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II

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

DECISIONS

COMMISSION

COMMISSION DECISION

of 24 January 2007

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

(notified under document number C(2006) 6634)

(Only the Italian text is authentic)

(Text with EEA relevance)

(2007/374/EC)

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

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

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

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

Whereas:

I. PROCEDURE

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

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

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

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

⁽¹⁾ OJ C 118, 19.5.2006, p. 10.

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

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

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

II. DETAILED DESCRIPTION OF THE AID

II.A. DESCRIPTION OF THE AID

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

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

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

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

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

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

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

⁽³⁾ See footnote 1.

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

II.B. BACKGROUND

II.B.1. THE COMPLAINANTS

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

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

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

II.B.2 THE CONTEXT

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

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

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

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

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

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

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

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

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

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

⁽¹⁴⁾ OJ L 108, 24.4.2002, p. 33.

⁽¹⁵⁾ OJ L 108, 24.4.2002, p. 21.

⁽¹⁶⁾ OJ L 249, 17.9.2002, p. 21.

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

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

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

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

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

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

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

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

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

(31) As regards coverage in terms of T-DVB — according to AGCOM⁽²⁰⁾ — in 2004 more than 50 % of the population was effectively covered by at least two multiplexes and 60 % was potentially covered by three multiplexes. The market trend suggests that coverage should increase considerably. According to Italy, 85 % of households could potentially be covered by at least two multiplexes after the switchover to digital terrestrial. On the other hand, satellite broadcasting could cover virtually 100 % of the population.

(32) As regards programmes, according to Italy, in June 2005 23 national channels and some 250 local programmes were broadcast free-to-air on digital terrestrial frequencies. Ten of these national channels were broadcast in simulcast with analogue terrestrial television (simultaneous broadcasting in analogue and digital mode). Four channels had been created specifically for digital broadcasting; the remaining channels were broadcast in simulcast with satellite transmissions.

(33) As has already been stated, the TV market was once characterised by mass viewing of free-to-air TV in analogue terrestrial mode and by the offer of satellite pay-TV. The introduction of digital terrestrial TV and the development of cable and Internet TV are altering this pattern. For example, in January 2005 Mediaset and Telecom Italia (through LA7) launched on T-DVB a pay-TV service for premier league soccer matches based on a system of prepaid cards. At the same time, TF1 — 49 % partner in the D-Free broadcaster — indicated that it may be interested in launching pay channels on its T-DVB multiplex. The pay-TV services are made possible, with the prepaid card system, by the digital interactive technology contained in the decoders that are subsidised by the measure in question.

(34) Total revenue from the television market in 2005 amounted to EUR 6 851 million, of which some 57 % (EUR 3 885 million) came from advertising and 21 % from the licence fee paid to the RAI and the supply of pay-TV (EUR 1 483 million and EUR 1 437 million respectively). Pay-TV revenue amounted to EUR 1 199 million from subscription fees (up by 26,4 % from 2004) and EUR 238 million from pay-per-view (up by 65 % from 2004), a considerable share of which (EUR 45 million) was revenue from the new DTT services.

II.C. GROUNDS FOR INITIATING THE PROCEDURE

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

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

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

(36) The Commission also expressed doubts as to the compatibility of the aid with the EC Treaty. The case in hand seemed not to meet either the exceptions from the general prohibition on aid listed in Article 87(2) or the exception in Article 87(3)(c) of the EC Treaty. Particularly problematic, in the Commission's view, is the fact that the objective pursued by Italy — i.e. the diffusion of open standards for digital television — was reached by causing disproportionate distortion of competition and an unnecessary infringement of the principle of technological neutrality.

(37) Lastly, the Commission initiated the formal investigation procedure in order to give the Italian Government and interested parties the opportunity to submit their comments on its provisional assessment of the measure described and to provide the Commission with any relevant information.

III. COMMENTS FROM INTERESTED PARTIES

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

III.A. COMMENTS FROM ITALY, MEDIASET AND RAI

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

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

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

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

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

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

III.A.1. THE MEASURE IS NOT AID

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

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

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

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

⁽²²⁾ Law No 215 of 20 July 2004.

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

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

III.A.1.2. *Distortion of competition*

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

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

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

III.A.2. COMPATIBILITY

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

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

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

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

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

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

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

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

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

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

Subsidising consumers

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

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

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

Increasing competition between platforms

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

Externalities

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

Promoting innovation

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

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

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

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

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

III.A.3. RECOVERY

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

⁽²⁹⁾ See footnote 24.

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

⁽³¹⁾ See footnote 24.

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

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

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

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

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

III.C. COMMENTS FROM ANIE

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

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

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

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

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

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

III.D. REPLY BY ITALY

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

IV. LEGAL ASSESSMENT

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

(79) The Commission has examined whether the measure in question can be characterised as State aid within the meaning of Article 87(1) of the EC Treaty, which lays down the following conditions for the presence of State aid. First, there must be an intervention by the State or through State resources. Second, it must confer a selective economic advantage on the recipient. Third, it must distort or threaten to distort competition. Fourth, the intervention must be liable to affect trade between Member States.

IV.A.1. STATE RESOURCES

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

IV.A.2. ECONOMIC ADVANTAGE

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

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

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

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

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

Broadcasters

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

⁽⁴¹⁾ See footnote 24.

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

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

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

Network operators

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

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

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

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

Producers of decoders

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

IV.A.3. SELECTIVITY

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

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

IV.A.4. DISTORTION OF COMPETITION

(102) *Broadcasters*

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

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

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

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

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

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

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

Network operators

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

⁽⁴⁷⁾ See footnote 5.

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

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

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

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

IV.A.6. CONCLUSION

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

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

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

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

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

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

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

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

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

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

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

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

IV.B. COMPATIBILITY ASSESSMENT

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(b) Is the aid well designed to deliver the objective of common interest, i.e. does the proposed aid address a market failure or other objective? In particular:

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

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

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

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

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

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

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

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

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

⁽⁵⁴⁾ See footnote 14. See recital 18.

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

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

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

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

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

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

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

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

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

The coordination problem

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

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

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

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

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

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

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

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

Compensation for consumers

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

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

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

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

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

Strengthening of competition between the different distribution platforms

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

Existence of externalities

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

be considered as compensation for the costs incurred by incumbents.

