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⁽¹⁾ Text with EEA relevance.

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Acts whose titles are printed in light type are those relating to day-to-day management of agricultural matters, and are generally valid for a limited period.

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II

(Non-legislative acts)

DECISIONS

COMMISSION DECISION (EU) 2021/2034

of 10 June 2021

on the State aid SA.28599 (C 23/2010) (ex NN 36/2010, ex CP 163/2009)) implemented by Spain for the deployment of digital terrestrial television in remote and less urbanised areas (outside Castilla-La Mancha)

*(notified under document C(2021) 4048)***(Only the Spanish version is authentic)****(Text with EEA relevance)**

THE EUROPEAN COMMISSION,

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

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

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

Whereas:

1. PROCEDURE

- (1) On 18 May 2009, the Commission received a complaint from SES Astra S.A. ('Astra'). The subject of the complaint was an alleged State aid scheme that the Spanish authorities had adopted in relation to the switchover from analogue television to digital television in remote and less urbanised areas of Spain. Astra argued that the scheme constituted non-notified and therefore unlawful aid, resulting in a distortion of competition between the satellite and the terrestrial broadcasting platforms.
- (2) The contested scheme has its origin in Law 10/2005, of 14 June 2005 on Urgent Measures for the Promotion of Digital Terrestrial Television, Liberalisation of Cable Television and Support of Pluralism ⁽²⁾. Further legislation adopted with respect to the digital terrestrial transition process includes, amongst others, Royal Decree 944/2005 of 29 July 2005 on approving the National Technical Plan for Digital Terrestrial Television ⁽³⁾ ('NTP'); Royal Decree 945/2005 of 29 July 2005 approving the General Regulations for the delivery of the digital terrestrial television service ⁽⁴⁾; Order ITC 2476/2005, of 29 July 2005 approving the General Regulations and regulations relating to the delivery of the digital terrestrial service ⁽⁵⁾, and Royal Decree 920/2006 of 28 July 2006 approving the General Regulations for the delivery of the radio and cable television broadcasting ⁽⁶⁾.

⁽¹⁾ OJ C 337, 14.12.2010, p. 17.

⁽²⁾ Ley 10/2005, de 14 de junio, de Medidas Urgentes para el Impulso de la Televisión Digital Terrestre, de Liberalización de la Televisión por Cable y de Fomento del Pluralismo. BOE número 142, 15.6.2005; <http://www.boe.es/boe/dias/2005/06/15/pdfs/A20562-20567.pdf>.

⁽³⁾ Real Decreto 944/2005, de 29 de julio, por el que se aprueba el Plan técnico nacional de la televisión digital terrestre. BOE número 181, 30.7.2005; <http://www.boe.es/boe/dias/2005/07/30/pdfs/A27006-27014.pdf>.

⁽⁴⁾ Real Decreto 945 /2005, de 29 de julio, por el que se aprueba el Reglamento general de prestación del servicio de televisión digital terrestre, https://www.boe.es/diario_boe/txt.php?id=BOE-A-2005-13114

⁽⁵⁾ Orden ITC/2476/2005, de 29 de julio, por la que se aprueba el Reglamento técnico y de prestación del servicio de televisión digital terrestre, https://www.boe.es/diario_boe/txt.php?id=BOE-A-2005-13117

⁽⁶⁾ Real Decreto 920/2006, de 28 de julio, por el que se aprueba el Reglamento general de prestación del servicio de difusión de radio y televisión por cable, <https://www.boe.es/buscar/doc.php?id=BOE-A-2006-15301>

- (3) By letter dated 29 September 2010, the Commission informed the Kingdom of Spain that it had decided to initiate the formal investigation procedure laid down in Article 108(2) of the Treaty on the Functioning of the European Union (TFEU) in respect of the aid in question for the whole territory of Spain with the exception of Castilla-La Mancha, for which a separate investigation was opened ⁽⁷⁾. The Commission decision to initiate the procedure ('opening decision') was published on 14 December 2010 in the Official Journal of the European Union ⁽⁸⁾. The Commission invited the interested parties to submit their observations on the measure.
- (4) Following extension of the deadline, Spain replied by letter dated 30 November 2011 to the request for comments made in the opening decision. Apart from the central government, the authorities of Asturias, Aragon, the Basque country, Castilla y Leon, Castilla-La Mancha ⁽⁹⁾, Extremadura, Galicia, la Rioja, Madrid and Murcia submitted their comments and replies to questions asked in the opening decision.
- (5) The Commission also received comments from Radiodifusión Digital SL (Radiodifusión) by letter dated 11 January 2011, from Grupo Antena 3 and UTECA (Union de Televisiones Comerciales Asociadas) by letters dated 28 January 2011, from Gestora La Sexta by letter dated 31 January 2011, from Abertis Telecom SA (from 1 April 2015 called Cellnex Telecom S.A., hereinafter referred to as: 'Abertis' or 'Cellnex') by letter dated 2 February 2011, from Astra and Telecinco by letters dated 4 February 2011. By letters dated 19 January 2011 and 9 February, the Commission forwarded those observations to Spain, which was given the opportunity to react. Spain provided comments by letters dated 22 February 2011 and 14 March 2011.
- (6) In the course of the investigation, several meetings were held: between the Commission and Spain on 11 and 12 April 2011, between the Commission and Astra on 14 April 2011, between the Commission and Abertis on 5 May 2011 and between the Commission and UTECA on 5 July 2011. After several submissions of information by Spain on its own initiative, including observations from the Basque Country dated 24 February 2011, a formal request for information was addressed to Spain by letter dated 14 February 2012. Following extension of the deadline, Spain provided reply in a letter dated 16 April, which was followed up by letters dated 15, 19 and 25 June 2012. As part of the information was still missing, on 9 August 2012 the Commission addressed a request for additional information. After extension of the deadline, Spain provided replies in a letter dated 10 October 2012, followed by a letter dated 30 October 2012.
- (7) Furthermore, Abertis provided on its own initiative additional submissions on 22 June 2011 and 25 July 2012. Astra provided additional information in letters dated 21 July 2011, 16 May 2011, 8 September 2011 and 11 November 2011, all of which were sent to Spain for comments.
- (8) On 19 June 2013, the Commission adopted Decision 2014/489/EU ⁽¹⁰⁾ ('the 2013 Decision'), pursuant to Article 7 of Council Regulation (EC) No 659/1999 ⁽¹¹⁾ ('1999 Procedural Regulation'). Article 1 of the 2013 Decision stated that the State aid granted to the operators of the terrestrial television platform for the deployment, maintenance and operation of the digital terrestrial television ('DTT') network in Area II was put into effect in breach of Article 108(3) TFEU, and that it was incompatible with the internal market, except for the aid which was granted in compliance with the criterion of technological neutrality. Article 3 of the 2013 Decision ordered the recovery of that incompatible aid from the DTT operators, whether they received the aid directly or indirectly.

⁽⁷⁾ Commission Decision 2010/C 335/08 of 29 September 2010 (OJ C 335, 11.12.2010, p. 8).

⁽⁸⁾ Commission Decision 2010/C 337/07 of 29 September 2010 (OJ C 337, 14.12.2010, p. 17).

⁽⁹⁾ Apart from submitting comments in this case, Castilla-La Mancha subsequently submitted its observations on case C 24/2010.

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

⁽¹¹⁾ Council Regulation (EC) No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article 93 of the EC Treaty (OJ L 83, 27.3.1999, p. 1).

- (9) Following the adoption of the 2013 Decision, the Commission services assisted Spain in developing a model template for technologically neutral tenders. The template was finalised on 14 October 2014. The Commission services granted time to Spain until 31 October 2014 for all of the Spanish Autonomous regions and cities concerned to launch new, technologically neutral tenders based on that template. This condition has not been fulfilled, as described in Section 2.3.
- (10) Spain and some of the beneficiaries launched various actions for annulment against the 2013 Decision before the General Court. On 26 November 2015, the General Court dismissed all those actions, upholding the 2013 Decision ⁽¹²⁾. Subsequently, the judgments of the General Court were appealed before the Court of Justice. The appeals launched by Spain, the Basque Country and Itelazpi, Cataluña and the CTTI, Navarra de Servicios y Tecnologías, and Cellnex Telecom and Retevisión were dismissed by the Court of Justice ⁽¹³⁾. However, on 20 December 2017, following the appeal launched by the Autonomous Community of Galicia and Retegal, the Court of Justice set aside the respective judgment ⁽¹⁴⁾ of the General Court and annulled the 2013 Decision ⁽¹⁵⁾, due to the Commission's failure to state reasons as to the selectivity of the measure at issue.
- (11) Following the annulment of the 2013 Decision, Astra provided on its own initiative various submissions (on 22 and 30 January 2018, on 29 May 2018, on 15 June 2018, and on 11 January 2019), expressing its views on the consequences of the annulment. In the course of the investigation, several meetings were held at the initiative of the parties: on 28 June 2018 between the Commission and Cellnex, on 19 September 2018 between the Commission and Astra, on 16 October 2018 between the Commission and Spain. On 31 October 2018, Spain provided an overview of the tender procedures and other measures carried out by the Autonomous Communities following the 2013 Decision. The Commission by its letter of 14 December 2018 requested further information from Spain. Spain submitted further information on 19 February 2019. On 19 March 2019, Spain has forwarded to the Commission a submission from the Basque Country, dated 4 February 2019. On 4 April 2019, the Commission sent a request for information to Spain to which Spain replied on 10 May 2019. On 26 April 2019, the Commission sent further requests for information, inviting Spain, Itelazpi, Cellnex, Retevisión, CTTI, Navarra de Servicios y Tecnologías, SA, Retegal and Astra to express their views on the selectivity of the measures, in light of the Court of Justice judgment in case C-70/16 P. Astra submitted its reply to the request for information on 27 May 2019, while Cellnex and Itelazpi submitted their reply on 13 June 2019. Spain provided its reply to that request for information on 14 June 2019. On 1 October 2020, the Commission sent a request for information to the Spanish authorities, requesting an update on the measures implemented following the 2013 Decision. Spain provided its reply to that last request for information on 19 October 2020 and 5 February 2021.

2. DETAILED DESCRIPTION OF THE AID

2.1. Background

2.1.1. The complaint

- (12) The complainant is a satellite platform operator. Set up in 1985 as Société Européenne des Satellites (SES), SES ASTRA ('Astra') was the first private satellite operator in Europe. Astra operates the ASTRA Satellite System, which offers a comprehensive portfolio of broadcasting and broadband solutions for customers in and outside Europe. It broadcasts radio and television programmes directly to millions of homes, and provides internet access and network services to public authorities, large corporations, SMEs and individual households.

⁽¹²⁾ Judgments in cases T-465/13, *Comunidad Autónoma de Cataluña and CTTI v Commission*, ECLI:EU:T:2015:900; T-462/13, *Comunidad Autónoma del País Vasco and Itelazpi v Commission*, ECLI:EU:T:2015:902; T-461/13, *Spain v Commission*, ECLI:EU:T:2015:891; T-463/13 and T-464/13, *Comunidad Autónoma de Galicia and Retegal v Commission*, ECLI:EU:T:2015:901; T-487/13, *Navarra de Servicios y Tecnologías v Commission*, ECLI:EU:T:2015:899; T-541/13, *Abertis Telecom, and Retevisión I v Commission*, ECLI:EU:T:2015:898.

⁽¹³⁾ See judgments in cases C-81/16 P *Spain v Commission* ECLI:EU:C:2017:1003; Joined Cases C-66/16 P to C-69/16 P *Comunidad Autónoma del País Vasco and Others v Commission*; ECLI:EU:C:2017:999.

⁽¹⁴⁾ T-463/13 and T-464/13, *Comunidad Autónoma de Galicia and Retegal v Commission*, ECLI:EU:T:2015:901.

⁽¹⁵⁾ Judgment of the Court of 20 December 2017 in case C-70/16 P, *Comunidad Autónoma de Galicia, and Retegal v Commission*, ECLI:EU:C:2017:1002. See, in particular, paragraphs 57 to 63.

- (13) In its complaint, Astra argues that the measures put in place by the Government and the Autonomous Communities in remote and less urbanised areas of Spain infringe the principle of technological neutrality as they envisage terrestrial transmission as the only route towards digitisation. Astra refers in particular to the case of Cantabria. On the basis of a tender for extension of coverage of digital television for the whole territory of Cantabria launched in January 2008, the regional government of Cantabria had selected Astra to provide free-to-air channels via its platform. However, in November 2008, that contract was terminated by the regional government. According to Astra, the authorities only terminated the contract once they had been informed that the central government would finance the upgrade of the analogue terrestrial network. In fact, a letter from the Cantabrian authorities dated 7 November 2008 explained that the reason for the termination of the contract was that in the meantime the central government had taken decisions relative to the extension of coverage of digital television to the whole of Spain ⁽¹⁶⁾. Thus, the case of Cantabria would appear to demonstrate that, firstly, Astra could compete in that market and secondly, that the decisions of the central government made this competition impossible.

2.1.2. *The sector*

- (14) The case concerns the sector of broadcasting, in which many players are active at different levels of the broadcasting services products chain.
- (15) ‘Broadcasters’ are the editors of television channels which purchase or produce in-house television contents and bundle them in channels. The channels are then provided to the public through various platforms (for example satellite, DTT, cable, IPTV). In Spain, broadcasting services have been deemed to be a public service by the legislator and are therefore provided both by State-owned broadcasters (Radiotelevisión Española, RTVE) and by private broadcasters holding concessions from the State ⁽¹⁷⁾. These so-called ‘free-to-air’ (FTA) channels are provided free of charge to the viewers. In order to ensure that the population can effectively benefit from this public service, the law attaches minimum coverage obligations both for transmissions entrusted to the public broadcaster and to the private operators who hold the concessions. Consequently, public broadcasters have the obligation to cover at least 98 % of the Spanish population, while private broadcasters must cover at least 96 % of the population. In Spain, national broadcasters do not own a national broadcasting network. Therefore, they enter into agreements with platform operators to have their content transmitted and to fulfil their coverage obligations.
- (16) ‘Platform operators’ (or network operators) ⁽¹⁸⁾ are private or publicly controlled entities operating the necessary infrastructure (for example they transport and broadcast the signal) to deliver to the public the channels produced by the broadcasters. Platform operators may also set-up the necessary infrastructure and provide hardware. In the early days of the television industry, the only platform available was the analogue terrestrial platform. As the technology improved, more platforms have become available on the market, namely: the satellite platform, the cable platform and, most recently, the IPTV ⁽¹⁹⁾, which exploits the broadband connection to transmit the television signal.
- (17) ‘Hardware suppliers’ are manufacturers or installers of the necessary parts of the infrastructures and devices required to build the various platforms.
- (18) In terrestrial broadcasting, the television signal is sent from a television studio to a transmission centre (head-end), usually belonging to and operated by a network operator. Then the signal is transported and distributed from a transmission centre (head-end) to the broadcasting centres run by a network operator (for example a tower); sometimes the signal is transported via satellite. Lastly, the signal is broadcast from the broadcasting centres to

⁽¹⁶⁾ Astra challenged the termination of the contract before a court of first instance in Santander (procedure nr. 1728/2009), which on 23 December 2011 ordered the Cantabrian authorities to indemnify Astra for the unjustified termination of the contract. The Court did not find any breach of agreement on the part of Astra that would justify the termination of the agreement. According to the Court, the decision of the Spanish central government to develop the national strategy for DTT was one of the reasons for the termination of the agreement. See judgment 000313/2011 of the Court of First Instance in Santander.

⁽¹⁷⁾ The concession includes the assignment of a frequency for terrestrial broadcasting.

⁽¹⁸⁾ The terms ‘platform operators’ and ‘network operators’ are used interchangeably in the text of the Decision.

⁽¹⁹⁾ ‘Internet Protocol Television’ is a term used to refer to distribution systems of television and video signals through an electronic communications network using the Internet Protocol.

homes. To digitise the analogue terrestrial network, it is necessary to replace the transmitters on the ground. However, as the digital signal has a lower range than the analogue and therefore the new technology requires a more capillary network, maintaining the same coverage or extending it requires in some cases also the building of new transmission centres.

- (19) In satellite broadcasting, the signal is sent to a transmission centre (head-end) and then transported to satellite, which broadcasts it to homes. Alternatively, the signal could first be sent from a television studio directly to satellite, if the television studio has the appropriate devices. The viewer has to be equipped with a satellite dish and a decoder. To increase satellite coverage in a region, the ground equipment needs to be installed in the customer's home.
- (20) In terms of geographic coverage, the satellite platform could reach almost 100 % of the Spanish territory, whereas the terrestrial platform covers about 98 %.

