreover, in most cases, unlike other companies, TelecomCLM and Abertis were expressly informed in advance about the process and could therefore hand in their proposal ⁽⁶¹⁾. Eventually, in all the municipalities where such notices were published, either TelecomCLM or Abertis were selected.
- (127) Spain and Abertis claim that DTT and satellite are two different markets. DTT is the main platform for free-to-air terrestrial television, where the number of players in the national market is determined by the number of licences granted by the Spanish government. Funding for free-to-air terrestrial television channels comes from advertising. As for satellite television, a large number of channels are available on the only pay-television platform in Spain, for which Astra is the network operator. These channels are funded by subscriptions, generally for a package of channels. Spanish authorities underline in addition that in Spain the cost of satellite distribution for broadcasters is much higher than the cost of terrestrial broadcasting and therefore the free-to-air broadcasters, including regional and local ones, are not interested in switching to this platform.
- (128) For several reasons indicated in the decision it is concluded that terrestrial and satellite platforms operate in the same market.
- (129) First of all, in 2008 Astra competed for the extension of coverage of digital television in Cantabria and won the tender. In 2008 Astra held a series of meetings with the Autonomous Communities to whom it presented its offer to broadcast digital television channels so far broadcasted via terrestrial platform. Even if the contract with Cantabria was later on terminated by the authorities, the interest of the satellite operator in providing services in competition with the terrestrial platform suggests that there exists a possibility for satellite to provide similar services.
- (130) Second, several public and private channels distributed via terrestrial platform are also broadcasted via satellite platforms, including Astra itself ⁽⁶²⁾. Third, concerning the regional channels, some of them are available or were available in the recent past via satellite platform, which contradicts the statement that the regional broadcasters are not interested in satellite.
- (131) Fourth, some broadcasters have declared a preference for terrestrial transmission because they have acquired rights to broadcast content only for the terrestrial platform. This, however, does not imply that there exist different markets for terrestrial and satellite transmission. As they have acquired content rights for the terrestrial platform, if necessary, broadcasters could do the same for the satellite. Further, if a satellite platform is selected on the basis of a public tender, a 'must carry obligation' could be imposed on the broadcasters. Such a 'must carry obligation' was imposed on broadcasters for Area III where the satellite platform was selected.
- (132) Finally, according to data from May 2010 ⁽⁶³⁾, the coverage of DTT in Spain reaches 98,85 % of the population while only 93,5 % of the households watch TV via the terrestrial platform. Thus, 5 % of households have access to DTT but choose not to use it, as most of them are subscribed to pay-TV via satellite.
- (133) In conclusion, as satellite and terrestrial broadcasting platforms compete, the measure, for the deployment and operation and maintenance of DTT in Area II entails a distortion of competition between the two platforms.

⁽⁶¹⁾ CLM authorities could not provide any example of a bid submitted by another telecom operator. Some bids had been provided by 'telecom installers', however, they were excluded on the basis that they are not registered as telecom operators.

⁽⁶²⁾ For example, Antena 3, Cuatro, Telecinco, La Sexta, La Siete, Teleduarte, TVE, La2, Canal 24 horas.

⁽⁶³⁾ Analysis of the television market submitted by Spain in the notification of the measure: Compensation for damages for liberation of the digital dividend in Spain, SA.32619 (2011/N).

- (134) Finally, it should be noted that other platforms, especially IPTV, are also disadvantaged due to the measure. Even if broadband has not yet reached the entirety of Area II, it is very likely that in the future it will extend its coverage significantly. It is possible that a mix of technologies would have been more efficient to achieve coverage of Area II. In this case such other platforms could have contributed to the objective and they could have benefitted from the aid measure.

5.2.1.5. *Effect on trade*

- (135) The measure has an impact on intra-Union trade. In line with the case-law of the European Courts, when 'State financial aid or aid from State resources strengthens the position of an undertaking as compared with undertakings competing in intra-Community trade, the latter must be regarded as affected by that aid' ⁽⁶⁴⁾.
- (136) Network operators are active in a sector in which trade exists between Member States. Abertis forms part of an international group of companies, so does one of the complainants, Astra. Astra, based in another Member State (Luxembourg), would have bid for the provision of a digital network in the region of Castilla-La Mancha, if a technologically neutral tender had been organised. The measure therefore affects trade between Member States.

5.2.2. **Conclusions on the presence of aid**

- (137) In the view of the arguments exposed above, the Commission considers that the measure fulfils the criteria enshrined in Article 107(1) TFEU. Under those circumstances, the measure has to be considered as State aid within the meaning of Article 107(1) TFEU.