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

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

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

Promoting innovation

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

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

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

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

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

IV.B.3.3. *Avoiding unnecessary distortions*

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

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

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

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

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

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

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

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

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

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

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

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

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

IV.B.6. CONCLUSION ON THE COMPATIBILITY ASSESSMENT

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

IV.C. CONCLUSION OF LEGAL ASSESSMENT

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

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

V. ELIMINATION OF THE AID

V.A. NEED TO ELIMINATE THE AID

(179) According to the Court of Justice's established case-law, the Commission is competent to decide that the State concerned must abolish or alter aid⁽⁵⁸⁾ when it has found that it is incompatible with the common market. The Court has also consistently held that the obligation on a State to abolish aid regarded by the Commission as being incompatible with the common market is designed to re-establish the previously existing situation⁽⁵⁹⁾. In this context, the Court has established that that objective is attained once the recipient has repaid the amounts granted by way of unlawful aid, thus forfeiting the advantage which it had enjoyed over its competitors on the market, and the situation prior to the payment of the aid is restored⁽⁶⁰⁾.

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

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

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

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

⁽⁶¹⁾ See footnote 2.

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

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

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

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

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

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

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

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

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

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

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

V.B. STATE AID RECIPIENTS

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

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

⁽⁶²⁾ See footnote 24.

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

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

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

⁽⁶⁶⁾ See footnote 24.

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

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

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

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

V.C. QUANTIFICATION OF THE AID TO BE RECOVERED

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

V.D. IMPLEMENTATION OF THE DECISION

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

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

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

(208) Therefore the Commission:

HAS ADOPTED THIS DECISION:

Article 1

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

Article 2

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

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

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

Article 3

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

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

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

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

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

⁽⁷³⁾ OJ L 140, 30.4.2004, p. 1.

Article 4

This Decision is addressed to the Italian Republic.

Done at Brussels, 24 January 2007.

For the Commission
Neelie KROES
Member of the Commission

ANNEX

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

1. Calculation of the amount to be recovered

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

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

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

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

Comments:

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

2. Recovery measures planned or already taken

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

3. Recovery already effected

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

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

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

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

COMMISSION DECISION

of 7 February 2007

concerning the exemption from excise duty on mineral oils used as fuel for alumina production in Gardanne, in the Shannon region and in Sardinia implemented by France, Ireland and Italy respectively (C 78/2001 (ex NN 22/01), C 79/2001 (ex NN 23/01), C 80/2001 (ex NN 26/01))

(notified under document number C(2007) 286)

(Only the English, French and Italian versions are authentic)

(Text with EEA relevance)

(2007/375/EC)

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

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

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

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

Whereas:

used for alumina production in, respectively, the Gardanne, in the Shannon region and on Sardinia, from the excise duty which would otherwise have been imposed. The most recent decision is Council Decision 2001/224/EC of 12 March 2001 concerning reduced rates of excise duty and exemptions from such duty on certain mineral oils when used for specific purposes ⁽⁴⁾, which authorises the exemptions until 31 December 2006.

(2) Council Directive 2003/96/EC of 27 October 2003 restructuring the Community framework for the taxation of energy products and electricity ⁽⁵⁾ repealed Directive 92/82/EEC as from 31 December 2003. Article 2(4)(b) of Directive 2003/96/EC, states that the Directive does not apply to a number of uses of energy, including dual use of energy products. The second indent of Article 2(4)(b) states that the use of energy products for chemical reduction and in electrolytic and metallurgical processes is to be regarded as dual use. The use of heavy fuel for alumina production falls within this category. Therefore, as from 31 December 2003, the minimum excise duty for heavy fuel no longer applies to fuel used in the production of alumina. The derogations in Decision 2001/224/EC and other similar derogations were incorporated into Annex II of Directive 2003/96/EC.

(3) By Decisions C(2001)3296, C(2001)3300 and C(2001)3295 of 30 October 2001 ⁽⁶⁾ the Commission initiated the procedure laid down in Article 88(2) of the Treaty with respect to the exemptions. By Commission Decision 2006/323/EC ⁽⁷⁾ of 7 December 2005 (notified under document number C(2005)4436), the Commission closed that procedure in respect of the aid granted during the period to 31 December 2003, declaring part of the aid to be incompatible with the common market. As regards the period from 1 January 2004, the procedure was extended. Recitals 6 to 15 of Decision 2006/323/EC provide a detailed description of the correspondence between the Commission, the Member States concerned, the beneficiaries of the aid and the European Aluminium Association (hereinafter 'EAA') prior to December 2005.

1 PROCEDURE

(1) Taxation of mineral oils has been subject to harmonisation at Community level since the entry into force of Council Directive 92/81/EEC of 19 October 1992 on the harmonisation of the structures of excise duties on mineral oils ⁽²⁾. The use of mineral oils for alumina production was not excluded from the scope of Directive 92/81/EEC, nor was it the object of a compulsory or optional exemption under Article 8 of that Directive. Article 6 of Council Directive 92/82/EEC of 19 October 1992 on the approximation of the rates of excise duties on mineral oils ⁽³⁾ established a minimum rate of excise duty on heavy fuel oil, which Member States had to apply from 1 January 1993. By various decisions, however, the Council authorised France, Ireland and Italy to exempt mineral oils

⁽¹⁾ OJ C 30, 2.2.2002, p. 17, p. 21 and p. 25; and OJ C 109, 9.5.2006, p. 2.

⁽²⁾ OJ L 316, 31.10.1992, p. 12. Directive as last amended by Directive 94/74/EC (OJ L 365, 31.12.1994, p. 46).

⁽³⁾ OJ L 316, 31.10.1992, p. 19. Directive amended by Directive 94/74/EC.

⁽⁴⁾ OJ L 84, 23.3.2001, p. 23. See the Commission's Decision of 7.12.2005 for a detailed reference to earlier decisions.

⁽⁵⁾ OJ L 283, 31.10.2003, p. 51. Directive last amended by Directive 2004/75/EC (OJ L 157, 30.4.2004, p. 100).

⁽⁶⁾ See footnote 1.

⁽⁷⁾ OJ L 119, 4.5.2006, p. 12.