2.1.3. *Background*

- (21) The investigated measure must be examined in the context of digitisation of broadcasting that the terrestrial, satellite and cable platforms have undergone or are currently undergoing. In comparison to analogue broadcasting, digitised broadcasting has the benefit of the increased transmission capacity as a result of more efficient use of the radiofrequency spectrum. The switch to digital technology is especially significant for terrestrial broadcasting, where the available frequency spectrum is limited. Satellite transmission, on the other hand, has the advantage of operating in a completely different frequency band where there is no scarcity of frequencies.
- (22) The switchover from analogue to digital television releases a significant amount of high quality radio spectrum in what is known as 'the digital dividend', which will be free for the deployment of electronic communication services. This digital dividend, and especially the frequency of 790-862MHz ('800 MHz band'), can boost the electronic communications industry, have a major impact on competitiveness and growth and provide a wide range of social and cultural benefits ⁽²⁰⁾.
- (23) The 'digital dividend' could be reaped either by switching from terrestrial to a different platform or by moving from analogue to digital terrestrial broadcasting. Also, a mixed solution combining different platforms could be envisaged ⁽²¹⁾.
- (24) However, in the case of terrestrial broadcasting, the scarcity of frequencies remains an issue even after digitisation. This is illustrated by the fact that shortly after the termination of the switchover from analogue to digital television in April 2010, the Spanish government had to relocate broadcasters from the 800 MHz band to another frequency band. The relocation of DTT multiplexes assigned to broadcasters led to additional costs and additional State aid which was found incompatible aid by the Commission ⁽²²⁾. Moreover, Spain supports the liberation of the 700 MHz band by terrestrial television services by compensating households and television service providers. On the one hand, the measure provides compensation to multi-households buildings owners for the costs incurred by the

⁽²⁰⁾ The Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on transforming the digital dividend into social benefits and economic growth (COM (2009) 586) recommended Member States to cease using the 800 MHz band for high-power broadcasting services and fully implement the EU technical harmonisation decision by a certain date agreed at EU level.

⁽²¹⁾ See for instance, for France, State aid N666/2009 – Amendment of aid scheme to TNT N 111/2006; for Slovakia, State aid N671/2009 - Switchover to digital television broadcasting in Slovakia. In Spain: State aid SA.28685 (2011/NN) - Reception of digital television in Cantabria. It should also be noted that in Spain in remote and less urbanised areas under investigation ('Area II') it was not always viable to provide television signal via DTT platform and therefore satellite transmission was chosen in some cases.

⁽²²⁾ See Commission Decision (EU) 2016/2395 of 5 August 2016 on State aid SA.32619 (2012/C (ex 2011/N)) notified by the Kingdom of Spain for the compensation of certain costs for the release of the digital dividend (OJ L 361, 31.12.2016, p. 1).

adaptation of the television reception devices. The overall budget amounts to EUR 150 million. On the other hand, the measure provides compensation to private television service providers for the costs incurred by the adaptation of the broadcasting transmission systems. The overall budget amounts to EUR 10 million ⁽²³⁾.

- (25) With regard to television broadcasting, terrestrial digital transmission could be replaced in the future by broadband technology, as next generation networks (NGA) are likely to become the leading transmission technology. For the time being, however, in Spain the geographical coverage of such NGA networks is not universal.
- (26) In Spain there are today four broadcasting platforms: DTT - digital terrestrial technology (DVB-T), satellite (DVB-S), cable (DVB-C) and IPTV. DTT is the main platform for the free-to-air public and private Spanish channels ⁽²⁴⁾. The main operator of the terrestrial network is Abertis, which also controls the satellite operator Hispasat. There are also a number of local telecommunications operators carrying DTT signals, which are usually interconnected with Cellnex's national network. As for the pay television channels, they are broadcast mainly via satellite, cable and IPTV. Astra and Hispasat are the main satellite operators.
- (27) To address the process of digitisation, in order to switch from analogue to digital television, during the period 2005-2009 Spain adopted a series of regulatory measures that concerned the terrestrial network, as described in the Section 2.2. The Spanish central authorities divided the territory of Spain into three distinct areas:
- Area I – including the vast majority of the Spanish population, where the costs of switchover were borne by the broadcasters – 96 % of the population for the private broadcasters, and 98 % of the population for the public broadcasters. As broadcasters bore the costs, there was no need for State aid. Switchover from analogue to digital terrestrial television entails costs for consumers, since they have to either buy an integrated digital television or they had to buy a DTT set-top box ⁽²⁵⁾.
 - Area II – less urbanised and remote areas covering 2,5 % of the population who in the past received public and private channels via analogue terrestrial television. However, as the switch to digital technology requires upgrading of the existing transmission centres and the building of new ones, significant investments in the terrestrial network were necessary. The broadcasters did not have sufficient commercial interest in providing the service in Area II and refused to bear the costs of digitisation. The Spanish authorities therefore established the State aid scheme under investigation for upgrading the existing transmission centres and building new ones, in order to ensure that the residents, who until then received private and public channels via analogue terrestrial television, would continue to receive the channels via DTT. This process was commonly referred to as 'DTT coverage extension' (i.e. extension of coverage of DTT above what was compulsory for the commercial broadcasters). Similarly to Area I, switchover to digital terrestrial television in Area II entails costs for consumers, since they have to either buy an integrated digital television or they had to buy a DTT set-top box.
 - Area III – where due to the topography it is not possible to provide television service via the terrestrial platform and it is therefore provided by satellite. The transmission of free-to-air television signals in Area III is provided by Hispasat. The fact that the television service is provided through satellite entails costs for the consumers who have to acquire satellite dishes and set-top boxes.

⁽²³⁾ The Commission has assessed these measures and adopted a non-objection decisions under Article 107(3)(c) TFEU on 12 April 2019 in SA.51079 (2018/N) – Spain Audiovisual broadcasting reception aid for multi-households buildings on 12 April 2019 (OJ C 194, 7.6.2019, p. 1); and on 2 August 2019 in SA.51080 – Spain – Audio-visual broadcasting transmission aid for audio-visual service providers (OJ C 303, 6.9.2019, p. 1).

⁽²⁴⁾ Around 26 national free-to-air channels and around 30 regional channels.

⁽²⁵⁾ The existence of such costs is recognised by the 2015 Itelazpi Study and the 2019 Itelazpi Study, submitted by Itelazpi on 13 June 2019.

2.2. Description of the aid

- (28) The scheme being investigated is based on a complex system of legal provisions put in place by the Spanish central authorities as from 2005. On the basis of these provisions, State aid for the deployment of the DTT in Area II was granted in the years 2008-2009 by the Autonomous Communities and town councils, who channelled to the recipients the funds from the central budget and from their respective budgets. Moreover, since 2009 on-going aid has been granted by the Autonomous Communities for maintenance and operation of the networks in Area II.
- (29) The regulation of the transition to digital television technology started when Law 10/2005 of 14 June 2005 was adopted ⁽²⁶⁾. It mentions the need to promote a transition from analogue to digital terrestrial technology and required that the government take the appropriate measures to ensure this transition.
- (30) Following this mandate, with Royal Decree 944/2005, the Council of Ministers approved the National Technical Plan, which fixed the date of the analogue switch-off in Spain for 3 April 2010.
- (31) The National Technical Plan established the obligation of private broadcasters to reach by that date 96 % ⁽²⁷⁾ of the population in their respective areas of coverage, while public broadcasters were required to reach, by the same date, 98 % of the population in their respective areas of coverage.
- (32) In Area I the broadcasters had the obligation to cover these percentages of population with terrestrial digital television, and they had to bear the costs of digitisation themselves. Hence, no State aid was necessary in that Area.
- (33) As regards Area II and III, the Twelfth Additional Provision of the National Technical Plan provided for the possibility that the local and regional authorities extend the coverage in the range between 96 % and 100 % of the population. In this regard, the National Technical Plan explicitly refers to digital terrestrial television (DTT) and establishes six conditions under which the local authorities could carry out such extension. Condition (e) requires the local installation to be in conformity with the National Technical Plan for digital terrestrial television.
- (34) Subsequently, on 7 September 2007, the Council of Ministers approved the National Plan for the Transition to Digital Terrestrial Television ('Transition Plan') ⁽²⁸⁾, which implements the National Technical Plan. The Transition Plan divided the Spanish territory in ninety technical transition projects ⁽²⁹⁾ and established a deadline for the switch-off of analogue broadcasting for each of these projects.
- (35) On 29 February 2008, the Ministry of Industry, Tourism and Trade ('MITyC') adopted a decision aimed at improving the telecommunications infrastructures and establishing the criteria and the distribution of the funding of the actions aimed at developing the Information Society under the Plan Avanza for 2008 ⁽³⁰⁾. The budget approved by this decision amounted to EUR 558 million and was partly allocated to development of broadband, and partly to digitisation of television in remote and less urbanised areas of Spain falling outside the statutory obligations of the commercial broadcasters ⁽³¹⁾. Digitisation in that Area was commonly referred to as 'extension of coverage'. It was subsequently implemented through a series of addenda to existing framework agreements of 2006 ⁽³²⁾ signed by

⁽²⁶⁾ See supra, footnote 3.

⁽²⁷⁾ The Royal Decree 944/2005 established an obligation of coverage of 95 % for private broadcasters. This coverage obligation was increased to 96 % in 2010 by Royal Decree 365/2010.

⁽²⁸⁾ <http://www.televisiondigital.es/Documents/PlanNacionalTransicionTDT.pdf>.

⁽²⁹⁾ Subsequently classified in Phases I, II and III.

⁽³⁰⁾ Resolución de 29 de febrero de 2008, de la Secretaría de Estado de Telecomunicaciones y para la Sociedad de la Información, por la que se publica el acuerdo de Consejo de Ministros, por el que se formalizan los criterios de distribución, y la distribución resultante para el año 2008, del crédito para la financiación de las actuaciones encaminadas al desarrollo de la Sociedad de la Información en el marco del Plan Avanza, acordados por la Conferencia Sectorial de Telecomunicaciones y Sociedad de la Información. BOE número 57, 6.3.2008; <http://www.boe.es/boe/dias/2008/03/06/pdfs/A13832-13834.pdf>.

⁽³¹⁾ The decision regarding the distribution of funds to the development of broadband and to digitisation of television in Area II was left to the regional authorities.

⁽³²⁾ The framework agreements were signed between MITyC and the Autonomous Communities in 2006 within the framework of the Plan Avanza.

MITyC and Autonomous Communities between July and November 2008 ('the Addenda to the 2006 Framework Agreements'), published in the Spanish Official Gazette separately for each Autonomous Community. The Addenda to the 2006 Framework Agreements follow the same template for all Autonomous Communities, with some small differences. The Addenda to the 2006 Framework Agreements refer to Plan Avanza, to the Transition Plan and to Royal Decree 944/2005 on National Transition Plan for Digital Terrestrial Television. The wording of these agreements in a majority of cases points to digital terrestrial technology as the only technology to be funded. As a result of the agreements, MITyC transferred funds to all Autonomous Communities, which undertook to cover the remaining costs of the operation from their budgets. These addenda also included the obligation of the local authorities to comply with the provisions of the Twelfth Additional Provision of the National Technical Plan.

- (36) In parallel, on 17 October 2008, the Council of Ministers agreed to allocate further EUR 8,72 million to extend and complete DTT coverage within the transition projects to be completed during the first half of 2009, Phase I of the Transition Plan. The funding was granted following the signing of new framework agreements between MITyC and the Autonomous Communities in December 2008 ('the 2008 Framework Agreements'). These agreements refer to the aforementioned financing of EUR 8,72 million and were entitled 'Framework Collaboration Agreement between the Ministry of Industry, Tourism and Trade and the Autonomous Community of [...] for the Development of the National Plan for the Transition to DTT'. They lay down a list of activities that will be financed by the central and regional authorities in order to achieve coverage of digital television equal to the existing analogue coverage. These activities are related to the deployment of digital terrestrial television.
- (37) On 23 February 2009, Royal Decree 1/2009 on urgent measures in the subject of telecommunication was adopted ⁽³³⁾. Royal Decree 1/2009 confirms that the extension of coverage in Area II has been envisaged exclusively via digital terrestrial technology: Article 2 of this Royal Decree adds a new provision to Law 10/2005, stating that '*Access to these channels disseminated by satellite transmission system(s) shall be limited to citizens residing in areas where, after the switch over to digital terrestrial television, there will be no coverage of the terrestrial digital television service at State level.*' Moreover, the preamble of the said Decree states that the extension of coverage in Area II, financed by the authorities, is carried out exclusively via terrestrial technology. In other words, the Royal Decree assumes that only the terrestrial technology is used in Areas I and II ⁽³⁴⁾.
- (38) On 29 May 2009, the Council of Ministers approved the criteria for the distribution of EUR 52 million for the funding of DTT transition actions, aimed at financing the extension of coverage of the projects under Phase II and III of the Transition Plan ⁽³⁵⁾. The agreement of the Council of Ministers established a direct link with the Transition Plan given that it stated that '*in order to achieve the target set in the National Plan for transition to the DTT, a similar DTT coverage to that of the current terrestrial coverage with analogue technology, the financial support of the public authorities is needed*' and then that '*the implementation of this cooperation will be formalised within the framework set by the National Plan for the Transition to the DTT*'.

⁽³³⁾ Real Decreto-ley 1/2009, de 23 de febrero, de medidas urgentes en materia de telecomunicaciones. BOE número 47, 24.2.2009; <https://www.boe.es/eli/es/rdl/2009/02/23/1>.

⁽³⁴⁾ The preamble of Royal Decree 1/2009 states the following: '*De este modo, mediante sistemas de satélite, se realiza la extensión complementaria de la cobertura poblacional de los canales de Televisión Digital Terrestre de ámbito estatal, respecto de las zonas en las que residan ciudadanos que no vayan a tener cobertura de dichos canales de televisión una vez cumplidos los compromisos de alcanzar el 96 % de la población por los operadores privados del servicio de Televisión Digital Terrestre de ámbito estatal y del 98 % de la población por la Corporación de Radio y Televisión Española, así como realizadas las extensiones de cobertura, por las Administraciones Públicas, más allá de dichos porcentajes de población. Esta obligación de extensión complementaria de cobertura a través de sistemas por satélite, que se estima que alcanzará en el entorno del 1,5 % de la población que se ubica en zonas dispersas y aisladas del territorio y cuya cobertura mediante emisores terrestres de televisión supone un coste desproporcionado*'.

⁽³⁵⁾ Resolución de 24 de junio de 2009, de la Secretaría de Estado de Telecomunicaciones y para la Sociedad de la Información, por la que se publica el Acuerdo de Consejo de Ministros de 29 de mayo de 2009, por el que se formalizan los criterios de distribución y la distribución resultante, para el año 2009, del crédito para la financiación de las actuaciones encaminadas a la transición a la televisión digital terrestre y actuaciones en el marco del Plan AVANZA, aprobados por la Conferencia Sectorial de Telecomunicaciones y Sociedad de la Información. BOE número 159, 2.7.2009; <http://www.boe.es/boe/dias/2009/07/02/pdfs/BOE-A-2009-10972.pdf>.

- (39) Lastly, between October and December 2009, addenda to the 2008 Framework Agreements (mentioned in recital (36)) were published in the Spanish Official Gazette, including the funding for the extension of coverage of Phases II and III of the Transition Plan. These addenda define what should be understood by ‘action to extend the coverage’, by making explicit reference only to the terrestrial technology (although not formally excluding other technologies) ⁽³⁶⁾.
- (40) Following the publication of the 2008 Framework agreements and above-described addenda ⁽³⁷⁾, the governments of the Autonomous Communities started implementing the extension. They either organised public tenders themselves or charged a public undertaking with the extension task and/or with the carrying out of the tender. The subsidies were partly agreed upon with MITyC and therefore funded from the central budget (see recitals (35) to (38)) above and partly funded by the Autonomous Communities themselves. In certain cases, the Autonomous Communities mandated the municipality councils to carry out the extension.
- (41) The tenders for the extension of coverage meant that the winning company was charged with the mission of providing (often building) an operative DTT network. The tasks to be carried out included the design and engineering of the network, transport of the signal, deployment of the network and supply of the necessary equipment. The tenders for extending the coverage – besides the contract for provision of an operative DTT network – usually also included the supply of necessary equipment (and in certain instances, the provision of equipment without any cost for the network operator). Moreover, the tenders for extension of coverage often included ancillary contracts related to the digitisation of transmission centres or the building of new transmission centres (such as for example housing adaptation works, supply of energy, ‘strict maintenance’, leasing contracts, safety and health studies.) The other types of tenders were tenders for the supply of hardware, organised in the case of already existing networks. The winner of the tender was expected to upgrade it with the necessary equipment, i.e. supply, install and activate the equipment.
- (42) In most tenders the organising authorities refer explicitly, through the definition of the object of the tender ⁽³⁸⁾ and implicitly, in the description of the technical specifications or the equipment to be financed ⁽³⁹⁾, to terrestrial technology and DTT. In the few cases where satellite technology is expressly mentioned, these references are to satellite dishes for the reception of the satellite signal on terrestrial towers ⁽⁴⁰⁾ or equipment to access digital television in Area III ⁽⁴¹⁾. Very few tenders could be considered technologically neutral. These technologically neutral tenders were formulated in a way that – despite the plans of the Spanish Government to use DTT exclusively for the coverage extension – did not exclude technologies other than DTT ⁽⁴²⁾. Instead of publishing invitations to tender, some of the authorities chose a different way to extend DTT coverage. For example, the Basque Country granted directly financial support to the regional network operator Itelazpi. Also, a similar solution was chosen in Navarra.