5.3. COMPATIBILITY ASSESSMENT

- (138) The Commission actively supports the transition from analogue to digital broadcasting. The advantages of the digital switch-over were underlined in the Action Plan eEurope 2005 and in the two Communications relating to the digital switchover ⁽⁶⁵⁾. The Commission also recognises that the digital switch-over could be delayed if left entirely to market forces.
- (139) Member States may use aid to overcome a specific market failure or to ensure social or regional cohesion ⁽⁶⁶⁾. However, it must be shown in each specific case that the aid is necessary to address the issue, that it is an appropriate instrument, limited to the minimum necessary and does not unduly distort competition. Similarly, the Switchover Communication ⁽⁶⁷⁾ provides that in the specific area of digitisation, public intervention would be justified under two premises: first, the presence of general interests which are at stake; secondly, the existence of a market failure, that is, market forces alone fail to deliver in terms of collective welfare. It also specifies that in any case, public intervention should be supported by a sound market analysis.
- (140) The Switchover Communication also indicates that the transition to digital broadcasting represents a big industrial challenge that must be led by the market. In principle, each network should compete on its own strengths. In order to safeguard this principle, any public intervention shall aim at being technologically neutral. Exceptions from this principle can only be envisaged if the intervention targets a specific market failure or equity issue and is at the same time necessary, appropriate and proportionate to overcome these difficulties.
- (141) If left to the market, in view of their disadvantaged social situation, there is a risk that not all parts of the population can benefit from the advantages of digital television. With respect to this social cohesion problem, Member States may want to make sure that all citizens have access to digital television once analogue TV is switched off. Since the digital switch-over entails costs for consumers and requires a change in habits, Member States may want to assist in particular the disadvantaged groups of society such as elderly people, low-income households or people living in peripheral regions.

⁽⁶⁴⁾ T-55/99 Confederación española de transporte de Mercancías (CETM) v Commission of the European Communities [2000] II-3207.

⁽⁶⁵⁾ COM(2002) 263 final, 'eEurope 2005: An information society for all', COM(2003) 541 final, Communication from the Commission on the transition from analogue to digital broadcasting (from digital 'switchover' to analogue 'switch-off') and COM(2005) 204 final, 'Communication from the Commission on accelerating the transition from analogue to digital broadcasting'.

⁽⁶⁶⁾ See 'Less and better target state aid: a roadmap for state aid reform 2005-2009', COM(2005) 107 final.

⁽⁶⁷⁾ See footnote 68, COM(2003) 541 final.

- (142) In several State aid decisions, based on the Communications related to the digital switch-over, the Commission applied the State aid rules in this sector ⁽⁶⁸⁾. Member States have several possibilities to grant public funding for the switch-over to ensure that all geographical areas continue to have appropriate TV coverage. This includes funding for the roll-out of a transmission network in areas where otherwise there would be insufficient TV coverage ⁽⁶⁹⁾. Such funding may however be granted only if it does not entail an unnecessary distortion between technologies or companies and is limited to the minimum necessary.

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

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

5.3.2. Article 107(3)(c) TFEU

- (144) In order for the aid to be compatible under article 107(3)(c), the Commission balances positive and negative effects of the aid. In applying the balancing test, the Commission assesses the following questions:

- (1) Is the aid measure aimed at a well-defined objective of common interest?
- (2) Is the aid well designed to deliver the objective of common interest i.e. does the proposed aid address a market failure or other objective? In particular:
 - (a) Is the aid measure an appropriate instrument, i.e. are there other, better place instruments?
 - (b) Is there an incentive effect, i.e. does the aid change the behaviour of firms?
 - (c) Is the aid measure proportional, i.e. could the same change in behaviour be obtained with less aid?
- (3) Are the distortions of competition and the effect on trade limited, so that the overall balance is positive?

5.3.2.1. Objective of common interest

- (145) The national aid scheme, as implemented by JCCM for Castilla-La Mancha, aims at acceleration of the digital switch-over process in Spain and ensuring the continuity of TV reception to residents of certain remote and rural areas. In this respect, the measure is targeted to allow people living in those areas to watch television and to exercise their constitutional right to access information. As already mentioned at recital 138, the Commission has recognised the importance and the benefits of the digital transmission in the Action Plan eEurope 2005 ⁽⁷⁰⁾ as well as in its two Communications on the transition from analogue to digital broadcasting ⁽⁷¹⁾. In its iCommunication — A European Information Society for growth and employment ⁽⁷²⁾, the Commission has pointed out that the planned switching off of analogue terrestrial television by 2012 will improve access to spectrum in Europe. As digital broadcasting uses spectrum more efficiently, it frees up spectrum capacity for other users, such as new broadcasting and mobile telephony services, which will in turn stimulate innovation and growth in the TV and electronic communications industries.

⁽⁶⁸⁾ See, amongst others, N622/03 Digitalisierungsfonds — Austria (OJ C 228, 17.9.2005, p. 12); C25/04 Einführung des digitalen terrestrischen Fernsehens (DVB-T) in Berlin-Brandenburg — Germany (OJ L 200, 22.7.2006, p. 14); C24/04 Digital terrestrial television in Sweden (OJ L 112, 30.4.2007, p. 77); C52/05 Digital decoders Italy (OJ L 147, 8.6.2007, p. 1); N270/06 Subsidies to digital decoders with API — Italy (OJ C 80, 13.4.2007, p. 3); N107/07 Subsidies to IdTV — Italy (OJ C 246, 20.10.2007, p. 2); C34/06 Einführung des digitalen terrestrischen Fernsehens (DVB-T) in Nordrhein-Westfalen (OJ L 236, 3.9.2008, p. 10); SA.28685 Captación de Televisión Digital en Cantabria — Spain (OJ C 119, 24.4.2012, p. 1).