- (4) Decision 2006/323/EC was sent to France, Ireland and Italy by letters of 8 December 2005 (D/206670, D/206671, D/206673). It was sent to the beneficiaries concerned and the EAA by letters of 23 January 2006 (D/50525, D/50526, D/50527 and D/50528). The three Member States and two beneficiaries appealed the decision⁽⁸⁾. The Irish beneficiary, Aughinish Alumina Ltd (hereinafter 'Aughinish') also applied for the suspension of operation of the decision. That application was registered as Case T-69/06R. By order of 2 August 2006⁽⁹⁾ the Court of First Instance dismissed the application for interim measures.
- (5) Decision 2006/323/EC was published in the *Official Journal of the European Union* on 4 May 2006 and third parties were invited to submit comments by a notice published in the *Official Journal of the European Union* on 9 May 2006⁽¹⁰⁾. The Commission received comments from Aughinish in a letter dated 9 June 2006 (registered the same day under A/34490) and from Eurallumina SpA (hereinafter 'Eurallumina'), the Italian beneficiary, in a letter dated 24 June 2006 (registered on 25 July 2006 under A/35967). The latter was sent and received only after the delay of one month set out in the invitation for comments published in the *Official Journal of the European Union* and therefore the Commission is in principle not obliged to take the comments into account in the framework of this procedure. The Commission informed Eurallumina to that effect by letter dated 2 August 2006 (D/56648). Eurallumina replied by letter dated 3 August 2006 (registered on 4 August 2006 under A/36269). Nevertheless, the Commission notes that the comments raised by Eurallumina repeat many of the comments the Commission had already received in the context of the previous decision and is similar to the comments received in due time, which are addressed in this decision.
- (6) The comments from Aughinish were forwarded to France, Ireland and Italy by letters dated 20 June 2006 (D/55106, D/55107 and D/55109).
- (7) France and Ireland requested an extension of the time limit for responding to Decision 2006/323/EC, which was granted by the Commission. The Commission reminded Ireland and Italy of its invitation for comments by letters dated 9 March 2006 (D/52054 and D/52055). France, Ireland and Italy commented on the Commission's decision by letters dated 14 February 2006 (registered on 15 February 2006 under A/31248), 12 April 2006 (registered on 18 April 2006 under A/32940) and 17 May 2006 (registered on 18 May 2006 under A/33852), respectively.
- (8) France commented on Aughinish' comments by letter dated 27 July 2006 (registered on 28 July 2006 under A/35952). By e-mail of 24 July 2006, Italy informed the Commission that it did not have any further observations to make.

⁽⁸⁾ Cases T-50/06, T-56/06, T-60/06, T-62/06 and T-69/06.

⁽⁹⁾ OJ C 249 of 14.10.2006, p. 10.

⁽¹⁰⁾ See footnote 1 and 7.

2 DETAILED DESCRIPTION OF THE MEASURES CONCERNED

- (9) The measures consist of full exemptions from the excise duty on industrial heavy oil when used for alumina production. The beneficiaries of the French, Irish and Italian exemption are, respectively, Alcan, Aughinish and Eurallumina⁽¹¹⁾.
- (10) The Irish exemption is contained in Section 100(1)(e) of the Irish Finance Act 1999, which grants relief from mineral oil tax on 'fuel oil intended for use in, or in connection with, the manufacture of alumina, or for the maintenance of the manufactory in which the said manufacture is carried on'. The explanatory memorandum of the Finance Act explains that 'section 100 provides for relief from mineral oil tax in respect of oil used for particular purposes or in other particular situations. These include use for purposes other than motor or heating fuel, exports, fuel oil used in alumina production, oil used for sea-navigation, heavy oil used in commercial aviation and recycled oil'. The exemption for mineral oils used for alumina production has been in place in Ireland since 1983. While the original Statutory Instrument providing for the exemption was revoked in 1999, the exemption was preserved under the Finance Act 1999.
- (11) The Italian exemption from excise tax applies to all undertakings using mineral oils for the production of alumina within the meaning of point 14 of table A of the Single Text on excises. The exemption was instituted by Law of 12 November 1990, n. 331, implementing Decreto Legge 15 September 1990, n.261, Article 8(5). That text has been reproduced in the successive legal texts concerned, including the national measures transposing Directive 92/81/EEC and the successive 'Single Text on excises'.
- (12) The French exemption has its legal base in the 1997 rectifying Finance Law ('Loi de finances rectificative pour 1997'). It stipulates in Article 6 that 'the deliveries of heavy oil with a sulphur content below 2 % included in the identification index 28bis of table B of Article 265(1) of the Customs Code are eligible for exemption from the Internal consumption tax on petrol products when they are destined to be used as a fuel for the production of alumina. Article 265 bis of the customs code concerns products destined for uses other than motor fuel or heating fuel, but it does not, for example, contain similar provisions on uses of mineral oils in other industrial sectors.
- (13) Recitals 16 to 23 of Decision 2006/323/EC provide a more detailed description of the measures and beneficiaries concerned. The Member States concerned have not indicated whether they are continuing to apply the exemption beyond 2006 nor have they informed the Commission of any changes to the applicable legislation, in particular changes due to the transposition of Directive 2003/96, that could affect the Commission's assessment.

⁽¹¹⁾ See www.alcan.com, www.glencore.com and www.eurallumina.com.

(14) The relevant tax rates have changed since the initiation of the procedure. On 1 July 2006, the applicable rates of excise tax on heavy fuel oil for business use in France and Ireland amounted to EUR 18,50, and EUR 15.00. On the same date the applicable rates in Italy amounted to EUR 63,75 per tonne of heavy fuel oil with a sulphur content above 1 % and EUR 31,39 per tonne of heavy fuel oil with a sulphur content below 1 %.

3 REASONS TO INITIATE AND EXTEND THE PROCEDURE LAID DOWN IN ARTICLE 88(2) OF THE TREATY

- (15) In its decisions of 30 October 2001 to initiate the procedure laid down in Article 88(2) of the Treaty, the Commission expressed its doubts as regards the compatibility of the aid under the Community guidelines on national regional aid ⁽¹²⁾ and in particular in the light of the rules on operating aid contained in those guidelines. The Commission also raised doubts as regards the aids' compatibility under the Community guidelines on State aid for environmental protection of 1994 ⁽¹³⁾ and those of 2001 ⁽¹⁴⁾ (hereinafter the 'Environmental aid guidelines').
- (16) In Decision 2006/323/EC, the Commission explained that it maintained similar doubts as regards the period as from 1 January 2004. Given that the Member States and interested parties had not had the opportunity to submit their comments on the legal situation created by Directive 2003/96/EC, the Commission considered it appropriate to extend the formal investigation procedure.