⁽³⁶⁾ See, for example, Andalucía’s Addendum: Resolución de 5 de octubre de 2009, de la Secretaría de Estado de Telecomunicaciones y para la Sociedad de la Información, por la que se publica la Adenda al Convenio marco de colaboración entre el Ministerio de Industria, Turismo y Comercio y la Comunidad Autónoma de Andalucía, para el desarrollo del Plan Nacional de Transición a la TDT. BOE número 260, 28.10.2009; <http://www.boe.es/boe/dias/2009/10/28/pdfs/BOE-A-2009-17108.pdf>.

⁽³⁷⁾ In total, over 600 agreements – framework agreements, addenda etc. – were concluded between the authorities concerning the extension of coverage.

⁽³⁸⁾ For example Extremadura, Asturias, Canarias, Cataluña, Madrid.

⁽³⁹⁾ For example Aragón.

⁽⁴⁰⁾ As in the cases of Aragón or Asturias.

⁽⁴¹⁾ Extremadura.

⁽⁴²⁾ Out of 516 tenders provided for all the regions except Castilla-La Mancha the Commission analysed a sample of 82 tenders. The sample covers all Autonomous Communities of Spain, except Mellila (for that region the Spanish Authorities did not provide any tenders, claiming that there were no relevant documents). Out of these 82 tenders, only 4 tenders were qualified by the Commission as technologically neutral: 3 tenders in Castilla y Leon and one tender in Cantabria (reference: Gobierno de Cantabria/Dirección General de transportes y comunicaciones, Contratación de Contrato menor de ‘Infraestructura de Telecomunicación Multiservicio (ITM) en Herrerías’, expediente H12453C60581).

- (43) In total, in the years 2008-2009 almost EUR 163 million from the central budget (partly soft loans granted by MITyC to Autonomous Communities ⁽⁴³⁾), and EUR 60 million from the budgets of the 16 Autonomous Communities investigated (all but Castilla-La Mancha) were invested in the extension to Area II. In addition, municipal councils funded the extension with own funds of approximately EUR 3,5 million.
- (44) As a second step after the extension of DTT to Area II, starting from the year 2009, some of the Autonomous Communities have been organising additional tenders, or concluded relevant contracts without tenders, for operation and maintenance of the equipment digitised and deployed during the extension. Unlike the aid for switchover, the latter measures constitute on-going aid. As they are for operation and maintenance of the terrestrial network as installed in Area II, these contracts are not technologically neutral either. The total amount of funds granted through tenders for operation and maintenance (on-going aid) in the years 2009-2011 was of at least EUR 32,7 million.

2.3. Developments following 2013

- (45) Following the adoption of the 2013 Decision, some Autonomous Communities introduced certain changes in the measures related to the operation and maintenance *of the infrastructure*. Namely (recitals 46 to 60):
- (46) In Andalusia, the Contracting Authority published a call for tender on 12 November 2014 for telecommunications services to enable free-to-air national digital television channels to be received in certain geographical areas of the Autonomous Community of Andalusia. The tender was awarded on 11 April 2017 to U.T.E Andalucía Televisión Digital (Retevisión and Axió Infraestructuras de Telecomunicaciones, S.A.). The contract was signed on 9 June 2017.
- (47) In Aragon, the call for tender for the provision of digital television service in remote and less urbanised areas was published on 25 November 2016. The tender was awarded on 19 May 2017 to Retevisión and it was signed on 26 June 2017.
- (48) In the Balearic Islands, a call for tender was launched on 14 July 2014. The contract was awarded to Tradia Telecom, S.A. on 5 November 2014.
- (49) In the Canary Islands, the call for tender for broadcasting transmission services for national and regional digital television channels in remote and less urbanised areas of the Autonomous Community of the Canary Islands (competitive dialogue) was published on 28 January 2015. According to the information provided by the Spanish authorities on 5 February 2021, the contract was signed in January 2020 and the service is operational as from 3 July 2020.
- (50) In Cantabria, the call for tender for the broadcasting transmission service for digital television channels in remote and less populated areas of the Autonomous Community was published on 13 May 2015. The tender was awarded on 2 December 2015 to Retevisión and the contract was signed on 14 March 2016.
- (51) In Extremadura, the call for tender for telecommunication services enabling the dissemination and reception of digital television channels in certain areas of the Autonomous Community of Extremadura was published on 3 April 2015. The tender was awarded to Retevisión on 30 December 2015 and the contract was signed on 15 March 2016.
- (52) In Navarra, a tender for the extension of digital television in remote and less urbanised areas was published on 11 November 2014. On 28 May 2019, the Navarra authorities decided not to award the contract and abandoned the procedure.
- (53) In La Rioja, the competitive dialogue procedure has been published on 13 November 2014. According to the information provided by the Spanish authorities on 5 February 2021, the procedure is ongoing.

⁽⁴³⁾ Excluding Castilla-La Mancha.

- (54) The Autonomous Community of Asturias has launched a tender for co-location of equipment ⁽⁴⁴⁾ on 28 December 2018. That tender has been awarded to Retevisión on 10 January 2019. A tender for a service contract for maintenance has been launched on 19 December 2018. Moreover, a tender for broadcasting transmission services in Asturias with the equipment owned by Asturias has been launched on 10 December 2018. According to the information provided by the Spanish authorities on 16 January 2019, the two latter tender procedures are still ongoing.
- (55) As to Galicia, the Spanish Authorities informed the Commission that Galicia does not wish to finance operations and maintenance for operators in Area II and therefore it will not organise any new technology-neutral calls for tenders. Operations and maintenance for operators in Area II of the broadcasting network would not be the Autonomous Community's responsibility, but rather it would fall on the municipal councils.
- (56) The Spanish Authorities informed the Commission that Madrid launched a tender procedure for the maintenance of the digital television equipment. The tender was awarded to Retevisión on 8 July 2019 and the contract was signed on 7 August 2019. In connection with Melilla and Murcia the Spanish Authorities informed the Commission that no tender procedure will be held and that the municipal councils will be responsible for the maintenance.
- (57) According to the information received from Spain, the Basque country has not held any tender procedures following the 2013 Decision, nor does it intend to do so. Instead, the Basque country made a Service of General Economic Interest (SGEI) declaration. The agreement regarding the service for extension of the coverage of the television channels in the Autonomous Community of the Basque Country has been approved by the Governing Council on 2 December 2014.
- (58) Regarding Ceuta, the Spanish Authorities informed the Commission that no tender procedure will be held and claimed that any payment for maintenance would come under *de minimis* rules.
- (59) In the Valencian Community, a call for tenders has been held in January 2017 for the maintenance of equipment. The tender was awarded to Retevisión in December 2017 and the contract was signed on 18 May 2018. The contract is limited to the maintenance of equipment and does not include the provision of preventive and corrective maintenance services.
- (60) In Cataluña, a call for tender was published in the Official Journal of the European Union on 3 August 2018 ⁽⁴⁵⁾ for the transmission and distribution of audio-visual signals to cover the population of Cataluña in Area II. A contract was concluded in 2019 with a duration of 1 year, renewable for an additional year.
- (61) Based on the above, in some of the Autonomous Communities, the original measures related to the operation and maintenance aid were discontinued from the date of termination of the initial contracts as a consequence of the entry into force of the contracts concerning the new modified measures or of the introduction of a new legal basis for the ongoing operation and maintenance aid (which – according to Spain's views - fall under SGEI or *de minimis*).
- (62) The legal assessment of the new, modified measures is not subject of this decision. This decision does not in any way prejudice the evaluation of the modified measures under State aid rules.

2.4. Grounds for initiating procedure

- (63) In the decision to initiate the procedure, the Commission noted, firstly, that the measure described seemed to meet all the criteria of Article 107(1) TFEU and could, therefore, be regarded as State aid.

⁽⁴⁴⁾ The provision of physical space and technical facilities necessary to reasonably accommodate and connect the relevant equipment of a beneficiary.

⁽⁴⁵⁾ <https://ted.europa.eu/TED/notice/udl?uri=TED:NOTICE:340064-2018:HTML:ES:HTML&tabId=1&tabLang=es>

- (64) As there are different levels in the broadcasting market, three categories of State aid recipients have been identified in the opening decision: (i) network operators, (ii) hardware suppliers participating in the tenders for supply of the equipment necessary for the extension and (iii) broadcasters of television channels.
- (65) The Commission reached the preliminary conclusion that by financing the costs associated to the extension of the DTT platform, the scheme might have created a potential or actual distortion of competition between hardware providers active in different technologies and between the terrestrial and the satellite platform operators. In particular, according to the Commission's preliminary views (recitals 66 to 68):
- (66) Distortion of competition could arise between different platforms (terrestrial and satellite), as the contested measure aims at the digitisation and installation *ex novo* of terrestrial emission centres, without considering the satellite technology;
- (67) The contested measure might also distort competition between broadcasters. In the past, the terrestrial platform has traditionally hosted FTA broadcasters and the satellite platform mainly pay-TV or pay-per-view broadcasters. At the time of the opening decision, however, FTA broadcasters were launching pay-TV initiatives on the terrestrial platform and satellite broadcasters sought access to FTA channels in order to complete their offer and compete more actively with the FTA broadcasters.
- (68) With regard to hardware suppliers, the contested measure appeared to entail a competitive advantage (in the form of increased demand) to the benefit of hardware providers.
- (69) The Commission, in its preliminary assessment, considered that the measure constituted State aid within the meaning of Article 107(1) TFEU and it did not see any grounds on which it could be compatible with the internal market, since no derogation seemed to be applicable.
- (70) For additional factual details, the present decision refers to the opening decision.

3. COMMENTS FROM INTERESTED PARTIES

3.1. Comments from Astra

3.1.1. General remarks

- (71) Astra reiterates its earlier position that the measures leading to the switchover to terrestrial digital television were a coordinated plan designed at the level of central government and implemented by the regional authorities. However, even assuming that the State aid for the extension of coverage was designed, organised and implemented at regional level, Astra believes that they would constitute an unlawful and incompatible aid.
- (72) Concerning the tender in Cantabria, Astra insists that contrary to what is claimed by Spain, it was the obligation of the Cantabrian authorities to receive the authorisations from broadcasters to make their channels available to satellite platform. Moreover, even though the letters were sent by the broadcasters in March 2008, the Cantabrian authorities recommended to other Autonomous Communities the satellite alternative which they had chosen in July 2008. If – as Spain claims – the broadcasters' reluctance to use the satellite platform had been the reason for terminating the contract with Astra, the Cantabrian authorities would not have recommended the satellite solution to other Autonomous Communities.

3.1.2. Presence of State aid

- (73) Concerning the advantage received by network operators and especially Abertis, Astra notes that as hardware supplier Abertis was awarded around 45 % of the tenders for the digitisation of the terrestrial sites located in the extension of coverage areas. Since Abertis is a platform operator, the digitisation of the network favours its commercial offering to broadcasters since the DTT network will now reach almost 100 % of the population at no additional cost as opposed to the 96 % to 98 % that would have been terrestrially digitised in the absence of the contested measure. Furthermore, Abertis would benefit from the fact that Astra, as the main competing alternative platform operator, would be prevented from obtaining a foothold in the Spanish market by entering into Area II.

- (74) Moreover, according to Astra, Abertis received other advantages as a result of the measures. Firstly, a significant number of Abertis' terrestrial sites have benefited from the funds provided by the Spanish Authorities in the scope of the investigated measures and are indeed operated by Abertis. This is in particular the case of sites that are located in the area where RTVE (public broadcaster) is obliged to provide its signal, but where there is no such obligation for the private broadcasters (around 2,5 % of the population). Secondly, Astra claims that Abertis benefited indirectly from the State aid in adjacent markets such as the transport market. Additionally, the complainant notes that the investigated measure leads to distortions of competition in Area III ⁽⁴⁶⁾.
- (75) Astra believes that the satellite and terrestrial platforms belong to the same market. The distinction between pay-per-view and free-to-air television would not be relevant, as far as platform competition is concerned. Already today, the terrestrial and satellite platforms compete for the transmission of pay-TV, as there are already at least two pay-per-view channels offering their signal through the DTT platform and one of them is only available on DTT. Moreover, according to Astra, all currently authorised broadcasters have already requested a license from the Government to broadcast their content in the pay modality.
- (76) In its submission of 27 May 2019, Astra expressed the view that the measures in question are selective and they do not promote the development of broadcasting activities as a whole but rather discriminate in favour of terrestrial network operators. Astra explains that for the purposes of providing the extension of coverage in remote and rural areas, network operators using other technologies – including Astra – should be regarded as being in a situation comparable to that of operators using the terrestrial technology. In particular, Astra points out that the tender procedures for extension of coverage in some cases (for example Cantabria, Navarra) were organised in respect of technological neutrality and satellite platforms have competed with terrestrial operators and won the tender. In other Member States (for example France, Portugal and the United Kingdom) alternative platforms compete with terrestrial platform. Moreover, the services of a satellite operator, Hispasat, are exclusively used in Area III in Spain. Astra states that satellite is not at a competitive cost disadvantage compared to the terrestrial technology. In Astra's view, all these elements show that the terrestrial operators and operators using different technologies are in a comparable situation, in light of the objectives pursued by the measures at stake.
- (77) Astra considers that the investigated measures were not proportional. It indicates that the switch to DTT required significant adaptations in apartment buildings and investment in cabling. Moreover, to support its argument that the extension of coverage via satellite would not have been more expensive than via terrestrial platform, Astra referred to its internal cost study submitted together with the complaint, carried out in November 2008 ('Astra Study'). The study compared the costs of extension of coverage using both technologies – terrestrial and satellite. The assumptions of the study differ from the ones carried out by Spain and Abertis in various respects, amongst others concerning the costs of satellite dishes and the need to purchase external set-top boxes for the reception of digital terrestrial television. The findings of the study lead to the conclusion that the extension of coverage via satellite was not necessarily more expensive than using the terrestrial technology. Astra also submitted additional documents aimed to show that the installation and operation costs of both technologies do not differ significantly.
- (78) Astra also claims that ensuring the conditionality of access to satellite broadcasts is not an obstacle to broadcasting free-to-air channels. Conditional access systems are present all over the world and they are not difficult to use ⁽⁴⁷⁾. Moreover, the solution proposed in Cantabria for conditional access was accepted by the Cantabrian authorities, who could decide which users to activate in order to receive the service. Therefore, the territorial limitation of the service was controlled by the Cantabrian government. There was no need for a specific adaptation to this effect.

⁽⁴⁶⁾ According to Astra, thanks to funds provided by the authorities under Area II measures, Hispasat, a satellite provider co-owned by Abertis and serving Area III, can provide its satellite capacity to broadcasters at no additional cost. Finally, Astra claims that as a result of the measure, Abertis obtained the exclusive use of the must-carry obligation in Area III.

⁽⁴⁷⁾ It is put forward that satellite platforms have a very high number of users with conditional access around the world, and the complexity of conditional access was not an obstacle for its deployment.

- (79) Concerning the appropriateness of the measure, Astra claims that thanks to economies of scale, the larger the geographical coverage, the more economically attractive satellite technology becomes. By splitting the measure in Area II into more than 600 local and regional tenders, satellite technology had already been put at a significant competitive disadvantage. However, even if the Spanish government had not been able to impose or suggest the need to take into account cross-regional synergies as a condition for the granting of the funds, the regions could have taken this possibility into account in order to ensure that they were choosing the most cost-efficient solution for their taxpayers. In fact, Astra argues that they tried to do so before the Spanish central government's intervention in favour of the terrestrial technology. Indeed, after having selected Astra in the public tender, the Cantabrian authorities initially tried to convince other regions to also select the satellite platform, as this would have reduced further their own costs.