⁽⁶⁹⁾ See recital 132 of the Commission's decision C25/04 Einführung des digitalen terrestrischen Fernsehens (DVB-T) in Berlin-Brandenburg — Germany (OJ L 200, 22.7.2006, p. 14).

⁽⁷⁰⁾ COM(2002) 263 final, 'Europe 2005: An information society for all'.

⁽⁷¹⁾ COM(2003) 541 final, 'Communication on the transition from analogue to digital broadcasting (from digital "switchover" to analogue "switch-off")', and COM(2005) 204 final, 'Communication from the Commission on accelerating the transition from analogue to digital broadcasting'.

⁽⁷²⁾ COM(2005) 541 final, 1 June 2005.

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

5.3.2.2. Well-designed aid

Market failure

- (147) As stated by the Spanish authorities, it is generally recognised that there is a risk that not all the parts of the population can benefit from the advantages of digital television (problem of social and regional cohesion). A market failure might exist where market players do not take sufficiently into account the positive effects of digital switch-over on society as a whole because they do not have the economic incentives to do so (positive externalities). Moreover, with respect to social cohesion, Member States may want to make sure that all citizens have access to digital TV once analogue TV is switched off and may therefore also consider measures to ensure that all geographical areas continue to have appropriate TV coverage.
- (148) As already discussed in the opening decision, the Commission recognises that there exists a market failure in that the broadcasters are unwilling to bear additional costs of the extension of coverage beyond their statutory obligations. Moreover, neither the satellite nor private households have carried out investments ensuring the reception of digital channels via satellite by all the inhabitants of Area II. Therefore, the Commission recognises that people whose usual residence is in a rural area may be totally excluded from the free-to-air digital television signal reception if the digital coverage is left entirely to market forces and that public intervention can be beneficial through financial supports to individuals.

Technological neutrality

- (149) In digital switch-over cases, the principle of technological neutrality is well enshrined in several Commission decisions ⁽⁷³⁾. It has been upheld by the General Court and the Court of Justice ⁽⁷⁴⁾.
- (150) The choice of technology should normally be established by a technologically neutral tender, as happened in other Member States ⁽⁷⁵⁾. Carrying out such a tender may be costly or may delay the implementation of the project. In some cases this may not be justified, if it can be established *ex ante* that only one particular technology or a particular provider can render the requested services. Choosing a particular technology may therefore be acceptable if this choice is justified by findings of an *ex ante* study. Such a study would have to look into pricing and quality criteria. As the decision to pick a certain technology would prevent competition from other suppliers presenting their product and pricing proposals, the results of the study would have to be unequivocal and robust.
- (151) The Commission has recognised in the past that a study could be the basis for selecting a particular technological solution ⁽⁷⁶⁾. However, the burden of proof lies with the Member State that has to demonstrate that the results of the study are sufficiently robust and that it was carried out in the most independent manner ⁽⁷⁷⁾.
- (152) In this regard, several studies have been proposed by the Spanish authorities and by Abertis which are discussed in what follows.

Cost studies

- (153) The Castilla-La Mancha authorities have argued that the investigated measure was targeted at digital terrestrial broadcasting based on the results of an *ex ante* study, carried out before adoption of the Decree. The ‘*Comparative Socio-Economic Study*’ ⁽⁷⁸⁾, as summarised in recitals 59 to 61 concluded that the terrestrial solution would be the most cost efficient solution.

⁽⁷³⁾ See above, footnote 56.

⁽⁷⁴⁾ Cases T-8/06 – FAB Fernsehen aus Berlin GmbH v Commission, Judgment of 6 October 2009, [2009] ECR II-04293; C-544/09P — Germany v Commission, Judgment of 15 September 2011, not yet published; T-177/07, Mediaset SpA v Commission, Judgment of 15 June 2010, [2010] ECR II-02341; and C-403/10 P — Mediaset SpA v Commission, Judgment of 28 July 2011, not yet published.

⁽⁷⁵⁾ See footnote 7.

⁽⁷⁶⁾ For instance, a study served as a justification for a choice of a particular technology in a broadband case, see Commission Decision N222/2006 — Aid to bridge the digital divide in Sardinia (OJ C 68, 24.3.2007, p. 6).

⁽⁷⁷⁾ The UK chose DTT for the provision of local TV on the basis of an *ex ante* study carried out by its regulator OFCOM and on the basis of an *ex ante* consultation of market players. On this basis, the Commission did not insist on carrying out a technologically neutral tender. SA.33980 (2012/N) — Local TV in the UK.