4 COMMENTS FROM FRANCE, IRELAND AND ITALY AND FROM THIRD PARTIES

- (17) The Member States and beneficiaries generally maintain the comments they made earlier and which are summarised in recitals 26-56 of Decision 2006/323/EC. Some arguments have been developed in more detail. In addition, they make the following comments.
- (18) The measures do not constitute State aid and this is confirmed by Directive 2003/96/EC. They fall within the nature and logic of the respective tax systems. If they were to constitute State aid, Directive 2003/96/EC explicitly allows the aid, at least for the period until 31 December 2006. In any event, that Directive created legitimate expectations for the beneficiaries. Requesting recovery of the aid also breaches the principle of legal certainty and the principle of proper administration, given the contradictions with the Council decisions which were based on Commission proposals, the considerable delay and the manner in which the Commission has dealt with the investigation. The beneficiaries have undertaken long-term capital investments in reliance on the Council Decisions and the Directive. The Commission would therefore be estopped from adopting an act that is manifestly contrary to its conduct over a long period.

- (19) The rules in Directive 2003/96/EC override the State aid rules. The Commission could only challenge the validity of the measures under Article 18(1) of Directive 2003/96/EC and not under the State aid rules. Applying the State aid rules would breach the principle of *effet utile*.
- (20) Ireland and Aughinish argue that the Irish measure constitutes existing aid and that the Commission's reading of Article 15 of Council Regulation (EC) No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article 93 of the EC Treaty ⁽¹⁵⁾ is wrong: after expiry of the 10-year limitation period, the Commission's letter of 17 July 2000 could not have been an act interrupting the limitation period and the measure would constitute existing aid also for the period after 17 July 1990. They also claim that the Commission's assessment of the nature of the agreements between Aughinish and the Irish authorities in 1970 is flawed: binding commitments were entered into before Ireland's accession to the Communities.
- (21) Italy argues that the measure is closely linked to the realisation of environmental objectives related to the burden arising from alumina production. Aughinish argues that the exemption falls at least within the spirit of the Environmental aid guidelines and *'it has, notwithstanding the fact that it is not paying "a significant proportion of the tax", been provided with more than sufficient incentives to improve environmental protection'*.
- (22) Ireland argues that alternative measures could have been implemented from 1 January 2004 had it been known that the exemption was liable to be found incompatible with the common market. Ireland refers to the possibility to widen the scope of the relief to cover heavy fuel oil for dual use, or more widely to energy products generally for dual use. In this way, according to Ireland, the relief could have been converted into a general measure or into an acceptable State aid, for example under the Environmental aid guidelines. In the view of these possibilities, retrospective recovery would be unconscionable. Ireland stresses, furthermore, that Aughinish made various investments on the reasonable expectation that the exemptions would continue until at least December 2006.
- (23) The Commission should allow the aid on the basis of an effects-based economic assessment of the alumina markets and their competitive structure. The Commission should take into account the external aspects of competitiveness in assessing State aid, as proposed in the State aid action plan. Detailed information on the markets has been provided.
- (24) The Commission ought to suspend the formal investigation procedure until the Court of Justice has determined the issues which are the subject of the current challenges to

⁽¹²⁾ OJ C 74, 10.3.1998, p. 9.

⁽¹³⁾ OJ C 72, 10.3.1994, p. 3.

⁽¹⁴⁾ OJ C 37, 3.2.2001, p. 3.

⁽¹⁵⁾ OJ L 83, 27.3.1999, p. 1. Regulation as last amended by Regulation (EC) No 1791/2006 (OJ L 363, 20.12.2006, p. 1).

Decision 2006/323/EC. Aughinish submits, in addition, that it was not appropriate for the Commission to take a decision to extend the Article 88(2) procedure by means of a recital to Decision 2006/323/EC. The Commission should have taken a separate decision.

- (25) The EAA did not submit any comments in addition to the points raised earlier, which are summarised in recital 50 of Decision 2006/323/EC.
- (26) The comments from the Member States and beneficiaries coincide to a large extent with their pleadings before the Court of Justice in the pending challenges to Decision 2006/323/EC⁽¹⁶⁾.

5 ASSESSMENT

5.1 The procedural concerns raised by the parties

- (27) The parties argue that the Commission ought to suspend the formal investigation procedure until the Court has determined the issues which are the subject of the current challenges to Decision 2006/323/EC⁽¹⁷⁾. That decision, however, concerns the period until 31 December 2003, whereas this decision concerns the period as from 1 January 2004. In addition, this decision is presumed valid unless and until annulled by the Court of First Instance. Therefore, and given the continuing distortion of competition that the State aid presents, the Commission does not see a reason to suspend the conclusion of the procedure.
- (28) The Commission did not take the decision to extend the Article 88(2) procedure merely by alluding to this in a recital. Specific attention was drawn to the extension in the conclusion in the preamble to Decision 2006/323/EC. The decision to initiate an investigation procedure under Article 88(2) of the Treaty takes the form of a letter to the Member State and therefore does not require the use of the structure of a normative decision, with an operative part and numbered articles. Furthermore, it is clear from the challenges made to Decision 2006/323/EC, and the comments received as regards the extension of the procedure, that interested parties were able to take the fullest cognisance of all aspects of the content of that decision.

5.2 Existence of State aid as from 1 January 2004

- (29) Article 87(1) of the Treaty provides that 'any aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of

certain goods, shall, in so far as it affects trade between Member States, be incompatible with the common market'.

- (30) It is evident that the exemptions are financed through State resources since the State foregoes a certain amount of money that it would otherwise collect.
- (31) As set out in recitals 60, 61 and 62 of Decision 2006/323/EC, the measures confer an advantage on the beneficiaries and can be assumed to affect intra-Community trade and to distort or threaten to distort competition. The exemptions from excise duty reduce the cost of one important input and thus confer an advantage on the beneficiaries which are placed in a more favourable financial position than other undertakings using mineral oils in other industries or regions. The fact that competitors in the alumina industry in other Member States may not be subject to similar taxes at all and that the beneficiaries have undertaken expenditure to mitigate the environmental impact of their production, does not detract from this assessment.
- (32) The measures favour *certain* undertakings as they only apply to companies that use heavy fuel in the production of alumina and in practice, in each Member State there is only one company benefiting from the exemption: Aughinish in the Shannon region, Eurallumina in Sardinia and Alcan in Gardanne. For the reasons set out in recitals 33 to 40, they can not be considered as being justified by the nature and general scheme of the respective energy tax systems.
- (33) Dual uses, non-fuel uses of energy and mineralogical processes fall outside the scope of Directive 2003/96/EC and, since 1 January 2004, Member States have had discretion as to whether or not to tax such uses. Indeed, an exemption of such energy uses may constitute a general measure that does not involve State aid if it falls within the nature and the logic of the domestic tax system. Recital 22 in the preamble to Directive 2003/96/EC states that '*energy products should essentially be subject to a Community framework when used as heating fuel or motor fuel. To that extent, it is in the nature and the logic of the tax system to exclude from the scope of the framework dual uses and non-fuel uses of energy as well as mineralogical processes.*'
- (34) In addition, when Directive 2003/96/EC was adopted, the Council and the Commission jointly declared⁽¹⁸⁾ '*Energy products should essentially be subject to a Community framework when used as heating fuel or motor fuel. It can be considered that it is in the nature and the logic of the tax system to exclude from the scope of the framework dual uses and non-fuel uses of energy as well as mineralogical processes. Member States may then take*

⁽¹⁶⁾ See footnote 7.