3.1.3. *State aid for operation and maintenance*

- (80) Astra repeats that part of the contested measures amount to on-going State aid, as the Autonomous Community governments will finance the costs of operation and maintenance of the local networks in Area II on an on-going basis. Concerning the annual operation and maintenance costs for the satellite solution, Astra estimates that they would amount to EUR 100 000 per channel per year, although reductions could have been achieved had more than one region chosen the satellite solution.

3.2. **Comments from Abertis / Cellnex**

- (81) Abertis is a telecommunications infrastructure operator and network equipment supplier. It owns, amongst other companies, Retevisión S.A. and Tradia S.A. which manage and operate telecommunication networks and infrastructures.

3.2.1. *Presence of State aid*

- (82) First of all, Abertis notes that the investigated measures do not constitute State aid within the meaning of Article 107(1) TFEU. The regional authorities simply acquired goods and services on market terms by way of open tenders and they remain the owners of the equipment installed in the transmission centres in Area II. For this reason, neither any funds nor any digital equipment acquired with those funds were ever transferred to any external recipient.
- (83) Abertis considers, in addition, that the contested measures did not confer any appreciable economic advantage on the network operators. Abertis claims that it does not operate any of the local networks located in Area II (even where it owns the respective transmission centres) and that therefore it cannot obtain any direct advantage. Secondly, in Area II Abertis only acted as a hardware provider. Thirdly, even in the situation where the digital equipment used to upgrade a transmission centre was sold by Abertis, and that equipment was later installed in a transmission centre belonging to Abertis, there was no benefit. This is because Abertis simply rents those transmission centres to the local network operators on market terms and the amount of the rent paid to Abertis was not affected by the digitisation process. Fourthly, Abertis insists that the incremental increase of 1-2 % in the coverage of a DTT network does not translate into any economic benefit for Abertis as a platform operator in Area I. Finally, the digitisation of Area II does not affect the price that Abertis is able to charge to broadcasters for its transmission services, especially given that Abertis' wholesale pricing is regulated by the Comisión del Mercado de Telecomunicaciones, the Spanish regulatory authority ('CMT') ⁽⁴⁸⁾.
- (84) Concerning the local network operators in Area II (i.e., municipal councils), Abertis considers that there cannot be any economic advantage as they do not qualify as undertakings within the meaning of Article 107(1) TFEU and in any event perform a public service.

⁽⁴⁸⁾ As from October 2013, CMT functions have been assigned to the Comisión Nacional de los Mercados y la Competencia (CNMC).

- (85) Abertis also expressed the view that the investigated measure did not entail any economic advantage for the broadcasters. The digital switchover in Area II did not increase the number of television viewers when compared to the number of viewers who had access to analogue television before the process of transition to digital broadcasting started in 2005.
- (86) Moreover, Abertis considers that the contested measures did not have any appreciable effect on competition between the network operators. The fact that neither Astra nor any other private operator showed any interest in providing transmission services in Area II for the last 20 years, confirms that there was no market and that State intervention was required to facilitate the provision of services. In particular, there is no distortion of competition between satellite and DTT, as they are two separate markets. Moreover, the digitisation of the terrestrial networks in Area II did not change in any way the competitive structure of the relevant markets but simply represented a necessary technical upgrade of the existing analogue platform.
- (87) Abertis claims that the broadcasting services provided over the networks in Area II are limited to the local isolated areas and therefore do not have an effect on trade between Member States.
- (88) In the event the Commission considers that the relevant public authorities or their affiliates are undertakings within the meaning of Article 107(1) TFEU, Abertis considers that the funds to cover the digital switchover in Area II were compensation for the provision of a public service. In this respect, Abertis believes that the contested measures respect the conditions set out in the *Altmark* case-law⁽⁴⁹⁾ and that there is no State aid involved.
- (89) In its submission of 13 June 2019, Cellnex explains that the measures at stake are not selective and therefore they do not constitute State aid. In their view DTT and satellite technology are not in a comparable factual and legal situation in the light of the objective pursued by the legal regime in question. Notably, DTT and satellite are subject to different legislation and, unlike satellite, DTT has a public service character. Terrestrial technology has a pre-existing infrastructure and DTT benefitted from the synergies created by the digitisation of Area I. In addition, Cellnex points out that broadcasters often do not have the right to broadcast over satellite and they would have to renegotiate the content rights required for their programming. This would increase the cost of the content and content authors might not be willing to sell the rights. Moreover, costs related to satellite would be significantly higher than the cost related to DTT, as shown by various studies in the file. Cellnex explains that the Astra Study has several shortcomings and therefore the Commission cannot rely on this study.
- (90) Cellnex claims that the annulment of the 2013 Decision entails the annulment of the opening decision. In Cellnex's opinion, the Commission should have adopted a new opening decision following the annulment of the 2013 Decision, setting out the reasons as to why the investigated measures are selective. Cellnex contends that in the absence of such decision, it cannot exercise its right of defence.

3.2.2. Existing aid

- (91) According to Abertis the deployment of broadcasting networks in Area II began in a non-liberalised broadcasting sector in 1982. At that time, Spain held a legal monopoly in the market for terrestrial broadcasting. Public funds are used to finance the installation, maintenance and operation of the local networks in Area II put in place prior to the liberalisation of this sector. Therefore, the investigated measure is on-going, existing aid.

3.2.3. Compatibility

- (92) Abertis argues that any potential State aid would be compatible by virtue of the provisions of article 106 TFEU, as fulfils all the conditions of Commission Decision 2005/842/EC⁽⁵⁰⁾ ('the 86(2) Decision').

⁽⁴⁹⁾ C-280/00 *Altmark Trans GmbH and Regierungspräsidium Magdeburg* (ECLI:EU:C:2003:415).

⁽⁵⁰⁾ Commission Decision 2005/842/EC of 28 November 2005 on the application of Article 86(2) of the EC Treaty to State aid in the form of public service compensation granted to certain undertakings entrusted with the operation of services of general economic interest (OJ L 312, 29.11.2005, p. 67).

- (93) Should this not be the case, any potential aid would in any event be compatible with Article 107(3)(c) TFEU. Firstly, the aim of the measures adopted by the Spanish authorities is to accelerate the digital switchover process in Spain, which has been recognised in the Commission's State aid decision-making practice as an objective of common interest. Secondly, the aid was an appropriate instrument as DTT is a more suitable technology to provide the coverage extension ⁽⁵¹⁾. Apart from economic reasons, Abertis also notes that broadcasters are reluctant to use satellite platforms, which is due to the constraints faced by broadcasters when acquiring content rights for their free-to-air programmes. In most cases they only acquire the right to broadcast the contents over a specific platform, namely DTT, as this technology allows targeted transmission and geographical limitations. Moreover, the measures are proportionate since they cover only the costs strictly necessary for the switchover from analogue to digital television services in Area II. The only costs supported by the contested measures are those related to the digitisation of the transmission centres in Area II, which is carried out through the acquisition and installation of digital equipment.
- (94) Regarding the technological neutrality of the measure, Abertis notes that the terrestrial technology was not the only solution taken into consideration by the Spanish government. Moreover, in Area III the satellite platform was finally considered the most adequate technological choice to provide digital television services. More importantly, Abertis claims that DTT is deemed to be the most appropriate and least costly platform to provide digital television services in Area II in order to achieve the same coverage that existed before the analogue switch-off, as is borne out by the submitted cost studies ⁽⁵²⁾.

3.3. Comments from Itelazpi

- (95) Itelazpi S.A ('Itelazpi') is a public company of the Basque Government that provides transport services and broadcasting coverage to radio and television. In its submission of 13 June 2019, Itelazpi explains that the measures at stake are not selective and therefore they do not qualify as State aid. They explain that the DTT and satellite technology are not in a comparable factual and legal situation in the light of the objective pursued by the legal regime in question. Notably, DTT and satellite are subject to different rules (including rules on territorial coverage obligations, copyright). Unlike satellite, DTT has a public service character. DTT has a pre-existing infrastructure that is a source of synergies and justifies the option for the DTT technology. In addition, broadcasters often do not have the right to broadcast over satellite and in case they were required to use the satellite platform, they would have to renegotiate the content rights required for their programming. This would increase the cost of the contents and content authors might not be willing to sell the rights. Moreover, costs related to satellite would be significantly higher than the cost related to DTT, as shown by various studies in the file. Itelazpi submits two further cost studies, prepared by FTI Consulting in 2015 and in 2019 ⁽⁵³⁾ ('2015 Itelazpi Study' and '2019 Itelazpi Study').
- (96) Moreover, in Itelazpi's view the opening decision does not explain the framework of analysis related to the selectivity criterion. Itelazpi claims that the Commission should have adopted a new opening decision following the annulment of the 2013 Decision which new decision should set out the reasons as to why the measures at stake are selective.

⁽⁵¹⁾ Abertis refers to its own cost study conducted in January 2010 to compare the respective costs of using DTT and satellite technology to provide digital television services in Area II. According to this study, the overall cost for using DTT technology would represent about EUR 286 million over a 10-year period, whereas the total cost of using the satellite technology in the same period would amount to approximately EUR 532 million. Abertis submitted this internal study to an external accountancy company whose report confirmed its findings, while pointing out that the satellite and DTT cost estimates were conservative. In any event, both studies confirmed the appropriateness of the cost comparators and the conclusion that using satellite technology to provide digital television services in Area II would have been significantly more costly than using DTT, mainly owing to the higher economic and social costs to be borne by the consumers in the case of satellite.

⁽⁵²⁾ According to those studies, satellite technology would entail higher costs for the provision of the services at issue. Those costs would have to be supported by broadcasters and local network operators as well as by the viewers. The cost study carried out by Abertis also concluded that the use of satellite technology would require an additional period of approximately 6 months before the digital switchover could be achieved, as consumers in Area II would need time to purchase and install satellite decoders and dishes, etc. This in turn would give rise to additional costs related to simulcast broadcasting (analogue and digital platforms broadcasting simultaneously) during that period of time.

⁽⁵³⁾ When explaining the differences between the DTT and satellite technology, the study argues that the use of satellite was restricted to area III by government policy and if the Basque Government wanted to use satellite in area II, they would have needed to agree the removal of this restriction. This would have been an additional burden on the Basque Country. (see Section 2.9 on page 12 of the 2019 Itelazpi Study).

3.4. Comments from Radiodifusión

- (97) Radiodifusión is a provider in the market of audio-visual signal transmission services registered with CMT's Registry of Operators in November 2005.
- (98) Radiodifusión agrees in general with the opening decision and supports the Commission in its views, providing some additional observations. It agrees that the State aid does not meet *Altmark* requirements and entails a substantial transfer of State resources.
- (99) The investigated State aid scheme benefitted network operators already operating in rural areas. In fact, in the market in question, which is characterised by high entry barriers, benefiting an already dominant operator, the measure has led to replicate the same historical monopoly patterns. In particular, Abertis has been able to reinforce its monopoly position and to actually use public funding to develop a new and denser network which enable it to compete on new markets.
- (100) Radiodifusión claims that the investigated State aid is not proportional. To be in line with the proportionality requirement, the aid should be limited to the necessary, i.e. applying only to remote rural areas, and it should benefit all operators equally by requiring effective access obligations.

3.5. Comments from broadcasters

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

4. COMMENTS FROM SPAIN

4.1. General remarks

- (104) In its observations on the opening decision, Spain and the Autonomous Communities have put forward numerous arguments⁽⁵⁴⁾. Broadly speaking they fall into two categories. First, the Spanish authorities put forward that there is no State aid involved, because as the service is an SGEI the measure does not constitute aid, as it falls under the public service remit of public broadcasting. Moreover, it does not generate any advantage. Second, if there was any State aid, in any event it would be compatible under Article 106(2) or Article 107(3)(c) TFEU given that (a) the analogue network already existed and, from an efficiency perspective, a mere up-grade of the existing infrastructure would be less costly than switching to a new platform; (b) only the DTT technology would fulfil the necessary quality criteria and (c) the tenders were technologically neutral and other platform operators could have participated in the tendering. These arguments are summarised below.

⁽⁵⁴⁾ The arguments of the central and regional authorities are presented together as the position of Spain (or Spanish authorities), except for the Basque Country, who provided a very detailed submission on the application of public service compensation rules. Other Autonomous Communities (for example Aragon, Castilla y Leon and Navarra) also refer to the applicability of the SGEI rules.

- (105) In its submission of 14 June 2019, Spain argues that the financial support granted for the extension of coverage of digital television in remote and less urbanised areas is not selective and therefore cannot be qualified as State aid (see Section 4.2.3 below). Moreover, Spain states that the annulment of the 2013 Decision entailed the annulment of the opening decision ⁽⁵⁵⁾ and therefore the Commission should adopt a new opening decision. In Spain's view, such new opening decision should set out the Commission's view regarding the selectivity of the measures at stake.

4.2. Absence of aid

4.2.1. Service of General Economic Interest (SGEI)

- (106) Regarding the network operators, according to the Spanish authorities they provide a service of general economic interest within the meaning of the *Altmark* judgement ⁽⁵⁶⁾. However, as the Autonomous Communities are responsible for actions to extend coverage, the applicability of the *Altmark* judgment must be examined on a case-by-case basis and it is up to the Autonomous Communities to prove that the *Altmark* conditions had been fulfilled. The most detailed argumentation was submitted by the Basque Country, who carried out digitisation through a public company, Itelazpi S.A. ('Itelazpi').

4.2.2. No advantage

- (107) Concerning the hardware providers, Spain expressed the view that the fact that they won tenders for supply of equipment rules out the existence of a selective advantage.
- (108) As regards the network operators, although Abertis is the main operator in Area I and it owns 29 % of the sites in Area II which were upgraded, it does not operate the network in Area II. Abertis would therefore not benefit from the measure as a network operator.
- (109) Network operation is, instead, carried out by some regional operators, by the Autonomous Communities or by local councils, which simply rent Abertis' premises and installations. The Autonomous Communities and local councils do not compete with other network operators, and therefore they do not obtain a competitive advantage. Moreover, they do not earn any revenue, as broadcasters do not pay for the provision of transmission services in Area II.
- (110) As for the DTT broadcasters, Spain argues that the impact of the investigated measures on broadcasters is almost non-existent. The measures did not increase broadcasters' audiences compared with when programmes were transmitted on analogue, as the 2,5 % of the population targeted by the extended coverage already received analogue terrestrial television. As a result, the measures have no impact on these businesses' finances.

4.2.3. No selectivity

- (111) The Spanish Authorities argue in their submission of 14 June 2019 that the measures at stake are not selective. They explain that the rules applicable to terrestrial television and satellite are very different. At the time when the measures were taken, different technologies were regulated by different laws ⁽⁵⁷⁾. Spain explains that although currently all audio-visual services are regulated by General Law 7/2010 of 31 March 2010 on Audio-visual Communication, the legal framework for DTT technology and other technologies are very different. Notably, the requirements for obtaining a license to provide a DTT service is more stringent, comprehensive and detailed compared to other technologies. Moreover, the DTT technology – unlike other technologies – qualifies as a service of general economic interest and it has strict coverage obligations.

⁽⁵⁵⁾ In this respect Spain refers to recital 41 of the 2013 Decision 'For additional factual details please refer to the opening decision, which should be considered an integral part of this Decision.'

⁽⁵⁶⁾ Judgement of the Court of 24 July 2003 in *Altmark*.

⁽⁵⁷⁾ Notably, Spain explains that DTT was regulated by Law 10/2005 of 14 June 2006 on urgent measures for the promotion of digital terrestrial television; satellite by Law 37/1995 of 12 December 1995 on satellite communications; and cable services by Law 42/1995 of 22 December 1995 on cable communications.