⁽⁷⁸⁾ See footnote 34.

- (154) The starting point of the study is the quantification of the population for which a technological choice could be made. The main part of Castilla-La Mancha belongs to the so-called Area I where the switch-over to DTT had already happened. In certain cases, Area I and Area II overlap. For technical reasons, the study argues that in these areas (which are already partly equipped with DTT) one should only consider the extension of DTT. When comparing the satellite and DTT options, the study therefore only looks at about 9,8 % of the population. Secondly, the author of the study considers that among this subgroup, part of the population receives in addition a regional television service via terrestrial platform. Without further assessment it concludes that for these services, 'it would not be rational to make the population adopt different modes of reception'. Finally, there remain 2,85 % of the population — or 57 510 inhabitants in 689 villages — to be considered for an alternative technology.
- (155) The study first produces an estimation of the total cost of the satellite platform — including the cost of decoders installation, assumptions based on market data about the rental cost of a satellite transponder, and the O&M costs over 10 years — and then compares it to the estimated total cost of the terrestrial platform. In the latter it includes the cost of decoders' installation and terrestrial transmitters, and the O&M costs over 10 years. In the end, the total cost would be between EUR 47 672 550 and EUR 97 646 800 for the satellite solution, and between EUR 15 136 550 and EUR 17 224 350 for the terrestrial solution.

Assessment

- (156) At the time, the authorities had the choice either to carry out a technologically neutral tender or, on the basis of such a cost study, to pre-select one particular technology. Thus, the authorities had to decide whether it would be worthwhile at all to invite potential competitors to tender. If an open tender had been carried out, the agency could have chosen between different bids including possible *discounts* offered by bidders. On the other hand, it may be justified to dispense with such a tender procedure if the study demonstrated that, taking into account all possible discounts which could be envisaged from potential bidders, the satellite technology was clearly more expensive or it would not fulfil essential qualitative requirements. As the study is merely necessary to justify dispensing with the tender, it would be necessary to demonstrate a significant cost difference between the two platforms and the robustness of such a result.
- (157) The study is far from meeting these requirements. First, following a request for information sent by the Commission in 2011, the authorities had to make corrections to the data used in the study. The corrections consisted in the increase of the costs for transmission sites by about 65 %, as well as of the number of transmission sites that were actually needed to guarantee the expected coverage. JCCM argued that even with these new figures, the outcome of the comparison between terrestrial and satellite transmission technologies would not change. In fact, however, when taking these new figures into account the cost advantage of the DTT technology was diminished, or, in some scenarios, even turned around into a cost advantage for the satellite solution. This already shows that the results of the study are not robust. These flaws should have been evident to the authorities at the time if they had exercised sufficient diligence.
- (158) As regards the cost calculation, the study takes the wrong approach when calculating the cost of satellite transmission. It assumes that municipalities would rent satellite transponder capacity from the satellite platform and operate the satellite connection itself. Its calculation is therefore based on published (2008) rental prices for satellite transponder capacity. As these prices are for individual connections they do not take into account any quantity discounts and possible price negotiations. Further, in the case of an open tender, as demonstrated in the case of Cantabria, the satellite operator would enter itself as a competitor. Its bid would be based on a completely different price calculation. In comparison to individual rental prices, if the contract covers the entire Area II in Castilla-La Mancha, it can be expected that such a bid would include significant capacity price discounts.

- (159) Further, the study's approach unduly drives the results against the satellite option ⁽⁷⁹⁾:

— Calculations should be based on net present value (NPV) of recurrent cost instead of using the plain sum ⁽⁸⁰⁾,

⁽⁷⁹⁾ There have been several other flaws of the study. For instance, the study does not provide sufficient justification why only 2,85 % of the population of Castilla-La Mancha are taken into consideration. This assumption has an impact on the cost effectiveness of the two platforms.

⁽⁸⁰⁾ The NPV takes into account whether payments are made today or in the future (future revenues/expenditures are discounted). Already by introducing a rather conservative discount rate of 4 %, the gap between terrestrial and satellite cost shrinks.

- the study neglects the exponential evolution in the need (and related cost) for new DTT transmission sites due to the remoteness of the last villages to be covered and considers rather a linear expansion,
 - the study calculates yearly O&M cost of 3 % of equipment cost, while the authorities themselves mention that 'costs for two years of operating and maintenance are estimated at 20 % of the equipment costs' (i.e. yearly 10 %)
- (160) As a result the cost calculation for DTT, instead, appears overly optimistic. This conclusion is supported when comparing the study's estimated cost for DTT roll-out with the money actually spent thereafter. The study estimates that the maximum cost of DTT deployment would amount to about EUR 15-17 million. However, Castilla-La Mancha authority later spent EUR 46 million for the DTT upgrading (plus expenses for the installation of satellite receptors where in fact it turned out that DTT was not economically feasible).