⁽¹⁷⁾ See footnote 7.

⁽¹⁸⁾ Addendum au projet de process verbal, 14140/03, of 24.11.2003, <http://register.consilium.eu.int/pdf/en/03/st14/st14140-ad01.en03.pdf>

measures to tax or not to tax or to apply total or partial taxation to each use. Electricity used in similar ways should be treated on an equal footing. Such exceptions to the general system or differentiations within that system, which are justified by the nature or general scheme of the tax system, do not involve State aids.'

- (35) The Council also stated that *'The Council furthermore states that it understands the legal situation arising with the adoption of this Directive in relation to the Treaty rules on State Aid, the same way as it was set out by the Commission at the meeting of the Working Party on Tax Questions on 14 November 2002.'* In the Staff Working Paper, which was discussed in that meeting ⁽¹⁹⁾, the Commission explained the notion of general measures, that the situation in each individual Member State has to be analysed to define the general excise duty system applicable at national level, and also stated that *'the draft directive on energy taxation contains numerous options, making it impossible to determine in advance whether or not the way they will be implemented by Member States will give rise to State aid within the meaning of Article 87'*. Recital (32) of the preamble and Article 26(2) of Directive 2003/96/EC, accordingly, remind Member States of the obligation laid down in Article 88(3) of the Treaty to notify State aid.
- (36) In this specific case, neither France, Ireland and Italy, nor any of the beneficiaries have demonstrated that the exemptions fall within the nature and logic of the domestic systems. None of them has, for example, explained whether dual use of energy products in other production processes has been exempt, and if not, the underlying reasons. Nor have they explained how the exemptions compare to the national taxes on electricity used principally for the purposes of chemical reduction and in electrolytic and metallurgical processes and energy use for mineralogical processes, which are other uses of energy falling outside the scope of Directive 2003/96/EC pursuant to Article 2(4)(b) thereof.
- (37) Italy explained that if any other industrial operator had requested the same benefit, it would not have encountered any obstacle to its access to the relevant market. It is, however, not clear what precisely is meant by this statement and whether this means that the same benefit could also be granted to any industry other than alumina. In any event the benefit would not be granted with automatically as in the case of alumina. As regards the reasons for the exemption, Italy, for example, in its letter of 7 December 2000 referred to the 'recognition of the island (Sardinia) as a strongly disadvantaged region, and the possible negative effects on employment' ('reconoscimento dell'isola (Sardegna) quale area fortemente disagiata, ed i possibili effetti negative sull'occupazione').
- (38) As regards the Irish exemption, Article 100 of the Finance Act, 1999 contains some other specific exemptions, but this does not bring the exemption for alumina production within the logic of an overall system. It rather demonstrates that the exemption for alumina is a particular exemption alongside other specific exemptions, as is also confirmed in the preamble to the Law ⁽²⁰⁾. In addition, the Irish law also excludes potential new entrants from the tax exemption when dual use of energy concerns other production processes. With respect to the Irish situation, Aughinish accepts that it *'does not believe that there are any other such industries (benefiting from an excise reduction like the alumina industry)'* and *'is also unaware of any allegations of discrimination'*. This rather tends to confirm the selective nature of the measure.
- (39) In their letter of 7 August 1998, the French authorities indicate that they asked for the derogation from Directive 92/81 in order to 'put in place an excise regime that does not penalise the sector' ('pour pouvoir instaurer un regime d'accise non pénalisant pour le secteur') (emphasis added). The exemption would be limited to re-establishing the competitive conditions between Péchiney, which has been taken over by Alcan, and the other producers in the Community. Article 265bis of the customs code, does not contain similar provisions for energy uses in other sectors.
- (40) In fact, the Member States and beneficiaries failed to identify any overall logic of their respective tax systems. On the basis of the information available to the Commission, it is clear that the reasons for granting the aid derive rather from the circumstances of alumina production in the specific regions concerned. These arguments do not derive from the nature and logic of the respective domestic tax systems. Therefore, the Commission concludes that the exemptions remain highly selective, favouring the production of a specific product and, de facto, specific undertakings and they cannot be justified within the logic of the domestic tax systems.
- (41) In conclusion, the exemptions at stake constitute State aid.

5.3 New aid, not existing aid

- (42) As explained in recitals (65)-(70) of Decision 2006/323/EC, the aid granted as from 1 January 2004 does not constitute existing aid within the meaning of Article 1(b) of Regulation (EC) No 659/1999.
- (43) The claim by Ireland and Aughinish that the exemptions constitute pre-accession aid is in contradiction with the letter of May 1983 by which Ireland accepted that the aid was notifiable within the terms of Article 88(3) of the Treaty. In addition, a commitment to make provision for

⁽¹⁹⁾ Commission Staff Working Paper *State-aid aspects in the proposal for a Council directive on energy taxation*, SEC(2002) 1142 of 24.10.2002. The same wording appeared already earlier in the Report to the Ecofin Council and the Council conclusions (note of the presidency to the Coreper/Ecofin Council of 13.12.2001, 14640/01, FISC 255 of 30.11.2001). See also recital 63 of the Decision of 7 November 2005.

⁽²⁰⁾ See recital 10.

the exemption is not the same as actually granting the aid before accession. Finally, the legislation concerned was fundamentally altered after accession.