- (112) Spain argues that the factual situation of terrestrial and other technologies is very different. Terrestrial and other technologies are not technically, commercially or economically comparable. When carrying out the digital switchover, Spain relied on the existing terrestrial network infrastructure. Digital migration through satellite technology would have required the full deployment of new emission and reception infrastructure. This would have made the switchover more difficult and more costly. Spain points out that earlier submitted cost studies demonstrate that DTT was the most cost-effective solution. Moreover, in more than 30 years, satellite technology has never been offered by any operator or used in Spain for the broadcast of free-to-air television, which is broadcast exclusively via DTT. In Spain's view, this also points to the fact that DTT and other technologies are in a different factual situation.
- (113) The Basque Country in its submission of 4 February 2019 argued that satellite and DTT technologies are not in comparable legal and factual situation and therefore the measure is not selective. The Basque Country pointed out that there are a number of studies submitted by Spain and by Abertis that show significant legal and factual differences between the satellite and DTT technologies. These reports indicate that using technologies other than DTT for the digitisation would have implied significantly higher costs and would have caused serious delays in the digitisation of Area II.
- (114) The Government of Cataluña, in its letter dated 14 January 2019, forwarded to the Commission by the Spanish Authorities on 19 February 2019, submitted a study from September 2017. The study has been commissioned by the Centre de Telecomunicacions i Tecnologies de la Informació ('CTTI') and has been prepared by the Federación Catalana de Empresas Integradas e Integradoras de Telecomunicaciones (FEDECOMINTE), the Catalan Association of Engineers (Telco.cat) and the Telecommunications Technical Engineering Association of Cataluña (Graus TIC) ('Cataluña Study'). The study assessed the different technologies envisaged for the provision of digital television in Area II and concluded that the most viable technologies were terrestrial and satellite and that between these two technologies the DTT technology was the least expensive for the citizens. On the basis of the study, the Government of Cataluña argues that the choice of DTT technology for delivering digital television in Area II is objectively justified and that the measure cannot be considered as discriminatory and selective from a State aid perspective.

4.3. Compatibility under Article 106(2) and Article 107(3)(c) TFEU

- (115) The Basque Country authorities submitted that the State aid granted to Iteizpi is compatible with the internal market by virtue of the provisions of article 106 TFEU. In this respect, they believe that the measure fulfils all the conditions of the Decision of 28 November 2005 on the application of Article 86(2) of the EC Treaty to State aid in the form of public service compensation granted to certain undertakings entrusted with the operation of services of general economic interest ('86(2) Decision') ⁽⁵⁸⁾.
- (116) In the event of the Commission deciding that the measures taken by the Spanish authorities with regard the deployment of digital terrestrial television in Area II constitute State aid, and that they are not compatible with the internal market in application of Article 106 TFEU, Spain claims that they would certainly be compatible with the internal market insofar as their purpose is to ensure that an objective which is of Union interest is achieved (the conversion to digital broadcasting), so they would benefit from the exemption of Art 107(3)(c) TFEU.

⁽⁵⁸⁾ Decision 2005/842/EC and Community framework for State aid in the form of public service compensation, 2005/C 297/04, (OJ C 297, 29.11.2005, p. 4) ('Framework'). The above Decision has been replaced from 31 January 2012 by Commission Decision 2012/21/EU of 20 December 2011 on the application of Article 106(2) of the Treaty on the Functioning of the European Union to State aid in the form of public service compensation granted to certain undertakings entrusted with the operation of services of general economic interest, (OJ L 7, 11.1.2012, p. 3). The above Framework has been replaced by the Communication from the Commission — European Union framework for State aid in the form of public service compensation, (OJ C 8, 11.1.2012, p. 15).

4.3.1. *Efficiency arguments*

- (117) According to Spain, at the national level, the National Technical Plan and Transition Plan are not coverage extension plans as they only refer to the switchover in Area I. As such, the plans do not restrict the technology options available for the extension of coverage. As far as the framework agreements are concerned, they do not have the same regulatory status as these two Plans and they are based on agreements between the central and regional authorities. Moreover, according to Spain, they would not exclude the use of satellite and other technologies. In any event, the extension of coverage and the choice of technology were done by the Autonomous Communities, usually through tendering procedure. Spain argues that one such tender – carried out in Castilla y León – was technologically neutral and the mere fact that such a tender was held proves that the central authorities did not impose the terrestrial technology on the Autonomous Communities.
- (118) Even if some tenders held elsewhere do refer to certain technical elements of the terrestrial technology, this is explained by the fact that terrestrial broadcasting requires certain elements that satellite broadcasting does not, and their insertion was necessary in order not to exclude terrestrial solutions from the tenders.
- (119) The Spanish authorities also refer to a study into the feasibility of providing a universal digital television service through different technologies (DTT and satellite) carried out by the MITyC in July 2007, i.e. before proposing funding to extend DTT coverage ('2007 Spain Study'). Although the authorities admit that the study was only an internal document not later taken on board, they nevertheless emphasise that it took into account the realistic costs of using either DTT or satellite transmission. The conclusions of the study were that it is not possible to establish in advance which technology is more efficient or cheaper to extend the coverage of television signal. Instead, a choice should be made on a region-by-region basis, preferably by means of studies carried out by the particular Autonomous Communities, which analyse such factors as topography, territorial distribution of population and the state of the existing infrastructure.

4.3.2. *Qualitative requirements*

- (120) Two qualitative arguments have been put forward. Firstly, to date DTT free-to-air channels have not been available via satellite broadcast in this Area. Switching to the satellite platform would therefore mean that customers have to pay for the service.
- (121) Secondly, apart from national channels, regional channels also need to be broadcast. DTT technology allows each geographical area to receive the channels for that area. On the basis of the regional and local channels, a total of 1 380 frequencies are allocated to the terrestrial television throughout Spain, without the need for any technical restrictions and without extending broadcast beyond the target area of each channel. According to Spain, this would be impossible for satellite networks as they do not provide the possibility of geographical delimitation and would therefore have to use a complex system of conditional access. This would further increase the costs of satellite broadcasting, and broadcasters would not be willing to give access to their channels without being sure that delimitation is possible.

4.3.3. *Technological neutrality*

- (122) According to Spain, the bilateral agreements between the central and regional authorities did not impose a particular digitisation technology. They merely established transfers to the Autonomous Communities in line with the costs of digitisation, calculated on the basis of what was considered to be an efficient reference technology, i.e. DTT. In this respect, it should be taken into consideration, according to Spain, that at the time of extension, terrestrial analogue television reached 98,5 % of Spanish homes.
- (123) Concerning the tender in Cantabria referred to in the opening decision, the Spanish authorities emphasise that the tender won by Astra concerned both Areas II and III, i.e. was aimed at universal provision of digital television in Cantabria. This would have a twofold impact on the assessment of the case.

- (124) Firstly, the Cantabrian project became a failure when, after the award of the contract to Astra, some of the main broadcasters informed Astra and the Cantabrian government that they would not allow their content to be broadcast via satellite. As a result, the objective of the plan was no longer readily achievable. Secondly, the main reason for termination of the contract was the decision of the central government to provide satellite coverage across all the Area III in Spain, and not the decision to provide funding from the central government to extend the coverage in Area II. Furthermore, the contract was terminated in November 2008 because at this point in time it was obvious that Astra would not be able to comply with its obligations. In particular, Astra did not undertake the necessary works on time and did not receive authorisations from free-to-air broadcasters to broadcast their channels.
- (125) In the context of this decision, the Cantabria project is relevant only to the extent the satellite platform can be considered a valid alternative to the terrestrial platform. In this regard, the above arguments are not pertinent. When opting for the satellite platform for Area III, the Spanish authorities adopted a national plan and enacted a special regulation requiring broadcasters to co-ordinate among themselves and to select one common satellite platform provider. Spain notes that according to the opening decision, a similar mechanism could also have been applied for Area II. However, according to Spain, imposing such an obligation on broadcasters in Area II would have been contrary to the principle of minimal intervention. Moreover, in Spain broadcasters are unwilling to use the satellite platform. Unlike in other Member States, in Spain there is no free-to-air satellite platform. According to Spain, the reasons given for the termination of the contract do not cast any doubt on the fact that the satellite technology may not be a valid platform for the transmission of television signals in Area II.

4.3.4. *No distortion of competition and trade*

- (126) Concerning competition between network operators, Spain expressed the view that terrestrial and satellite television are two completely different markets and that therefore the investigated measures did not distort competition on the affected markets. Spain maintains that the investigated measures have no effect on the intra-Union market as the measures are directed towards the residents of a restricted geographical area. Since they are local services, the measure is unlikely to affect trade between Member States.

4.4. **The applicability of the *de minimis* rule**

- (127) The Spanish authorities also expressed the view that the *de minimis* rule introduced by Commission Regulation (EC) No 1998/2006 on *de minimis* aid ⁽⁵⁹⁾ certainly applies to a significant proportion of the funding. The hardware was purchased independently in each Autonomous Community or local council, and therefore the *de minimis* provisions should be analysed at that level. As in these cases the amount paid is known, as are the goods and services which were acquired, the aid was sufficiently transparent for the *de minimis* thresholds to apply.

4.5. **State aid for operation and maintenance**

- (128) Concerning operation and maintenance of the transmission centres, the Spanish central authorities believe that they fall outside the work to extend coverage partially funded by the MITyC. The ministry has no jurisdiction to require councils or the Autonomous Communities to continue operation and maintenance beyond the period included in the tenders for extension of coverage. Therefore, it cannot be entirely excluded that operation and maintenance of some centres might be interrupted because of local council budget cuts. The yearly costs of operation and maintenance were provisionally assessed by the central authorities as amounting to 10 % of the initial investment. During the course of the investigation, several Autonomous Communities provided more detailed data on funds spent for operation and maintenance of the DTT network in Area II.

⁽⁵⁹⁾ Commission Regulation (EC) No 1998/2006 of 15 December 2006 on the application of Articles 87 and 88 of the Treaty to *de minimis* aid, OJ L 379, 28.12.2006, p. 5. The above Regulation has been replaced from 1 January 2014 by Commission Regulation (EU) No 1407/2013 of 18 December 2013 on the application of Articles 107 and 108 of the Treaty on the Functioning of the European Union to *de minimis* aid, (OJ L 352, 24.12.2013, p. 1).

5. ASSESSMENT OF THE PROCEDURAL ARGUMENTS RAISED BY THE PARTIES

- (129) Itelazpi, Cellnex and Spain in their observations of 13 and 14 June 2019, argued that the Commission should have adopted a new opening decision following the annulment of the 2013 Decision, which should have set out the Commission's view on the selectivity of the measures at stake. In Spain's and the interested parties' views, the lack of a new opening decision did not allow the parties to exercise their right of defence.
- (130) Spain and Cellnex also argued that the opening decision in this case has been annulled when the Court annulled the 2013 Decision. Recital 41 of the 2013 Decision stated the following: '[f]or additional factual details please refer to the opening decision, which should be considered an integral part of the Decision'. In Spain's view, this means that the annulment of the 2013 Decision entails the annulment of the opening decision. This view is erroneous for the following reasons.
- (131) First, the opening decision and the final decision are separate legal acts, with separate legal effects. The opening decision has been adopted on the basis of Article 4(4) of the 1999 Procedural Regulation. The opening decision sets out the Commission's doubts as to the investigated measures' compatibility with the internal market. The final decision (i.e. the 2013 Decision) has been adopted on the basis of Article 7(5) of the 1999 Procedural Regulation. In the 2013 Decision the Commission found that the aid was not compatible with the internal market and ordered the recovery of the aid. Since the opening decision and the final decision are two different legal acts, the correct reading of recital 41 of the 2013 Decision is that the factual details set out in the opening decision are part of the 2013 Decision. Furthermore, the annulment of the final decision is not linked to these factual details.
- (132) Second, none of the various court actions filed by Spain and the interested parties following the adoption of the 2013 Decision requested the annulment of the opening decision: they sought the annulment of the final decision. According to settled case law, the scope of the annulment pronounced by the Court may not go further than that sought by the applicant ⁽⁶⁰⁾. Since none of the actions requested the annulment of the opening decision, the Court could not have annulled the opening decision in the *Retegal* judgment ⁽⁶¹⁾.
- (133) Third, according to established case law, the annulment of a Union measure does not necessarily affect the preparatory acts ⁽⁶²⁾. The annulment of an act concluding an administrative proceeding, which comprises several stages does not necessarily entail the annulment of the entire procedure prior to the adoption of the contested act, regardless of the grounds, procedural or substantive, of the judgment pronouncing the annulment.
- (134) As to the alleged obligation of reopening of proceedings following the annulment of the 2013 Decision, the Commission notes that nothing in the legislation or in the case law suggests that the annulment of a Commission decision would necessarily involve the reopening of the formal investigation procedure by adopting a new decision (see notably case T-1/15 *SNCM v Commission*, ECLI:EU:T:2017:470, paragraph 69). As explained above, according to the case law, the annulment of a Community measure does not necessarily affect the preparatory acts. In *SNCM*, following the annulment of the final Commission decision, the Commission did not re-open proceedings but it simply invited the parties to submit observations. The Court stated that since the Commission gave the possibility to the Member State and the parties to make observations following the annulment of the decision, the procedural rights of the Member State and the interested parties were respected. Moreover, Council Regulation (EU) 2015/1589 ⁽⁶³⁾ does not specify when the Commission is obliged to re-open a procedure. Therefore, an alleged obligation to re-open proceedings by adopting a new decision cannot stem from the above Regulation either.

⁽⁶⁰⁾ See *Comunità montana della Valnerina v Commission* (C-240/03 P, ECLI:EU:C:2006:44), paragraph 43 and the case-law cited therein.

⁽⁶¹⁾ Judgment of the Court of 20 December 2017 in case C-70/16 P, *Comunidad Autónoma de Galicia, Redes de Telecomunicación Galegas Retegal SA (Retegal) v Commission* (ECLI:EU:C:2017:1002).

⁽⁶²⁾ See Case T-301/01 *Alitalia v Commission*, EU:T:2008:262, paragraph 100; Case C-415/96 *Spain v Commission* ECLI:EU:C:1998:533, paragraph 32; see also, to that effect, Case C-331/88 *Fedesa and Others*, ECLI:EU:C:1990:391, paragraph 34.

⁽⁶³⁾ Council Regulation (EU) 2015/1589 of 13 July 2015 laying down detailed rules for the application of Article 108 of the Treaty on the Functioning of the European Union, (OJ L 248, 24.9.2015, p. 9).

- (135) Spain, Itelazpi and Cellnex claim that the Commission should have adopted a new opening decision, setting out a detailed selectivity analysis so that the parties could express their views on the selectivity of the measure. The Commission notes that the Spanish authorities has already stated their views on the lack of selectivity in the preliminary investigative phase (as stated in recital 22 of the opening decision ⁽⁶⁴⁾). The opening decision set out the Commission's preliminary view as to the existence of State aid (including the selectivity) and as to the compatibility of the aid. The opening decision stated that the contested measures distort competition by favouring DTT technology and it also argued that DTT and satellite compete (for example it referred to the case of Cantabria where initially satellite operator won a tender). The opening decision explained why some platforms were favoured compared to others. It enabled Spain and interested parties to develop their views on the selectivity of the measures. In its comments of 30 November 2010 on the opening decision, Spain explained that the network operators using DTT technology did not receive a selective advantage compared to other network operators. Spain also argued that the measures at stake did not discriminate against technologies other than DTT, explaining the differences between DTT and satellite, in terms of cost and market conditions. Spain emphasised that satellite and DTT do not belong to the same market. This shows that Spain had the opportunity to express its views on the issue of selectivity already following of the opening decision.
- (136) In addition, neither the measure under investigation, the facts of the case nor its legal assessment have changed.
- (137) Moreover, on 26 April 2019, the Commission sent a request for information to Spain, Itelazpi, Cellnex, Retevisión, CTI, Navarra de Servicios y Tecnologías, SA, Retegal and Astra, whereby it invited the parties to comment on the *Retegal* judgment and on the selectivity of the measures at stake ⁽⁶⁵⁾. Cellnex, Itelazpi, Spain and Astra provided detailed comments in their replies to the Commission's request for information, providing their view on the selectivity criterion. The parties submitted detailed observations and the Commission has analysed all new, relevant and contemporaneous elements brought by Spain and the third parties concerned. On the basis of the above, Spain and the other interested parties had ample opportunities to make their views heard on the issue of selectivity, therefore the parties' procedural rights were fully respected.

6. ASSESSMENT OF THE AID

6.1. Legal basis of the aid

- (138) As described in detail above in Section 2.2, recitals (28) to (39), the legal framework for the digital switchover in Spain is a complex net of various acts issued both by the central government and the regional and local authorities over a period of 4 years. The 2005 National Technical Plan and the 2007 Transition Plan mainly regulate the transition to the DTT in Area I but they also set the basis for further extension measures in Area II. These extension measures were implemented by the regional authorities, after conclusion of several framework agreements with the central government (the 2008 Framework Agreements) and addenda in 2008 to the previous 2006 Framework Agreements and in 2009 to the 2008 Framework Agreements.
- (139) As a result of the conclusion of these agreements and addenda, the regional and local authorities carried out a wide array of measures aiming at extending the coverage of DTT in Area II, primarily through public tenders, as described above at recitals (40) to (43). The Commission therefore considers that the various acts adopted at central level and the agreements concluded and amended between the MITyC and the Autonomous Communities constitute the basis of the aid scheme for the extension of coverage in Area II and include its essential features, that is, the incentive for switch to digital television in Area II and limitation of this incentive to terrestrial technology. These acts and

⁽⁶⁴⁾ In the preliminary investigation, Spain explained *inter alia* that there was no discrimination between DTT and satellite. Spain also explained that DTT and satellite operated at different markets.