Conclusion

- (161) The estimates of the study are not robust. By using Castilla-La Mancha's own (even if updated) figures, the initial cost advantage of the DTT network diminished, or, in some scenarios even turned around into an advantage for the satellite platform⁽⁸¹⁾. This does not yet take into account the possibility of discounts offered by a satellite operator in a competitive tender procedure. On the basis of the above considerations, the study therefore does not provide sufficient evidence to justify the *ex ante* choice of the DTT technology and refraining from an open tendering procedure.

Other cost studies

- (162) The Spanish government provided an in-house study into the feasibility of providing universal DTT service using DTT or satellite, carried out by the Ministry of Industry, Tourism and Trade (MIEyT) in July 2007. However, that study was not made available to the Autonomous Communities, as Castilla-La Mancha and it was only used as an internal document. In any case, the Commission considers that the *ex ante* study provided by the Spanish authorities, as referred to in recital 62, does not demonstrate the superiority of the terrestrial platform over satellite. On the contrary, the study considers that a mix of technologies is more realistic and assumes for Area II a combination of 70 % satellite and 30 % terrestrial transmission⁽⁸²⁾. Moreover, the study concludes that the choice of a particular technological solution for the extension of coverage shall be analysed on a region-by-region basis, taking into account the topographic and demographic particularities of every region. Instead of suggesting an *ex ante* choice of a particular technology, this conclusion rather advocates for the need to carry out a technologically neutral tender to determine which platform is more suitable in the particular case of Castilla-La Mancha.
- (163) Concerning the two cost studies submitted by Abertis, it has to be noted that they were performed in 2010, long after the investigated measures were put into effect. Irrespectively of whether they could be considered independent and sufficiently robust, the fact that they are posterior to the contested measures excludes such studies from justifying the Spanish government's selection of the DTT technology and to dismiss a technologically neutral tender. The Commission received also cost estimations provided by Astra which demonstrate that satellite technology is more cost effective. For same reasons they also were not taken into account.
- (164) As concluded for the JCCM study in recital 161, also other studies do not allow to conclude that the terrestrial digital platform is, in terms of quality or price, superior to other technological solutions. They therefore do not justify that JCCM refrained from an open tendering procedure.

⁽⁸¹⁾ If one takes into account updated figures, according to the Commission's own calculations, one obtains a shift in both cost scenarios, with an optimistic estimation of EUR 36 466 648 for the satellite mode and EUR 60 542 411 for the terrestrial mode, and a pessimistic estimation of EUR 56 760 211 for the satellite mode and EUR 65 155 166 for the terrestrial mode. These calculations are based on three elements which have complemented the CLM study: (1) the consideration of the NPV approach to recurrent costs over a 10-year horizon, (2) the number of new transmission sites to guarantee the expected additional coverage and (3) the corrected level of O&M costs. The distinction between 'optimistic' and 'pessimistic' scenarios follows from the original CLM study.

⁽⁸²⁾ It distinguishes 15 % terrestrial transmission including additional equipment to eliminate the echo and 15 % terrestrial with echo (page 34 of the study).

Appropriateness and proportionality of the measure

- (165) For a number of reasons, the measure cannot be considered appropriate.
- (166) By granting the aid directly to the established DTT operators TelecomCLM and Abertis, the measure does not consider alternative solutions which may have been more cost efficient or may have provided a better qualitative solution. As discussed in the previous section, there is no justification for ruling out a satellite platform. The fact that some households in Area II receive free-to-air channels via satellite demonstrates that terrestrial technology is not always the most efficient and appropriate platform. It is also noted that satellite transmission has also been the choice used for digital TV in some other Member States, even in areas where the terrestrial solution was also possible ⁽⁸³⁾. Moreover, the fact that Astra competed and won the technologically neutral tender for extension of coverage of digital television in Cantabria suggests, at least, that satellite platform can provide this service ⁽⁸⁴⁾.
- (167) Further, the various cost studies only compare DTT and satellite platforms. They do not consider alternative technological solutions as cable networks and IPTV. While the latter cannot cover the entire territory, a technology mix which includes such platforms as well as DTT and satellite transmission could have been more efficient.
- (168) The measure is also not appropriate as it discriminates between DTT operators themselves. By selecting directly the established DTT operators TelecomCLM and Abertis, the measure does not investigate whether other DTT operators, as Radiodifusion, could have made a less expensive or qualitatively better offer.
- (169) The appropriateness of pre-selecting the DTT operators is further put into question by capacity constraints on the DTT platform. While the transition from analogue TV to DTT in the 800 MHz band was completed in Spain on 3 April 2010, in 2011 it was decided to auction the 800 MHz band frequencies to telecommunication operators in order to comply with Decision No 243/2012/EU. As a result, it is necessary to transfer broadcasts to other channels located below 790 MHz, no later than by 1 January 2014. As this creates additional costs, on 5 November 2011 Spain notified two measures for households and broadcasters with a budget of EUR 600-800 million in Area I (no measure has yet been notified for Area II) ⁽⁸⁵⁾. Such cost would not have arisen if other platforms (IPTV, cable or satellite) had been chosen. A further frequency shift to free more capacity for the future mobile LTE technology, creating similar cost, is expected for the coming years.
- (170) What is more, it has been raised that 4G mobile frequencies LTE interfere with DTT signals and households need to buy costly filters to protect their DTT signal from the LTE waves ⁽⁸⁶⁾. It cannot be excluded that similar interferences are a more general problem undermining the future appropriateness of terrestrial broadcasting, especially in the context of wider roll-out of NGA networks.
- (171) Spain proposed two other arguments why satellite transmission would be more expensive than DTT. First, in their agreements with content providers, broadcasters have territorial restrictions. To ensure such conditional access would be more expensive for satellite technology. Second, satellite technology would not be equipped to broadcast a large number of regional channels. These allegations have not been substantiated and are contradicted by the fact that Astra's Cantabria contract contained a professional system of conditional access. Moreover, according to Astra's cost calculations, the satellite technology would still be cheaper even if it had to enter into separate agreements with each of the Spanish regions. As regards the regional broadcasting, Astra maintains that the Spanish government's number of 1 380 channels is hugely inflated ⁽⁸⁷⁾. Again, according to its own calculations, the satellite option would be cheaper even if regional and local channels were included.
- (172) In conclusion, the Commission considers that the investigated measure did not respect the principle of technological neutrality. As explained above, the measure is not proportional and it is not an appropriate instrument for ensuring the coverage of free-to-air channels to the residents of Area II of Castilla-La Mancha.