- (44) As explained in recital (70) of Decision 2006/323/EC, aid granted by Ireland until 17 July 1990 constitutes existing aid by virtue of the limitation period provided for in Article 15 of Regulation (EC) No 659/1999. The expiry of the 10-year limitation period does not mean that all aid granted after the expiry of this period also constitutes existing aid. The aid was not awarded to Aughinish once and for all in 1983. The Statutory Instrument enacted by Ireland to grant the exemption is expressed in general terms as an exemption for alumina manufacture, so as the legislation stands, the exemption would extend to any other alumina producer that commenced production in Ireland. Furthermore, the exemption in respect of Aughinish was not defined at the time the Statutory Instrument was adopted, nor was its value capable of assessment at that time: neither the evolution of the excise duty rates from which Aughinish was exempted, nor the duration of that exemption was defined by the Statutory Instrument. The exemption therefore falls within the definition of an aid scheme in Article 1(d) of Regulation (EC) No 659/1999, being 'an act on the basis of which, without further implementing measures being required, individual aid awards may be made to undertakings defined within the act in a general and abstract manner'. Therefore, the aid consists of a series of grants of aid, made each time Aughinish carried out a customs procedure that would, in the absence of the exemption, have incurred a liability to excise duty. Aid granted as from 17 July 1990 therefore does not constitute existing aid pursuant to Article 15 of Regulation (EC) No 659/1999.

5.4 Compatibility of the aid granted as from 1 January 2004

5.4.1 Compatibility under the rules for environmental aid

- (45) The Commission has examined whether the aid granted by France, Ireland and Italy as from 1 January 2004 qualifies for an exemption from the prohibition of State aid contained in Article 87(1) of the Treaty. The aid consists in an exemption from energy tax, and such taxes are not only meant to raise financing for the authorities, but also to reduce the consumption of energy and thereby protect the environment. The 2001 Environmental aid guidelines contain rules for exemptions from environmental taxes. For reasons of equal treatment, transparency and legal certainty, these rules are binding upon the Commission.
- (46) As regards the period from 1 January 2004, section E.3.2, recitals (47)-(52), of the 2001 Environmental aid guidelines lay down rules applicable to all operating aid in the form of tax reductions or exemptions. As explained in recitals (73) and (74) of Decision 2006/323/EC, the excise duties on mineral oils can be considered as environmental taxes, they must be considered as existing taxes within the meaning of point 51.2 of the guidelines, they have an appreciable positive impact in terms of environmental protection

within the meaning of point 51.2(a) and they may be considered as if they had been decided at the time the excise tax was adopted. Consequently, in accordance with point 51.2 of the guidelines, the provisions in point 51.1 can be applied.

- (47) Under point 51.1 tax exemptions covering a 10-year period may be authorised. After expiry of such a period, and in line with point 23 of the Environmental aid guidelines, the Member States remain free to notify a prolongation of the measures in question to the Commission, which could adopt the same approach in its analysis as the one set out in this point while taking into consideration the positive results obtained in environmental terms through the adoption of taxes. The Irish and Italian exemptions in this case have been granted since 1993 and the French exemption has been granted since 1997, meaning that the measures have been in force for more than 10 years.
- (48) None of the Member States confirmed or denied that the exemptions would continue to be applied after 31 December 2006. None of the Member States have indicated the presence of a time constraint for the exemptions which currently apply, other than the date of 31 December 2006, which under Community tax law is not a binding constraint, since the exemptions do not fall within the scope of Directive 2003/96/EC. Nor have any of the Member States notified a prolongation of the measure in question under the Environmental aid guidelines. The provisions in the tax legislation of the respective Member States do not seem to contain such limits either. The Commission considers that in this case, the circumstances referred to in point 23 of the guidelines are still present. Therefore, pursuant to point 51.1 of the guidelines, the Commission could authorise further aid, but only on the condition that it becomes subject to a time limitation of maximum 10 years.

- (49) As explained in recital (75) of Decision 2006/323/EC, the conditions for applying point 51.1(a) of the Environmental aid guidelines are not fulfilled and therefore only the provisions of point 51.1(b) can be applied in this case.
- (50) As from 1 January 2004, taxation of mineral oils intended for dual uses, non-fuel uses and mineralogical processes falls outside the scope of harmonised Community measures and therefore, since that date, the exemptions concern domestic taxes imposed in the absence of a Community tax within the meaning of point 51.1(b), second indent, of the Environmental aid guidelines. That provision requires companies benefiting from the exemptions to pay a 'significant proportion' of the national tax. The reason for that is to leave them with an incentive to improve their environmental performance. This follows from the wording of point 51.1(b), first indent, of the guidelines, which allows for tax reductions from a harmonised tax if the beneficiaries pay more than the Community minimum rates 'in order to provide firms with an incentive to improve environmental protection'. This also applies where the national tax is significantly higher than comparable taxes in (some)

other Member States, as was the case in Italy. In the practice of the Commission ⁽²¹⁾, it has become clear that in general 20 % of the domestic tax or the Community minimum that applies to other energy uses that do fall within the scope of Directive 2003/96/EC (EUR 15 per tonne), can be regarded as a significant proportion, even though the Community minimum does not apply to the energy use at hand. Therefore, the Commission considers that only the exemption above 20 % of the domestic tax or above EUR 15 per tonne, whichever is the lowest of the two, can be considered compatible with the common market; the exemption up to the level of 20 %, or up to EUR 15 per tonne, constitutes incompatible aid.

5.4.2 Compatibility of the aid pursuant to Article 87(3)(a) of the Treaty and under other provisions

- (51) For the reasons explained in recitals (78)-(81) and (82)-(86) of Decision 2006/323/EC, the aid can not be found compatible with the common market under Article 87(3)(a) of the Treaty, nor is it covered by the exemptions set out in Article 87(2) and (3) of the Treaty.
- (52) Basing the assessment on section E.3.2 of the Environmental aid guidelines is appropriate since the rules in that section take into account economic factors, in particular the risk of a loss of international competitiveness due to the absence of tax harmonisation and even allow for full exemptions for certain firms provided they enter into an agreement with the Member State concerned to improve their environmental performance. However, in the current cases no such agreements were entered into and therefore a full tax exemption under point 51.1(a) of the Environmental guidelines cannot be justified. Nevertheless, the information on the alumina markets provided to the Commission confirms that the authorization of a major part of the aid is appropriate and, as concluded above, can be justified under point 51(1)(b) of the Environmental aid guidelines by the overall positive results obtained in environmental terms through the adoption of taxes. This authorisation is, however, subject to the beneficiaries paying more than the Community minimum rates or a significant proportion of the domestic tax, which is considered necessary to provide firms with an incentive to improve environmental protection. There are no grounds for relying on other provisions in other communications of the Commission with respect to the part of the aid that cannot be found compatible on the basis of the Environmental aid guidelines.