⁽⁶⁵⁾ In addition, the Commission invited Spain to transmit the request for information to all undertakings which might be concerned by a potential negative Commission decision ordering recovery of unlawful incompatible aid in this case.

agreements had the objective to lead the Autonomous Communities to adopt measures which were not technologically neutral ⁽⁶⁶⁾. While the National Technical Plan regulates the switchover to DTT in Area I, it also gives a mandate to local authorities to establish, in cooperation with the Autonomous Communities, additional transmission centres necessary to ensure reception of the DTT in Area II. Thus, at that point in time the central government already envisaged the extension of DTT coverage. The mandate contained in the main legal act regulating the switchover to digital television refers only to the terrestrial platform. Moreover, Royal Decree 1/2009 shows that the use of satellite technology has been envisaged only for Area III. In practice, the Autonomous Communities have therefore executed the central government's guidelines on the extension of DTT ⁽⁶⁷⁾. The Autonomous Communities implemented the central government's plan on the basis of their respective Framework Agreements, which Agreements followed the same template.

- (140) Thus it emerges from the mentioned acts adopted at central level, agreements and addenda that they are the basis for a scheme aimed at extending the coverage of DTT in Area II by using exclusively terrestrial broadcasting. Furthermore, in such circumstances, central or local authorities had no margin in the technical implementation of the scheme to comply with the principle of technological neutrality. The measures taken by national, regional or local authorities followed the same objective and in view of their close links should be analysed together as part of a same scheme. This was further corroborated by the General Court that confirmed, in case T-541/13, regarding the action for annulment of the 2013 Decision the following. This conclusion remains valid also for the measures examined in the present Decision (that are the same measures as those examined in the 2013 Decision):

'52 Il résulte de différents actes législatifs et administratifs des autorités espagnoles que le plan de transition vers la télévision numérique dans l'ensemble du territoire du Royaume d'Espagne par un recours prédominant à la technologie terrestre obéissait à une initiative lancée et coordonnée par l'administration centrale. Il est constant, ainsi qu'il ressort du considérant 24 de la décision attaquée, que la loi 10/2005, qui marquait le début de la réglementation du passage à la TNT, a précisé la nécessité d'encourager la transition de la technologie analogique vers la TNT. Ainsi qu'il ressort du considérant 26 de ladite décision, les autorités espagnoles prévoyaient, dans une disposition additionnelle du programme technique national en faveur de la TNT, la possibilité d'une extension de couverture au moyen de la technologie terrestre dans les zones à faible densité de population à la condition que l'installation locale soit conforme à ce programme. Les considérants 28 à 32 de cette décision, dont le contenu n'est pas contesté par les requérantes, décrivent la collaboration entre le MITC et les communautés autonomes au moyen de conventions-cadres et d'addenda à des conventions-cadres afin de procéder à la numérisation dans ladite zone. Ces actes avaient notamment trait au cofinancement par le gouvernement espagnol de l'extension de la couverture de la TNT dans cette zone.

- 53 Au vu des éléments qui précèdent, il ne saurait être reproché à la Commission d'avoir analysé les mesures espagnoles en faveur du déploiement de la TNT dans la zone II dans un seul et même contexte. En effet, les différentes interventions étatiques aux niveaux national, régional et communal devant être analysées en fonction de leurs effets, elles présentaient, en l'espèce, des liens tellement étroits entre elles qu'elles pouvaient être considérées par la Commission comme un seul régime d'aides accordé par les autorités publiques en Espagne. Tel est le cas notamment parce que les interventions consécutives en

⁽⁶⁶⁾ Such guidance can be found in the relevant documents of the Central government. In particular, the framework agreements signed in December 2008, entitled *Framework Collaboration Agreement between the Ministry of Industry, Tourism and Trade and the Autonomous Community of [...] for the Development of the National Transition Plan to DTT*, provide for a list of activities that will be financed by the central and regional authorities in order to reach the digital television coverage equal to the existing analogue coverage. On the one hand they refer to existing transmission centres upgraded by broadcasters (DTT centres deployed in Area I) and, on the other hand, to 'coverage extensions' – additional centres that will need to be deployed in order to ensure the same penetration of digital television. Given that only the DTT technology requires existence of transmission centres, it seems clear that the actions planned concern only the DTT technology. Further, the addenda to the 2008 Framework Agreements signed between October and December 2009 refer to funding for the coverage extension. They define what should be understood by 'action to extend the coverage', by making explicit reference only to terrestrial technology.

⁽⁶⁷⁾ In meetings with the Autonomous Communities, MITyC expressed its objective to ensure the transition to DTT also in Area II. This is confirmed by a presentation, publicly available on Internet, and signed by MITyC. <http://www.fenitel.es/asamblea08/PONENCIAS/4SETSI.pdf>. It is also confirmed by statements from Autonomous Communities in reply to the Commission's request for information. In their replies, the Autonomous Communities explicitly refer to the National Transition Plan adopted by Royal Decree 944/2005 and to the Plan Avanza. See, for example, the reply from Extremadura: 'In accordance with ... Royal Decree 944/2005 ... approving the National Technical Plan for terrestrial digital television setting out the local initiative concerning extension of DTT coverage....'.

Espagne présentaient, au regard notamment de leur chronologie, de leur finalité et de la situation dans ladite zone, des liens tellement étroits entre elles qu'il ne saurait être reproché à la Commission de ne pas les avoir dissociées (voir, en ce sens, arrêt du 19 mars 2013, Bouygues et Bouygues Télécom/Commission, C-399/10 P et C-401/10 P, Rec, EU:C:2013:175, points 103 et 104).'

- (141) To further corroborate this finding, the Commission has also investigated a significant sample of the individual tenders carried out by the Autonomous Communities themselves. The sample of tenders covers the entire territory of Spain, except Melilla (for that region the Spanish Authorities did not provide any tenders, claiming that there were no relevant documents). The sample includes both tenders for extension of coverage and tenders for supply of equipment. Moreover, the sample includes tenders with different budget sizes: tenders with relatively small budgets and tenders with larger budgets (budgets over EUR 10 million). The choice and coverage of the sample, as described, ensure its representativeness. These tenders are the result of the implementation of the national programme described in the above recitals, which was pre-defined on the basis of laws and agreements with the Autonomous Communities. The verification of the sample confirms the above conclusion, as the vast majority of the examined tenders have not been technologically neutral. On the basis of that representative sample, the Commission confirmed that the tenders carried out in certain Autonomous Communities generally obeyed the logic of being exclusively targeted at terrestrial technology only.
- (142) Even when qualifying as technologically neutral individual tenders which were not formally discriminatory, the Commission could identify only very few of them. The specifications of these tenders were formulated in such a way that – despite the plans of the central Spanish authorities – operators using technologies other than terrestrial could participate. In any event, the mere fact that a minority of tenders would be technologically neutral only point to an incomplete enforcement of the scheme, but does not disqualify it as a scheme.
- (143) The General Court also clarified, with regard to the 2013 Decision, that: *'the Commission did not employ extrapolation when it considered that the irregularities found for the sample were reproduced throughout Spain. The Commission merely studied the characteristics of the aid scheme at issue and correctly did not conclude that, because the calls for tenders which it analysed did not respect the principle of technological neutrality, that principle was not respected in all the calls for tenders concerned by the operation of the DTT network, which is reflected, in particular, in the operative part of the contested decision.'*⁽⁶⁸⁾ This conclusion remains valid also for the measures examined in the present Decision (that are the same measures as those examined in the 2013 Decision).
- (144) The moment when the State aid for the deployment of the DTT in Area II was effectively disbursed was marked by the transfer of funds from the central and regional authorities to the beneficiaries. This happened over a period of time which varied from one Autonomous Community to another. From the information received, the earliest identified tenders took place in July 2008⁽⁶⁹⁾. The Annex provides a calculation of public expenditure by region.
- (145) As for the on-going aid for operation and maintenance of the networks, this aid is accessory of the scheme aimed at extending the coverage of DTT in Area II by using exclusively terrestrial broadcasting, and is the logical consequence of it, although the implementation of this on-going aid was left by the central government in the hands of the Autonomous Communities. Some of the Autonomous Communities (see 'Recurrent costs' in Annex to the Decision) launched tenders for the operation and maintenance of the existing terrestrial digital networks, which were published in their respective official journals⁽⁷⁰⁾.

⁽⁶⁸⁾ See judgment in T-461/13, para. 107.

⁽⁶⁹⁾ Tender for supply of equipment of 30 July 2008 published by the Autonomous Community of La Rioja and tender for extension SE/CTTI/06/08 of 27 July 2008 published by the Autonomous Community of Cataluña.

⁽⁷⁰⁾ See, for example, resolution of the Authorities of Castilla y León: Resolución de 24 de septiembre de 2012, de la Dirección General de Telecomunicaciones, por la que se anuncia la licitación del servicio: Contrato de servicios para la conservación y renovación tecnológica de las infraestructuras de televisión digital de la Junta de Castilla y León. Expte.: Serv 05-4/12; BOCYL 10 de octubre 2012.

(146) As explained above in recital (62), the legal assessment of the new, modified measures is not subject of this decision.

6.2. State aid assessment pursuant to Article 107(1) TFEU

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

(147) The measure in question, including the on-going aid for operation and maintenance as described in recital (44), can be characterised as State aid within the meaning of Article 107(1) TFEU, which lays down the conditions for the presence of State aid. Firstly, there must be an intervention by the State or through State resources. Secondly, it must confer a selective economic advantage on the recipient. Thirdly, it must distort or threaten to distort competition. Fourthly, the intervention must be liable to affect trade between Member States.

6.2.1.1. State resources

(148) The measure in question originates from the system of the legal acts described above, adopted at both central and regional and local level, as well as from agreements concluded between different levels of the Spanish administration. Moreover, Spain did not contest the finding of the opening decision that the measure was financed from the budgetary resources. It insisted, however, that it was financed both from the central and from the regional and municipal budgets. It also expressed the view that the measure in question was actually a mere transfer of funds between different administrations. As such, the fact that the funds originate mainly from the central budget and partly from the regional and local budgets was not disputed by Spain. Furthermore, the measure was not a mere transfer of funds between administrations, as ultimately the funds were used for the deployment of the DTT network by entities carrying out an economic activity (as explained in Section 6.2.1.2).

(149) In these circumstances, it is concluded that the investigated measure was funded directly from the State budget and from the budgets of particular autonomous communities and local corporations. Aid for operation and maintenance, as described in recital (44), was not funded from the central State budget, but directly from the budget of the Autonomous Communities. It is therefore imputable to the State and involves the use of State resources.

6.2.1.2. Economic advantage to entities carrying out an economic activity

(150) The measure in question entails a transfer of State resources to certain undertakings. Although the concept of an undertaking is not defined by the Treaty, it refers to any natural or legal person, regardless of its legal status and its financing, who carries out an economic activity. In Commission practice, as confirmed by the Courts, operation of television transmission networks is considered to be an economic activity ⁽⁷¹⁾, similarly to other cases involving management of infrastructure by the regional authorities ⁽⁷²⁾. In the case at hand, platform operators and most of the public undertakings or town councils are registered in the register of the CMT as network operators. This suggests that they provide certain services, which according to settled case practice constitutes an economic activity. A market exists if other operators would be willing or able to provide the service in question, which is the case. For instance, Astra held several meetings with the Autonomous Communities before the implementation of the extension of the coverage in Area II to present them its offer. In addition, in March 2008 Astra participated in and won a technologically neutral tender for providing digital television in Area II and Area III published in Cantabria. The fact that the public undertakings and town councils do not receive remuneration for the provided services does not preclude the activities in question from being considered to be an economic activity ⁽⁷³⁾.

⁽⁷¹⁾ Commission decisions N622/2003 Digitalisierungsfonds Austria; C 25/2004 DVB-T Berlin Brandenburg (recital 62), (OJ L/200/2006); C 34/2006 DVB-T North-Rhine Westphalia (recital 83), (OJ L 236, 3.9.2008, p. 10); C 52/2005 Mediaset (recital 96), (OJ L/147/2007).

⁽⁷²⁾ Case T-196/04 Ryanair Ltd. v European Commission, ECLI:EU:T:2008:585, paragraph 88; Case C-82/01P Aéroports de Paris v Commission, ECLI:EU:C:2002:617, paragraphs 107-109 and 121-125.

⁽⁷³⁾ See Joined Cases T-443/08 and T-455/08, *Freistaat Sachsen and Land Sachsen-Anhalt (T-443/08) and Mitteldeutsche Flughafen AG and Flughafen Leipzig-Halle GmbH (T-455/08) v European Commission*, ECLI:EU:T:2011:117, paragraph 115, where the Court states: 'The fact that an activity is not engaged in by private operators or that it is unprofitable are irrelevant criteria in regard to the classification of that activity as an economic activity (...).'

- (151) The Commission does not agree with Spain's argument that operation of the terrestrial network by the Autonomous Communities, public undertakings and town councils falls within the exercise of official powers as a public authority and is therefore outside the scope of Article 107 TFEU. It has been recognised that the activities linked to the exercise of State prerogatives by the State itself or by authorities functioning within the limits of their public authority do not constitute economic activities for the purposes of competition rules ⁽⁷⁴⁾. Such activities are those that form part of the essential functions of the State or are connected with those functions by their nature, their aim and the rules to which they are subject. The Courts' case law has provided several examples of activities that fall within this category, thus establishing a dividing line between pure State activities and the commercial activities a State entity may engage in. This list includes activities related to the army or the police, the maintenance and improvement of air navigation safety, air traffic control ⁽⁷⁵⁾; the anti-pollution surveillance which is a task in the public interest that forms part of the essential functions of the State as regards the protection of the environment in maritime areas ⁽⁷⁶⁾ and standardisation activities as well as related research and development activities ⁽⁷⁷⁾.
- (152) In this light, the Commission is of the opinion that in the present case the operation of the terrestrial broadcasting network does not fall within the State's obligations or prerogatives nor is it a typical activity that could only be performed by the State. The services under consideration are not typically those of a public authority and are in themselves economic in nature, which is evidenced by the fact that several undertakings are active on the market in the Area I. Second, a private undertaking, not dependent on any public authorities – namely Astra (as evidenced by its presence as a bidder in the 2008 tender in Cantabria) – was interested in providing this service in Area II. Third, the deployment of the network in Area II only concerns the transmission of national and regional private channels ⁽⁷⁸⁾. The economic character of the deployment of a digital terrestrial network in Area II has been confirmed by several Court judgments; see for instance case T-808/14 Spain v Commission ⁽⁷⁹⁾; case T-37/15 and T-38/15, Abertis and Telecom Castilla-la Mancha v. Commission ⁽⁸⁰⁾; case T-487/13 Navarra de Servicios y Tecnologías, SA v European Commission ⁽⁸¹⁾. As a result, it is concluded that the operation of the terrestrial network by the Autonomous Communities, public undertakings and town councils does not fall within the exercise of official powers as a public authority.

Direct beneficiaries of the aid

- (153) The operators of the DTT platform are the direct beneficiaries of the contested measures, as they received the funds for the upgrading and extension of their network in Area II and for the supply of hardware in connection with their network. Similarly, they benefit from the on-going aid for the operation and maintenance of these networks. The Autonomous Communities chose different approaches to implement the coverage extension and therefore different types of direct beneficiaries have been identified.

⁽⁷⁴⁾ Communication from the Commission on the application of the European Union State aid rules to compensation granted for the provision of services of general economic interest, (OJ C 8, 11.1.2012).

⁽⁷⁵⁾ Case C-364/92, SAT/Eurocontrol, paragraphs 19 to 30, ECLI:EU:C:1994:7 ; C-113/07 P, *Selex*, ECLI:EU:C:2009:191.

⁽⁷⁶⁾ Case C-343/95, *Cali & Figli*, ECLI:EU:C:1997:160, paragraph 22.

⁽⁷⁷⁾ Case T-155/04 *Selex*, ECLI:EU:T:2006:387, paragraphs 73-82, confirmed by C-113/07, *Selex* ECLI:EU:C:2009:191.

⁽⁷⁸⁾ As set out in Section 2.1.3. public broadcasters have a 98 % coverage obligation and therefore had to cover Area II by their own means. Moreover, the national public television channels of RTVE and regional public channels are broadcast via a different network. While private broadcasters use the Single Frequency Network (SFN) signal, public broadcasters use the Red Global Española (RGE) network. As a result of these differences, the terrestrial facilities require different equipment for each of the two networks.