⁽⁸³⁾ E.g. France, UK, Italy, Slovakia.

⁽⁸⁴⁾ As further underlined by the judgement of the national court. See above, footnote 5.

⁽⁸⁵⁾ See footnote 11.

⁽⁸⁶⁾ <http://stakeholders.ofcom.org.uk/consultations/second-coexistence-consultation/>

⁽⁸⁷⁾ According to Astra's estimations, the total number of local channels actually broadcasted is limited to 415 channels.

Operation and maintenance of the networks

- (173) Concerning the ongoing financing granted for operation and maintenance of the subsidised digital terrestrial and satellite networks, as this is ancillary to the deployment aid, it cannot be considered technologically neutral. It has been directed to the conservation of the sites broadcasting signal via terrestrial platforms. Such aid is therefore also incompatible.
- (174) Any future aid for operation and maintenance has to be notified and has to respect the principle of technological neutrality.

5.3.2.3. *Avoiding unnecessary distortions*

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

Conclusion regarding Article 107(3)(c) TFEU

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

5.3.3. **Article 106(2) TFEU**

- (177) The Article 106(2) exception applies to State compensation for the costs of providing public service. The national (or regional) authorities have to define the SGEI clearly and entrust it to a particular undertaking.
- (178) In the course of the formal procedure, the Spanish authorities have not put forward arguments or evidence as to why the measure should be declared compatible on the basis of Article 106(2) TFEU.
- (179) For Article 106(2) TFEU to apply, the national (or regional) authorities have to define the SGEI clearly and entrust it to a particular undertaking. There has not been any such entrustment for the deployment of the DTT in the Spanish law or by the authorities. In the first place, Spanish law does not declare the operation of a terrestrial network to be a public service. The Law on Telecommunications of 1998⁽⁸⁸⁾ states that telecommunication services, including operation of networks supporting radio and television, are services of general interest but they do not have the status of public services⁽⁸⁹⁾. The Law on Telecommunications currently in force⁽⁹⁰⁾ maintains the same qualification. The transmission services for broadcasting of television, i.e. transport of signals through the telecommunications networks, are considered as telecommunication services and as such are services of general interest but not public service⁽⁹¹⁾.
- (180) Further, the provisions of the Law on Telecommunications are technology neutral. Telecommunications is defined as the transmission of signals through any telecom network, without referring to the terrestrial network in particular⁽⁹²⁾. Moreover, Article 3 of the Law specifies as one of its objectives to encourage, to the extent possible, technological neutrality in regulation.

⁽⁸⁸⁾ Ley 11/1998, de 24 de abril, General de Telecomunicaciones.

⁽⁸⁹⁾ These include services related to public defence and civil protection and operation of telephony network.

⁽⁹⁰⁾ Ley 32/2003, de 3 de noviembre, General de Telecomunicaciones.

⁽⁹¹⁾ Article 2.1. of this law provides: 'The telecommunications services are services of general interest provided under the rules of free competition'.

⁽⁹²⁾ Annex II to the law 32/2003 contains precise, technologically neutral, definitions of the telecommunications and electronic communications network. 'Telecommunications: any transmission, emission or reception of signs, signals, writing, images and sounds or information of any nature by wire, radio electricity, optical means or other electromagnetic systems'. 'Electronic communications network means transmission systems and, where applicable, switching or routing equipment and other resources, including network elements which are not active, which permit the conveyance of signals by wire, radio, optical or other electromagnetic means, including satellite networks, fixed (circuit- and packet-switched, including internet) and mobile terrestrial networks, electricity cable systems, to the extent that they are used for the purpose of transmitting signals, networks used for radio and television broadcasting, and cable television networks, irrespective of the type of information conveyed'.