⁽²¹⁾ See e.g. Commission Decision of 30.6.2004 in Case C42/2003 (OJ L 165, 25.6.2005, p. 21), Decision of 13.2.2002 in Case N449/01 (OJ C 137, 8.6.2002, p. 24), Decision of 11.12.2002 in Case N74/A/2002 (OJ C 104, 30.4.2003, p. 9) and Decision of 11.12.2001 in cases NN3A/2001 and NN4A/2001 (OJ C 104, 30.4.2003, p. 10). These cases are particularly relevant, as they also concerned exemptions from energy taxes. An indication as to what the Commission might consider as too low on the other hand is contained in the Commission Decision on the partial refund of the waste water tax in Denmark, Decision of 3.4.2002 in case NN30/A-C/2001 (OJ C 292, 27.11.2002, p. 6).

- (53) As there are no other grounds for finding the aid to be compatible with the common market, the only aid that can be found compatible is the part of the aid complying with the Environmental aid guidelines as specified in recital (50).

6 RECOVERY OF THE INCOMPATIBLE AID

- (54) Under Article 14(1) of Regulation (EC) No 659/1999, where negative decisions are taken in cases of unlawful aid, the Commission must decide that the Member State concerned is to take all necessary measures to recover the aid from the beneficiary.
- (55) Recitals (95)-(100) of Decision 2006/323/EC explain why the principles of legitimate expectations and of legal certainty, or any other general principle of Community law, preclude recovery from the beneficiaries of the unlawful and incompatible aid granted until 2 February 2002. However, recitals 101 and 102 of the decision explain why these principles do not preclude the recovery of the unlawful and incompatible aid granted from 3 February 2002 until 31 December 2003. The arguments in these latter recitals are also equally applicable with respect to the aid granted as from 1 January 2004.
- (56) In addition, the preparation and adoption of Directive 2003/96/EC cannot have given rise to legitimate expectations on the part of the beneficiaries, nor is recovery precluded by the principle of legal certainty. Recital 32 of the preamble to the Directive refers to the obligation laid down in Article 88(3) of the Treaty upon Member States to notify State aid and it explicitly stipulates that the Directive 'does not prejudice the outcome of any future State aid procedure that may be undertaken in accordance with Article 87 and 88 of the Treaty'. The reference to any future State aid procedure in that recital cannot be understood as an authorisation of aid subject of a procedure that had already started when the Directive was adopted. In fact, the same wording was already present in recital 6 of the preamble to Decision 2001/224/EC, which extended the derogations until the end of 2006. The explanatory memorandum that accompanies the Commission's proposal for that decision ⁽²²⁾ reads 'The Commission proposes to (...) extend for a two-year period the (...) derogations which require a detailed examination, in particular in the light of the State aid rules (...) Nevertheless, nothing in this Decision overrides the requirement for Member States to notify instances of potential State aid to the Commission under Article 88 of the Treaty. Such notifications will be examined under the terms of Article 87 of the Treaty'. In addition, in summer 2000 the Commission had already asked the Member States to notify the measures in question.

⁽²²⁾ COM(2000)678.

- (57) Recital 22 of the preamble to Directive 2003/96/EC states that: *'energy products should essentially be subject to a Community framework when used as heating fuel or motor fuel. To that extent, it is in the nature and the logic of the tax system to exclude from the scope of the framework dual uses and non-fuel uses of energy products as well as mineralogical processes. (...)*' That recital, although not referring to Articles 87 and 88 of the Treaty, cannot be understood to restrict the concept of State aid as laid down in Article 87(1) of the Treaty. The Commission explained the notion of general measures in a Staff Working Paper which explained: *'In this matter, the situation in each individual Member State has to be analysed, to define the general excise duty system applicable at national level'* ⁽²³⁾. That paper was discussed in the meeting of the Council Working Party on 14 November 2002. The paper continues with an explanation of the conditions under which aid in the form of tax measures can be found compatible with the common market. The minutes of the Council meeting of 27 October 2003, when Directive 2003/96/EC was adopted, expressly refer to the explanations given during the meeting of the Council Working Party on 14 November 2002.
- (58) Although 'dual use of energy' does not fall within the scope of Directive 2003/96/EC, Article 18 of the Directive authorises the Member States to continue to apply the exemptions listed in Annex II thereto. That Annex includes the three exemptions to which this Decision relates, for the period foreseen in the last extension in 2001, that is to say, until 31 December 2006. The authorisation is, however, not an authorisation under the State aid rules which the Commission is competent to enforce. To the contrary, this precisely demonstrates the potential relevance of recital 32. The argument put forward by the Member States and beneficiaries that the authorisation by the Council overrides the State aid procedures is incorrect.
- (59) When Directive 2003/96/EC was adopted, the Commission and the Council jointly declared that *'the Commission should go to the greatest possible length to ensure that measures taken by Member States in accordance with the exemptions and tax reductions laid down in the Directive will be considered compatible with state aid rules'*. Of course, the Commission must act within the framework of applicable State aid rules, in this case in particular the Environmental aid guidelines. In any event, that statement does not apply to the exemptions to which this decision relates, since they do not fall within the scope of the Directive.
- (60) Directive 2003/96/EC, the Staff Working Paper and the joint Commission and Council statement referred to above have never confirmed the absence of incompatible State aid. It should be recalled that the Commission had initiated the procedure laid down in Article 88(2) and any interested party could have asked the Commission to adopt a final decision. The initiation of a procedure under Article 88(2) vitiated the further existence of legitimate expectations (if any) as to the absence of incompatible aid.
- (61) Decision 2001/224/EC and earlier Council decisions on the exemptions were not State aid decisions. In fact, the Commission has long expressed doubts about the compatibility of the exemptions with the State aid rules.
- (62) As regards the duration of the investigation in this case, the Commission considered it necessary to await the adoption of Directive 2003/96/EC and to extend the procedure by Decision 2006/323/EC, in order to seek the views of the Member States on the situation in each Member State resulting from the transposition of Directive 2003/96/EC which permitted a number of possible outcomes. In any event, a 'prudent businessman' should be aware that once an investigation starts into unlawful aid, then should the investigation find that aid to be incompatible with the Treaty, the almost inevitable consequence is that the Commission will order the recovery of the aid. The Member States and the beneficiaries could have urged the Commission to conclude the procedure sooner, had they wished to consider alternative investments or alternative measures to comply with the Environmental aid guidelines.
- (63) For these reasons, the beneficiaries cannot hold any legitimate expectations precluding the recovery of the incompatible State aid after 31 December 2003, nor is recovery precluded on the basis of the principle of legal certainty.