⁽⁷⁹⁾ Judgment in T-808/14, par. 60-67. This judgment was confirmed by the Court in C-114/14 P *Spain v. Commission*, ECLI:EU:C:2018:753.

⁽⁸⁰⁾ Judgment in T-37/15 and T-38/15 *Abertis Telecom Terrestre, SA and Telecom Castilla-La Mancha, SA v European Commission*, ECLI:EU:T:2016:743, par. 82-90. The judgment was confirmed by the Court in Joined cases C-91/17 P and C-92/17 P *Cellnex Telecom SA and Telecom Castilla-La Mancha*, ECLI:EU:C:2018:284.

⁽⁸¹⁾ Judgment in case T-487/13, par. 53-56. This judgment was confirmed by the judgment in joined cases C-66/16 P to C-69/16 P.

- (154) Firstly, some of the Autonomous Communities ⁽⁸²⁾ charged a public undertaking, which sometimes operates as a telecommunications company, with the task of extending coverage. These undertakings either organised tenders for extension of coverage and left this task to the winner of the tender, or they carried out the extension themselves, after acquiring the necessary hardware.
- (155) These public undertakings are now in a position to operate the DTT network in Area II due to the public subsidy. They can also use the new infrastructure to provide other services, for example, WiMax (wireless broadband standards which can provide fix or mobile broadband), digital radio, mobile television (DVB-H), or co-location services to Telefonica's basic broadband network in rural areas and to mobile operators. Due to these economies of scope, the DTT network operators have opportunities to raise income from the publicly financed infrastructure.
- (156) The quantifiable advantage to the public undertakings is the amount of the funds received for the extension of coverage.
- (157) Secondly, some of the Autonomous Communities ⁽⁸³⁾ launched themselves tenders at the regional level for the extension of the DTT. Spain claims that the vast majority of tenders were for provision of hardware and equipment and the companies who won such tenders acted as hardware suppliers. This would also be the case of tenders won by Abertis, and its affiliated companies, Tradia and Retevisión. The findings of the investigation point however to the conclusion that a significant number of tenders were for the extension of coverage, and not only for the supply of equipment ⁽⁸⁴⁾. Therefore, contrary to what is claimed by Spain, the Commission considers that Abertis and other companies participated in such tenders in their quality of network operators ⁽⁸⁵⁾. In this case, the winners of such tenders did receive a competitive advantage over other network operators who were not even able to participate in the selection process. Their advantage is the sum of the funds received for extension as a result of a technologically non-neutral tender.
- (158) Thirdly, some of the Autonomous Communities ⁽⁸⁶⁾ granted funds to the town councils for the extension of the DTT coverage. Spain argues that these were merely transfers of funds between different levels of administration and that, by extending networks owned by the town councils, the councils simply carried out their administrative obligations towards the inhabitants. However, Spain recognises that local corporations acted as network operators, that many of them are registered on the CMT's list of network operators and that they effectively carried out the extension of the network, in some cases via tendering procedure. The Commission therefore considers that, where the local corporations act as local DTT network operator, they are direct beneficiaries of the aid. Their advantage is the amount received from the regional and central authorities for the extension of coverage. This also applies if the extension is partially financed by own resources of a local corporation which constitutes aid to the undertaking or to the activity.

⁽⁸²⁾ For example, Aragón telecom, Gestión de Infraestructuras Públicas de Telecomunicaciones del Principado de Asturias, S.A., Multimedia de les Illes Balears S.A., Instituto Tecnológico de Canarias, Sociedad Regional de Cantabria I+D+I (IDICAN), RETEGAL and Itelazpi are public companies that were charged with the task of extension and for that reason they organised tenders for the supply of equipment necessary to digitise broadcasting centres. Fundación Centro Tecnológico en Logística Integral de Cantabria, Centre de Telecomunicacions i Tecnologies de la Informació in Catalunya and Agencia de Informática y Comunicaciones de la Comunidad de Madrid were in charge of organising tenders for extension of DTT coverage, the extension was therefore executed by the successful bidders. OPNATEL in Navarra was in charge of carrying out extension and it acquired the necessary equipment without tenders.

⁽⁸³⁾ For example, Andalucía, Castilla y León, Extremadura, Murcia, La Rioja and the Valencian Community.

⁽⁸⁴⁾ As explained above in recital (41), in the case of tenders for the extension of coverage, the winning company was charged with the mission of providing, and in many cases building, an operative DTT network. To this end, necessary tasks included design and engineering of the network, transport of the signal, deployment of the network and supply of the necessary equipment. On the other hand, tenders for the supply of hardware were organised in the case of already existing networks. The winner of such tenders was expected to upgrade it with the necessary equipment, i.e. supply, install and activate the equipment.

⁽⁸⁵⁾ For example, Abertis and Retevisión won non-neutral tenders for the extension of coverage in Extremadura and Castilla y Leon for the total sum of EUR 5,6 million.

⁽⁸⁶⁾ Andalucía, Canarias, Extremadura, Murcia.

- (159) Overall, Abertis and Retevisión were the main beneficiaries of the tenders. In total, from the information received, it appears that they received approximately half of the total amount of the funds aimed at extension of coverage.
- (160) In addition, some of the Autonomous Communities have granted State aid for the operation and maintenance of the networks. These tasks are performed either by the public undertakings, by the town councils or are tendered out, for example to the owners of the transmission centres. Spanish central authorities submitted that they did not impose the obligation to operate and maintain the digitised sites and that it was up to the Autonomous Communities to decide on this matter. During the course of the investigation various Autonomous Communities submitted figures indicating that they indeed financed the operation and maintenance of the transmission centres in Area II, especially starting from 2009, after the expiry of the initial 2-year period of operation and maintenance included in the contracts with the successful tenderers. The undertakings charged with the operation and maintenance of the digitised terrestrial network in Area II are the direct beneficiaries of this aid.
- (161) Finally, in more general terms, Abertis also benefits from the exclusion of another platform operator from entering the market of transmitting free to air television signals in Spain ⁽⁸⁷⁾.

Indirect beneficiaries of the aid

- (162) *Network operators.* Network operators who participated and won the tenders for extension of coverage organised by the public undertakings under the first-case scenario described in recital (154) are indirect beneficiaries of the aid. The public undertakings did not carry out the extension themselves and did not keep the funds aimed at extension of coverage; rather, they channelled them to the network operators by means of tenders for extension. These tenders for extension were targeted only at terrestrial network operators. The latter therefore benefitted from the exclusion of satellite operators. Furthermore, due to the small number of operators in the market, the terrestrial network operators faced only a limited competitive constraint. As pointed out for direct beneficiaries above, network operators also benefit if they use the new infrastructure also for the provision of other services (as WiMax, digital radio, mobile television, etc.). The advantage received by these network operators amounts to the sum of funds received following a tender for extension ⁽⁸⁸⁾.
- (163) *Hardware suppliers.* Unlike network operators, hardware suppliers are not considered to be indirect beneficiaries as they did not receive a selective advantage. As in the case of digital decoders in Italy ⁽⁸⁹⁾, it has not been possible to draw a distinction between different categories of producers of various types of digital infrastructure because producers should be able to produce any type of equipment. The companies winning the tenders are not different from the group of undertakings who would have participated in tenders if the scheme had been technologically neutral with regard to platform operators ⁽⁹⁰⁾. In Spain the companies, which integrate, install and supply the hardware necessary for DTT extension usually also offer other services. Such equipment manufacturers, as well as telecommunications operators, may also offer terrestrial or satellite solutions or a combination of the two ⁽⁹¹⁾.

⁽⁸⁷⁾ As set out in recital (21), Abertis dominates the market for the transmission of free to air television signals on the terrestrial platform in Area I and via its subsidiary Hispasat in Area III. By extending the reach of digital terrestrial television to Area II, the provision of nation-wide free to air television signals remains under Abertis' control. The entry of Astra in Area II could also generate more platform competition also in Area I and III in the future. By way of analogy, there are numerous studies demonstrating the benefits in terms of lowering prices and increasing quality of service when satellite entered the television market in the US. Prior to satellite entry, cable firms had enjoyed monopoly power in local geographic areas. Compare, for example, Chenghuan Sean Chu, *The effect of satellite entry on cable television prices and product quality*, RAND Journal of Economics Vol. 41, No. 4, Winter 2010 pp. 730-764.

⁽⁸⁸⁾ This was the case of Retevisión, entirely owned by Abertis, who won non-neutral tenders for extension organised in Madrid and Cataluña for the total sum of EUR 14,8 million.

⁽⁸⁹⁾ C52/05 - Digital decoders Italy, (OJ C 118, 19.5.2006, p.10 and OJ L 147, 8.6.2007, p.1).

⁽⁹⁰⁾ To give some examples of companies which have won tenders for the supply of hardware, Tredess is a manufacturer of digital transmission equipment belonging to the Televes Group which also manufactures digital satellite television receivers, antennas, dishes (Compare: <http://www.tredess.com> and <http://www.televes.es>) Similar: Mier (<http://www.mier.es>), Elecnor (<http://www.elecnor.es/es.negocios.infraestructuras/telecomunicaciones>) Itelsis, BTESA, Axion, Retegal, Itelazpi, Telecom CLM.

⁽⁹¹⁾ The tenders in Area II regarding the extension of coverage often ask for 'turn-key' solutions which require integrating, installing and supplying several components of equipment (dish, antenna, transmitter, satellite receiver). In most cases the solution provided included satellite receiver equipment in order to receive the digital signal already distributed through satellite by the broadcasters.

- (164) The measure in question does not seek, through its object or general structure, to create an advantage for manufacturers. Indeed, any public policy in favour of digitisation (even the most technologically neutral) would favour producers of digital equipment. In the case of equipment manufacturers, the fact that they benefitted from an increase in sales due to the measure can therefore be considered to be a mechanical economic side effect. As a matter of principle, any State aid has a trickle-down effect on suppliers to the State aid recipient. This, however, does not necessarily create a selective advantage for such suppliers. Hardware suppliers were not targeted by the aid and therefore did not benefit from a targeted indirect effect. Furthermore, as they were selected on the basis of transparent tender procedures, which were open to all equipment suppliers, including those from other Member States, they cannot be expected to have benefitted from abnormal profits.
- (165) *Broadcasters.* Spain has sufficiently demonstrated that the terrestrial broadcasters did not receive any advantage following the extension of the coverage. In contrast to Area I, the broadcasters refused to pay for the digitisation in Area II as this would not generate any additional revenue for them. In fact, in the light of the limited population at stake, which does not seem to be the commercial target of the advertisers, following the extension to Area II, broadcasters could not significantly raise advertising fees. Therefore, the terrestrial broadcasters are not indirect beneficiaries of the measure under investigation.

6.2.1.3. Selectivity

- (166) Article 107(1) TFEU qualifies as aid measures granted by Member States or through State resources, which distort or threaten to distort competition *'by favouring certain undertakings or the production of certain goods'*. This criterion serves to identify measures that favour certain undertakings or certain sectors of the economy.
- (167) As set out above, the measure at stake concerns the broadcasting sector and within that sector the transmission of broadcasting signal. The measure concerned targets undertakings that are active only in certain segments of the broadcasting sector, namely in the transmission of broadcasting signal ⁽⁹²⁾.
- (168) According to the case law of the Court a measure is *'selective only if, within the context of a particular legal regime, it has the effect of conferring an advantage on certain undertakings over others, in a different sector or the same sector, which are, in the light of the objectives pursued by that regime, in a comparable factual and legal situation.'* ⁽⁹³⁾

(a) Main line of reasoning concerning the selectivity of the measure

- (169) Taking into account that the aid is in the form of subsidies, the system of reference in this case are the normal market conditions under which companies should operate. The objective of the system of reference is not to give subsidies, since under normal market conditions, operators bear their own costs. The measure under investigation aimed at accelerating the digital switchover and at the extension of coverage in Area II, as explained in recital (244). The measure constitutes a derogation from the system of reference (i.e. normal market conditions), since it alleviates the normal costs for certain companies.
- (170) The beneficiaries of the scheme are therefore favoured compared to all other undertakings in all other sectors and in the same sector, which have to bear their own costs. The measure is therefore *prima facie* selective.

⁽⁹²⁾ See Judgment of the Court of 15 June 2006 in joined Cases C-393/04 and C-41/05 *Air Liquide Industries Belgium* ECLI:EU:C:2006:403, paragraph 31, which states: *'Concerning the third condition, relating to the selective nature of the measures at issue in the main proceedings, it is common ground that the tax advantages concerned do not apply to all economic operators, but are granted to undertakings exercising certain types of activities, that is those using, in natural gas compression stations, motors to drive the compressors which create pressure in the supply pipes.'*

⁽⁹³⁾ See C-70/16 P *Comunidad Autónoma de Galicia, Retegal v Commission* ECLI:EU:C:2017:1002, paragraph 61.

(b) Subsidiary line of reasoning concerning the selectivity of the measure

- (171) Some of the parties have alleged that there was no selectivity because digital terrestrial operators would be in charge of a public service remit. As it will be explained in Section 6.2.1.4 of this decision, they are nevertheless not in charge of such a remit ⁽⁹⁴⁾. Furthermore, it should be recalled that a measure remains selective, even when its objective is to favour financially organisations regarded as socially deserving ⁽⁹⁵⁾ or when they create positive effects on the economy, which go beyond their individual interest ⁽⁹⁶⁾. The positive effects of a digitalisation of the broadcasting signal therefore cannot undermine the conclusion of a *prima facie* selectivity of the measure.
- (172) In any event, even if the system of reference was limited to the broadcasting sector (which is not the case), and even if the aim of the system of reference was considered as being the transmission of digital broadcasting (which is not the case either), it should be noted that, in the broadcasting sector typically several platforms compete with each other and all these platforms (such as terrestrial, cable, satellite or DSL networks) are able to provide services for the transmission of digital broadcasting signal.
- (173) The selectivity of the measure would be assessed by taking into consideration all undertakings providing or able to provide the extension of digital broadcasting coverage in Area II ⁽⁹⁷⁾. If network operators using other technologies than terrestrial – especially satellite – are able to provide the services for an extension of coverage in Area II, they should be considered as being in a comparable factual and legal situation, in the light of the objectives of the legal regime concerned.
- (174) Spain argued that the terrestrial and the satellite technology could not be considered as being in a comparable legal and factual situation. Spain explains that the legal framework for DTT technology and other technologies are very different. At the time of the adoption of the measures at stake, different laws regulated the different technologies ⁽⁹⁸⁾. In Spain's view, although currently all audio-visual services are regulated by the General Law 7/2010 of 31 March 2010 on Audio-Visual Communication, the legal framework for the DTT technology and other technologies are still different. Moreover, according to Spain, DTT technology is more cost-effective than satellite and DTT has been already widely available in Spain (in Area I) and the implementation of DTT in Area II was resting on the broadcasting infrastructure already held by the operators. Spain argues that no discrimination took place against undertakings using satellite technology, since these other technologies are not in a similar legal and factual situation as DTT.
- (175) The above arguments cannot be accepted. The Commission considers that the fact that different technologies are subject to different specific regulations has no relevance when assessing the selectivity criterion in this case. In the context of the regulatory differences, Cellnex referred to the *Eventech* judgment ⁽⁹⁹⁾ whereby the Court held that the practice of permitting Black Cabs to use bus lanes while prohibiting minicabs from using those lanes does not seem to confer a selective economic advantage on Black Cabs. In the Commission's view the *Eventech* case has limited relevance in this case, since the facts of that case are very different. In *Eventech*, the services offered by the two

⁽⁹⁴⁾ In the same vein, it seems that some of the parties try to dispute the selectivity of the measure, based on the idea that this measure would not grant an economic advantage to entities carrying out an economic activity. Such arguments should be rejected. First of all, as explained in Section 6.2.1.2 of this decision, this measure grants an economic advantage to entities carrying out an economic activity. Secondly, the analysis of selectivity of a measure is not a second analysis of other criteria of the existence of an aid (like the presence of an economic activity or the fact that the beneficiary of the measure is an undertaking).

⁽⁹⁵⁾ See for instance about a fiscal measure C-222/04, *Cassa di Riparmio di Firenze*, EU:C:2006:8, para 136 to 138.

⁽⁹⁶⁾ See Case T-674/17, *Port de Bruxelles e.a. v. Commission*, EU:T:2019:651, point 179.

⁽⁹⁷⁾ '[A]fter pointing out that the 2006 schedule applied in a non-discriminatory manner to all airlines using or liable to use Lübeck Airport, the General Court was correct in holding, in the light of the statement of reasons for the decision at issue, that the Commission had wrongly found that the schedule was selective.' Paragraph 64 of case C-524/14 P *European Commission v Hansestadt Lübeck* (ECLI:EU:C:2016:971).