- (181) Even if the public broadcasting service is considered a public service, it is not possible to extend this definition to the operation of a particular supporting platform. Moreover, where several transmission platforms exist, one particular platform cannot be considered to be 'essential' for the transmission of broadcasting signals. It would therefore have constituted a manifest error, if Spanish legislation had declared the use of a particular platform for the transmission of broadcasting signals to be a public service.
- (182) It is concluded that under Spanish law the operation of terrestrial networks does not have the status of a public service. Further, the Spanish authorities have not clearly defined the operation of a terrestrial platform as a public service and consequently they also have not entrusted the provision of such a public service to a particular platform operator.
- (183) Moreover, the authorities have not put forward any evidence of any entrustment act for the two beneficiaries, Abertis and TelecomCLM.
- (184) The Article 106(2) exception applying to State compensation for the costs of providing public service therefore cannot be invoked in this case.

5.3.4. Existing aid

- (185) Abertis suggests that the deployment of the terrestrial broadcasting network in Area II was financed almost entirely by the Spanish regions using public funds based on legislation dating back to 1982, i.e. prior to the date of accession of Spain to the European Economic Community in 1986. Therefore, according to Abertis, the scheme could be considered part of the ongoing public financing of the operation of local terrestrial networks and should therefore be considered as existing aid.
- (186) The financing of the extension of the terrestrial network by the regions indeed started in the early 1980s, but at this time there were no private broadcasters on the market. The extended infrastructure served therefore only the needs of the public broadcaster who, in any event, had the obligation to provide its signal to the majority of the population. Moreover, at the time the terrestrial television was the only platform for transmitting the television signal in Spain. As a result, the extension of the only available network did not create distortion of competition with other platforms.
- (187) Since then the law and the technology developed leading to new broadcasting platforms and new market players, in particular private broadcasters. Since the beneficiary and the overall circumstances of the public financing have changed substantially, the investigated measure cannot be regarded as an alteration of purely formal or administrative nature. It is rather an alteration affecting the actual substance of the original scheme and therefore is to be considered as a new aid scheme ⁽⁹³⁾. In any case, the switch from analogue to digital TV has become possible only due to recent technological advance and it is therefore a new phenomenon. The Spanish authorities should therefore have notified this new aid.

5.4. CONCLUSION

- (188) It is considered that the financing granted by Spain, the regional government of Castilla-La Mancha and the municipalities to terrestrial network operators for the upgrade and digitisation of their network to provide free-to-air TV channels in Area II constitutes aid within the meaning of Article 107(1) TFEU. The aid is not compatible with the common market. Furthermore, the aid was not notified to the Commission as required by Article 108(3) TFEU and was unlawfully put into effect without Commission authorisation. It must therefore be recovered from the terrestrial network operators.

⁽⁹³⁾ Cases T-195/01 and T-207/01, *Gibraltar*, [2002] ECR II-2309, paragraphs 109-111.

- (189) In addition, the Commission considers that the ongoing aid for operation and maintenance of the digitised network granted without tenders or following technologically non-neutral tenders is also incompatible. Also this aid was not notified to the Commission as required by Article 108(3) TFEU and it was unlawfully put into effect without Commission authorisation. It must therefore be recovered from the operators.
- (190) Any future State aid for maintenance and operation needs to be notified and has to respect the principle of technological neutrality.

6. RECOVERY

6.1. NEED TO ELIMINATE AID

- (191) According to the TFEU and the Court of Justice's established case-law, the Commission is competent to decide that the State concerned must abolish or alter aid ⁽⁹⁴⁾ when it has found that it is incompatible with the internal market. The Court has also consistently held that the obligation on a State to abolish aid regarded by the Commission as being incompatible with the internal market is designed to re-establish the previously existing situation ⁽⁹⁵⁾. 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 ⁽⁹⁶⁾.
- (192) Following that case-law, Article 14 of Council Regulation (EC) No 659/1999 ⁽⁹⁷⁾ lays down that 'where negative decisions are taken in respect of unlawful aid, the Commission shall decide that the Member State concerned shall take all necessary measures to recover the aid from the beneficiary'.
- (193) Thus, given that the financing of upgrade and digitisation of the terrestrial platform and subsequent maintenance and operation granted in Spain since the years 2008-2009 is illegal and incompatible aid, Spain should therefore be required to recover the incompatible aid, in order to re-establish the situation that existed on the market prior to the granting of the aid.