7 SUSPENSION OF PAYMENT OF COMPATIBLE AID

- (64) In its judgement in Case C-355/95P, *Textilwerke Deggendorf GmbH (TWD) v. Commission*, the Court of Justice stated that *'when the Commission examines the compatibility of a State aid with the common market it must take all the relevant factors into account, including, where appropriate, the circumstances already considered in a prior decision and the obligations which that decision may have imposed on a Member State'*. According to the Court of Justice, the compatibility of a new aid could depend on the existence of a previous unlawful aid that has not been repaid, since the cumulative effect of the aids could distort competition in the common market to a significant extent. Therefore the Commission, when it examines the compatibility of a State aid with the common market, has the power to take into consideration both the cumulative effect of this aid with an old one and the fact that such old aid has not been repaid ⁽²⁴⁾.
- (65) Therefore, in application of this case-law, when the Commission assesses a new aid measure it takes into account the fact that the beneficiaries may not have complied with earlier Commission decisions ordering them to reimburse previous unlawful and incompatible aid. In

⁽²³⁾ See footnote 17 above.

⁽²⁴⁾ [1997] ECR I-2549, paragraphs 25 to 27.

such cases, the Commission examines the effects on the beneficiaries of the combination of the new aid with the old incompatible aid which has not yet been reimbursed.

- (66) France, Ireland and Italy have not yet effectively recovered the aid that the Commission found incompatible in Decision 2006/323/EC ⁽²⁵⁾. The sums to be recovered, as calculated by the Member States and excluding interest, amount to EUR 786 668, EUR 8 095 881,43 and EUR 6 612 489,02 respectively. Moreover, this decision has also identified incompatible aid granted for an additional period, which should also be recovered. The cumulation of these aid amounts with otherwise compatible aid would continue to distort competition to an extent contrary to the common interest and no arguments were found to justify such a distortion. Therefore, any payment of compatible aid as described in point 50 above should be suspended until all incompatible aid has been recovered from the beneficiaries.

8 CONCLUSION

- (67) It is concluded that the exemptions from excise duty on heavy fuel oils used in the production of alumina granted by France, Ireland and Italy as from 1 January 2004 constitute State aid within the meaning of Article 87(1) of the Treaty. The aid is partially incompatible with the common market as the beneficiaries did not pay a significant part of the tax. The part of the exemption which exceeds the rate of 20 % of the tax level which would otherwise have been payable or EUR 15,00 per 1 000 kg, whichever is the lowest, can be found compatible with the common market on the condition that it is granted for a maximum of 10 years, after which the compatibility of the aid must be reviewed. The remaining aid should be declared incompatible with the common market.
- (68) France, Ireland and Italy should be required to take all necessary measures to recover the incompatible aid granted from 1 January 2004 onward from the recipients.
- (69) France, Ireland and Italy should be required to suspend the application of the exemptions until they have recovered from the respective beneficiaries the aid held to be incompatible with the common market in Decision 2006/323/EC and in this Decision.
- (70) The French, Irish and Italian authorities should forward a copy of this decision to the beneficiaries of the measures immediately,

⁽²⁵⁾ The Decision has been appealed before the Court of Justice, but according to art. 242 EC Treaty, the appeal does not have a suspensive effect.

HAS ADOPTED THIS DECISION:

Article 1

The exemptions from excise duty granted by France, Ireland and Italy in respect of heavy fuel oils used in the production of alumina as from 1 January 2004 constitute State aid within the meaning of Article 87(1) of the Treaty.

Article 2

The aid referred to in Article 1 is compatible with the common market insofar as the beneficiaries pay at least a rate of 20 % of the excise tax which would otherwise have been payable or the minimum level of taxation as determined by Directive 2003/96 (EUR 15,00 per 1 000 Kg), whichever is the lowest, subject to the condition that the aid is limited to a maximum duration of 10 years.

Article 3

The aid referred to in Article 1 is incompatible with the common market insofar as the beneficiaries do not pay at least a rate of 20 % of the excise tax otherwise payable or the Community minimum (EUR 15,00 per 1 000 Kg), whichever is the lowest.

Article 4

1. France, Ireland and Italy shall take all necessary measures to recover from the beneficiaries the aid referred to in Article 3 and unlawfully made available to the beneficiaries.
2. Recovery shall be effected without delay and in accordance with the procedures of national law provided that they allow the immediate and effective execution of the decision.
3. The sums to be recovered shall include interest from the date on which it was at the disposal of the beneficiaries until the date of its recovery. The interest shall be calculated in compound basis in conformity with the provisions laid down in Chapter V of Commission Regulation (EC) No 794/2004 ⁽²⁶⁾.
4. France, Ireland and Italy shall cancel all payment of outstanding aid referred to in Article 3 with effect from the date of notification of this decision.
5. France, Ireland and Italy shall ensure that this decision is implemented within four months of the date of its notification.

Article 5

France, Ireland and Italy shall suspend the payment of the aid referred to in Article 2, to beneficiaries who have not yet repaid the aid held to be incompatible with the common market by Decision 2006/323/EC and the aid referred to in Article 3 of this decision in so far as it was unlawfully made available to the beneficiaries, with interest.

⁽²⁶⁾ OJ L 140 of 30.4.2004, p. 1.

Article 6

1. France, Ireland and Italy shall keep the Commission informed of the progress of the national proceedings to implement this Decision until these proceedings have been completed.

2. Within two months of notification of this Decision, France, Ireland and Italy shall inform the Commission of the total amount to be recovered from the beneficiaries, indicating both principal amount and interest using the table in the Annex and submit a detailed description of the measures already taken and planned to comply with this Decision. Within the same time limit, they shall send to the Commission all the documents demonstrating that the beneficiaries have been ordered to repay the aid.

3. Within two months of notification of this Decision, France, Ireland and Italy shall submit evidence to the Commission showing that they have complied with Article 6.

4. After the expiry of the periods referred to in paragraphs 2 and 3, France, Ireland and Italy shall submit, on simple request by the Commission a report on the measures already taken and planned to comply with this Decision. The report shall also provide detailed information on the amounts of aid and recovery interest already recovered from the beneficiaries.

Article 7

This Decision is addressed to the French Republic, Ireland and the Italian Republic.

Done at Brussels, 7 February 2007.

For the Commission

Neelie KROES

Member of the Commission

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	
			Principle	Recovery interest

(*) Million of national currency.