6.2. STATE AID RECIPIENTS AND QUANTIFICATION OF THE AID

- (194) TelecomCLM and Abertis are the direct beneficiaries of the aid. All amounts mentioned in the recitals below are based on the information provided to the Commission. As set out in recital 42, for the upgrading of their own transmission centres, TelecomCLM and Abertis have received EUR 13,2 million and EUR 250 000, respectively. In addition, without public tender, TelecomCLM was selected to build new transmission centres for municipalities and six which have become its own property (EUR 2,26 million).
- (195) Where municipalities remain the owners of the DTT equipment, they have bought it from either TelecomCLM or Abertis. As these companies were selected directly (i.e. without public tender) to supply the digital equipment, and/or to provide O&M services, also in this case they are the direct beneficiaries. In effect, the public funding of about EUR 32,6 million was passed on to these two companies without public tender ⁽⁹⁸⁾.
- (196) The illegal and incompatible aid shall be recovered from TelecomCLM and Abertis.
- (197) The ongoing aid is for the maintenance and operation of DTT networks. Operators of these networks are the beneficiaries of such maintenance and operation aid. TelecomCLM and Abertis have received EUR 6,5 million for the period 2009-2011. The aid, and any further aid paid thereafter, has therefore to be recovered from those network operators.

⁽⁹⁴⁾ Case C-70/72 *Commission v Germany* [1973] ECR 00813, point 13.

⁽⁹⁵⁾ Joined Cases C-278/92, C-279/92 and C-280/92 *Spain v Commission* [1994] ECR I-4103, point 75.

⁽⁹⁶⁾ Case C-75/97 *Belgium v Commission* [1999] ECR I-030671 points 64-65.

⁽⁹⁷⁾ Council Regulation (EC) No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article 108 of the treaty on the functioning of the European Union (OJ L 83, 27.3.1999, p. 1).

⁽⁹⁸⁾ If, in individual cases, Spain can demonstrate that a public tender has taken place for the supply of equipment, such amount would be excluded from recovery.

- (198) In the cases where the individual beneficiaries received funding not exceeding thresholds specified in the Commission Regulation (EC) No 1998/2006 ⁽⁹⁹⁾, such funding is not considered State aid if all the conditions set by this Regulation are fulfilled, and is not subject to recovery.
- (199) Recovery shall be put into effect from the time when the advantage occurred to the beneficiaries, i.e. when the aid was put at the disposal of the beneficiary and shall bear recovery interest until effective recovery.

7. CONCLUSION

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

HAS ADOPTED THIS DECISION:

Article 1

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

Article 2

Individual aid granted under the scheme referred to in Article 1 does not constitute aid if, at the time it is granted, it fulfils the conditions laid down by the regulation adopted pursuant to Article 2 of Council Regulation (EC) No 994/98 ⁽¹⁰⁰⁾ which is applicable at the time the aid is granted.

Article 3

1. Spain shall recover the incompatible aid granted under the scheme referred to in Article 1 from TelecomCLM and Abertis.
2. The sums to be recovered shall bear interest from the date on which they were put at the disposal of the beneficiaries until their actual recovery.
3. The interest shall be calculated on a compound basis in accordance with Chapter V of Commission Regulation (EC) No 794/2004 ⁽¹⁰¹⁾.
4. Spain shall cancel all outstanding payments of aid under the scheme referred to in Article 1 with effect from the date of notification of this decision.

Article 4

1. Recovery of the aid granted under the scheme referred to in Article 1 shall be immediate and effective.
2. Spain shall ensure that this Decision is implemented within four months following the date of notification of this Decision.

⁽⁹⁹⁾ Commission Regulation (EC) No 1998/2006 of 15 December 2006 on the application of Articles 87 and 88 of the Treaty to de minimis aid (OJ L 379, 28.12.2006, p. 5).

⁽¹⁰⁰⁾ Council Regulation (EC) No 994/98 of 7 May 1998 on the application of Articles 107 and 108 of the Treaty on the Functioning of the European Union to certain categories of horizontal State aid (OJ L 142, 14.5.1998, p. 1).

⁽¹⁰¹⁾ Commission Regulation (EC) No 794/2004 of 21 April 2004 implementing Council Regulation (EU) 2015/1589 laying down detailed rules for the application of Article 108 of the Treaty on the Functioning of the European Union (OJ L 140 30.4.2004, p. 1).

3. Within two months following notification of this Decision, Spain shall submit the following information:
- (a) for the beneficiaries identified in Article 1, the total amount of aid received by each of them;
 - (b) the total amount (principal and recovery interests) to be recovered from each beneficiary;
 - (c) a detailed description of the measures already taken and planned to comply with this Decision;
 - (d) documents demonstrating that the beneficiaries have been ordered to repay the aid.

4. Spain shall keep the Commission informed of the progress of the national measures taken to implement this Decision until recovery of the aid granted under the scheme referred to in Article 1 has been completed. It shall immediately submit, on simple request by the Commission, information on the measures already taken and planned to comply with this Decision. It shall also provide detailed information concerning the amounts of aid and recovery interest already recovered from the beneficiaries.

Article 5

This Decision is addressed to the Kingdom of Spain.

Done at Brussels, 1 October 2014.

For the Commission
Joaquín ALMUNIA
Vice-President

ANNEX

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

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

(*) Million of national currency