⁽⁹⁸⁾ DTT was regulated by Law 10/2005 of 14 June 2006 on urgent measures for the promotion of digital terrestrial television; satellite by Law 37/1995 on Telecommunications by Satellite and cable services were regulated by Law 42/1995 on Cable Telecommunications.

⁽⁹⁹⁾ Judgment in case C-518/13 *Eventech Ltd. v The Parking Adjudicator*, ECLI:EU:C:2015:9.

groups of operators (i.e. Black Cabs and mini cabs) were quite different ⁽¹⁰⁰⁾. In the case at hand, DTT and satellite could provide essentially the same service (i.e. transmitting digital television signal in Area II). The regulatory differences of these two technologies do not result in the provision of different services. Moreover, *Eventech* concerned a regulatory measure, namely the prohibition of using bus lanes which is directly linked to the safety and efficiency of the transport system ⁽¹⁰¹⁾. In contrast, the case at hand concerns a state subsidy and not a regulatory measure. A fortiori, the measure at stake is not the necessary consequence of a regulatory measure liable to affect the safety and efficiency of the transmission network, and which would be objectively justified.

(176) Different technologies could have been used for the extension of coverage in Area II. The differences in technology-specific regulations do not affect the ability of these different technologies (i.e. DTT and satellite) to offer the services for the transmission of television signals in Area II. The Commission considers that technologies other than DTT – notably satellite – would be able to provide the services of transmitting television signal in Area II for the following reasons:

- Firstly, as explained in recital (226), in 2008 Astra won a tender for the extension of coverage of digital television in Cantabria. The interest of the satellite operator in providing services in competition with the terrestrial platform shows that there is a possibility for satellite operators to provide similar services ⁽¹⁰²⁾.
- Secondly, in Spain the satellite platform is used for the extension of coverage in Area III. There is no technical or qualitative reason why a technology which can be used in Area III could not also be used in Area II. Furthermore, in fact transmission by satellite platform is actually also used in Area II in support of terrestrial DTT transmission. Such services are operated by the satellite operator Hispasat ⁽¹⁰³⁾.
- Thirdly, for illustration, other Member States (for example France, Ireland ⁽¹⁰⁴⁾) use also satellite services to cover more remote areas with digital broadcasting.
- Fourthly, as explained in recital (228), several public and private channels distributed via terrestrial platform are also broadcasted via satellite platforms.
- Finally, as explained in recital (232), according to data from May 2010, the coverage of DTT in Spain reaches 98,85 % of the population while only 93,5 % of the households watch television via the terrestrial platform. Thus, 5 % of households have access to DTT but choose not to use it, as most of them subscribe to pay-TV via satellite.

(177) Apart from technical and qualitative criteria, the examples of the previous recitals also indicate that there is no inherent economic reason why other platforms should be excluded *ex-ante* for Area II. As discussed in more detail in Section 6.3.3.2, cost studies do not allow such an up-front exclusion. As explained in recital (257), some of the Autonomous Communities argued that terrestrial technology is more cost-efficient and submitted internal calculations comparing the costs of using both technologies to extend the coverage. However, these calculations were not detailed and robust enough to justify the choice of terrestrial technology. In addition, none of these calculations were carried out by an independent expert. Similarly, as explained in recital (256), the *ex-ante* 2007 Spain Study does not sufficiently demonstrate the cost difference between the terrestrial platform and satellite. Furthermore, as explained in recital (258), the two cost studies ⁽¹⁰⁵⁾ submitted by Abertis (now Cellnex) were prepared in 2010, long after the contested measures were put in effect. Moreover, as explained in recitals (260) to

⁽¹⁰⁰⁾ For example, mini cabs had to be pre-booked and could not be hailed in the street by passengers nor could they wait for passengers without any pre-booking. Moreover, only Black Cabs were subject to the rule of 'compellability' (which requires Black Cabs - once they picked up a passenger - to take the passenger where they want to go to, without a prescribed distance).

⁽¹⁰¹⁾ See paragraphs 59-61 of the *Eventech* judgment.

⁽¹⁰²⁾ Although Spain argued that the contract in Cantabria was terminated due to Astra's inability to get the signals from broadcasters, this argument cannot be accepted. First, this line of argumentation has been rebutted by a national Court in Spain. According to the Court of First Instance of Santander, the decision of the Spanish central government to develop the national strategy for DTT was one of the reasons for the termination of the agreement. (See judgment 000313/2011 of the Court of First Instance in Santander) Secondly, as explained in recital (184), satellite operators are able to negotiate with broadcasters and obtain the signal from them for the purposes of the extension of coverage in Area II.

⁽¹⁰³⁾ See recital (227).

⁽¹⁰⁴⁾ Including for free-to-air national channels.

⁽¹⁰⁵⁾ Comparative report on costs of extending coverage of digital terrestrial television in Spain: DTT v. SAT (January 2010); Special Report on Agreed Procedures (25 January 2011).

(264), the Cataluña Study submitted on 19 February 2019 and the 2015 and 2019 Itelazpi Studies do not sufficiently demonstrate that DTT is a more cost-effective technology than satellite. On this basis, the Commission concludes that satellite cannot be considered as being at a competitive cost disadvantage ⁽¹⁰⁶⁾.

- (178) This finding is further supported by Commission Decision C(2014)6846 in case SA.27408 related to the deployment of digital terrestrial television in Castilla-La Mancha ⁽¹⁰⁷⁾, whereby the Commission stated that the cost studies submitted by the authorities did not sufficiently demonstrate a significant cost difference between the satellite and terrestrial technology. The above Commission decision has been fully confirmed by the judgments of the General Court ⁽¹⁰⁸⁾ and the Court of Justice ⁽¹⁰⁹⁾.
- (179) Moreover, as discussed in recital (24), the scarcity of terrestrial frequencies requires regular relocation of DTT operators to other frequency bands. This creates considerable additional cost and subsequent further State aid. Such relocation costs would not have arisen if, for instance, the satellite platform had been selected.
- (180) Furthermore, at the time of digital switchover, satellite transmission was already digitised, thus it did not require a comparable adaptation of equipment. This also supports the view that satellite cannot be considered as being at a competitive cost disadvantage.
- (181) The fact that satellite cannot be considered as being at a competitive cost disadvantage further supports the view that satellite and terrestrial are in a comparable factual and legal situation, in the light of the objectives of the legal regime concerned.
- (182) As to the factual differences between DTT and satellite technology, Spain, Itelazpi and Cellnex further argued that a large part of the terrestrial infrastructure was already deployed in Spain, including in Area II, at the time when the National Technical Plan of DTT has been adopted. They argue that the use of the existing infrastructure creates synergies and therefore justifies the choice of DTT technology. Itelazpi argues that the extension of coverage did not lead to the widespread construction of new DTT centres but – in most cases – the improvement and transformation of pre-existing analogue terrestrial centres.
- (183) These arguments cannot be accepted for the following reasons. The deployment of DTT network in Area II cannot be considered as a simple adaptation or improvement of the existing analogue terrestrial network. The existing *analogue* terrestrial network did not mean that there was already in place an existing *digital* terrestrial network. Digital terrestrial broadcasting is a different technology from the analogue terrestrial broadcasting. The extension of coverage required the installation of digital equipment in the pre-existing centres and it also required the construction of new centres ⁽¹¹⁰⁾ in Area II ⁽¹¹¹⁾.
- (184) Itelazpi, Cellnex and Spain also argued that satellite platform operators would not be able to obtain the signal from broadcasters, due to the reluctance of broadcasters to use satellite transmission. They also explain that broadcasters often do not have the right to transmit their content via satellite technology. The Commission notes that these difficulties are surmountable. According to Article 31 of the General Law 7/2010 on the audio-visual media

⁽¹⁰⁶⁾ The conclusion stating the Spanish Authorities did not sufficiently demonstrate the superiority of terrestrial technology was confirmed by several judgments of the General Court: judgment in T-541/13 (paragraph 130-144); judgment in T-462/13 (paragraph 111-124); T-465/13, (paragraph 102-117).

⁽¹⁰⁷⁾ Commission Decision (EU) 2016/1385 of 1 October 2014 (OJ L 222, 17.8.2016, p. 52).

⁽¹⁰⁸⁾ Judgment in T-808/14 *Spain v Commission* ECLI:EU:T:2016:734; judgment in joined Cases T-37/15 and T-38/15 *Abertis Telecom Terrestre, SA and Telecom Castilla-La Mancha, SA v European Commission*, ECLI:EU:T:2016:743.

⁽¹⁰⁹⁾ Judgment in joined cases C-91/17 and C-92/17 *Cellnex Telecom SA and Telecom Castilla-La Mancha SA v European Commission*, ECLI:EU:C:2018:284; Judgment in case C-114/17 *Spain v European Commission*, ECLI:EU:C:2018:753.

⁽¹¹⁰⁾ The digital terrestrial signal spreads less easily than the analogue signal, therefore digital transmission required the construction of new centres.

⁽¹¹¹⁾ See paragraphs 89 and 150 of judgment in T-541/13 *Abertis Telecom, SA and Retevisión I, SA v Commission*, ECLI:EU:T:2015:898.

services ⁽¹¹²⁾, licensees of audio-visual media services at national level are required to negotiate the sale of their main broadcasting channels to television broadcasting service providers using any technology ⁽¹¹³⁾. These provisions aim at preserving fair competition and therefore technological neutrality, as shown by the preamble of General Law 7/2010 ⁽¹¹⁴⁾. Any dispute arising out of the negotiations under Article 31 of the General Law 7/2010 may be brought before the Spanish Competition Authority (CNMC, Comisión Nacional de los Mercados y la Competencia). The example of Navarra shows that by using such a procedure, satellite operators are able to obtain the agreement of broadcasters to transmit their channels. In Navarra, the public procurement authority proposed to award the tender for the extension of digital television to Astra in June 2015. Subsequently, the Navarra authorities have put on hold the award of the tender, since broadcasters did not agree to broadcast their content via the satellite platform. Following the intervention of the CNMC, in May 2019 Astra finally obtained authorisation from Atresmedia and Mediaset to access their channels under certain conditions. This example shows that satellite operators are able to negotiate with broadcasters and obtain the signal from them for the purposes of the extension of coverage in Area II ⁽¹¹⁵⁾.

- (185) Cellnex and Itelazpi also argue that – unlike the digital terrestrial transmission – satellite technology cannot broadcast in a targeted area (for example in the territory of an Autonomous Community), since satellite footprint covers the whole territory of Spain. This argument is contradicted by the fact that satellite is used in Area III, therefore technologically it should be possible to restrict the reception of the service provided via satellite to a certain, targeted area. Moreover, the encryption of the signal would normally allow that the reception of the service is restricted to the targeted areas.
- (186) Spain also argues that only DTT can be considered free-to-air television in Spain, other technologies such as satellite or cable charge a fee. This view is erroneous since no such distinction can be made between technologies. There is no technological specificity that would prevent satellite operators from offering free-to-air television. For example, in Spain the ‘SAT-TDT’ offer (which is available only in Area III and only for households that can prove that their DTT reception is insufficient) includes the channels free of charge. Moreover, in other Member States (for example France, Ireland) satellite operators offer free-to-air channels.
- (187) The contested measure favours the digital terrestrial platform operators (they are the only operators who can benefit from the measure), despite the fact that operators using other technologies (especially satellite) are able to provide the services in question and therefore they are in a legally and factually comparable situation as the terrestrial operators, in light of the objectives of the legal regime concerned. The contested measure therefore entails discrimination.
- (188) The objective of the aid measure concerned is to promote the switchover from analogue to digital broadcasting in Spain and to ensure the continuity of television reception to residents of certain remote and rural areas (Area II), as explained in recitals (27), (29) and (244). Broadcasters did not have sufficient commercial interest in providing the service in Area II and refused to bear the costs of digitisation (see recital (165)), therefore the Spanish authorities established the State aid scheme under investigation, for digitising the existing transmission centres and building new ones, in order to ensure that the residents would continue to receive all the channels via DTT (as explained in recital (27)). The said objective does not justify the exclusion from the aid measure operators using technologies other than the DTT technology.

⁽¹¹²⁾ Ley 7/2010, de 31 de marzo, General de la Comunicación Audiovisual. BOE número 79, 1.4.2010; <https://www.boe.es/buscar/act.php?id=BOE-A-2010-5292>.

⁽¹¹³⁾ According to the Spanish Competition Authority (Comisión Nacional de los Mercados y la Competencia, CNMC), the broadcasters are required to negotiate with the providers of broadcasting services also in the context of the extension of coverage (See the Resolution 156/E/2019 of 28 May 2019 of the Director-General for Informatics, Telecommunications and Public Innovation of the Government of Navarra).

⁽¹¹⁴⁾ The preamble of General Law 7/2010 states that its provisions aim at providing: (i) legal certainty to undertakings protecting citizens from dominant positions of opinion or restriction of access to universal content of great interest or value; (ii) clear competition and transparency rules; (iii) a binding framework for both private and public sectors.

⁽¹¹⁵⁾ On 28 May 2019, the Navarra authorities finally decided to abandon the tender procedure and did not award the tender to Astra. Astra has launched a complaint against this decision before the Tribunal Administrativo de Contratos Públicos de Navarra.

(c) Conclusion as regards selectivity

- (189) The measure attributes a selective economic advantage to individual companies that exercise commercial activities. The public financing grants a selective advantage to the beneficiaries by reducing the costs they would normally bear under normal market conditions.
- (190) On the basis of the above, the Commission considers that the measures under investigation are selective in the sense of Article 107(1) TFEU.

6.2.1.4. Public service remit

- (191) Due to the administrative organisation of the country and the division of competences between the central and regional authorities, according to Spain it is up to the regions to claim the absence of State aid under the *Altmark* case law. In particular, the Spanish authorities put forward the case of the Basque country.
- (192) In the Basque Country, a public company of the Basque Government – Itelazpi S.A. ('Itelazpi') provides transport services and broadcasting coverage to radio and television. For this aim, it operates around 200 broadcasting centres, most of which belong to the Basque government. In order to extend the coverage, Itelazpi was charged with the task of organising ten tenders at regional level for the supply of equipment necessary for digitising the terrestrial infrastructure.
- (193) According to the Basque Country, Member States have significant discretion to define an SGEI. The definition can be questioned by the Commission only in the case of manifest error; this margin of discretion is even wider in the case of public service broadcasting ⁽¹¹⁶⁾. On this basis, the Basque Country has argued that the operation of broadcasting networks can be considered to be an SGEI. It would not be on a stand-alone basis but rather as an 'essential service' inherent to the public broadcasting service stemming from various provisions of Spanish law and case law ⁽¹¹⁷⁾.
- (194) According to the Basque authorities, the funding granted to Itelazpi was in fact compensation for the provision of the services of general economic interest fulfilling the *Altmark* criteria.
- (195) Abertis also argued ⁽¹¹⁸⁾ that the operation of terrestrial broadcasting networks qualifies as public service and it fulfils the *Altmark* criteria. Abertis argued that the recipient undertaking is required to discharge public service obligations and those obligations are clearly defined. Abertis claimed that any compensation received by the network operators would never exceed what is necessary to cover the costs of providing the transmission services. Notably, Abertis claimed that the local authorities took appropriate steps to minimise costs: the purchases of equipment were undertaken by way of public tender that ensured that the equipment was acquired at market price.
- (196) Moreover, in their actions for annulment of the 2013 Decision, various parties claimed that operation of the digital terrestrial network has been attributed as an SGEI by an official act in a given region. Itelazpi (case T-462/13) referred to Law 31/1987 on the organisation of broadcasting of 18 December 1987, to Law 10/2005 and to Royal Decree 944/2005, as well as to the inter-institutional conventions concluded between the Basque Government, the Association of Basque Municipal Authorities and the three Basque Regional Councils. Cataluña and CTTI (case T-465/13) referred to a call for tender and to the public contract, as well as Law 10/2005. Navarra de Servicios y Tecnologías (case T-487/13) referred to Royal Decree 944/2005 and to the decision of the Navarra Government of 28 July 2008. Cellnex, Retevisión (case T-541/13) referred to Law 31/1987 on the organisation of broadcasting of 18 December 1987, as well as to Royal Decree 944/2005 and to calls for tenders. Spain (case T-461/13) referred to

⁽¹¹⁶⁾ As stated in the protocol on the public broadcasting system of the Member States annexed to the Treaty of Amsterdam.

⁽¹¹⁷⁾ Amongst others, Ley 31/1987, de 18 diciembre, de Ordenación de las Telecomunicaciones; Royal Decree-Law 529/2002 of 14 July, regulating the provision of the essential service relating to the support network for broadcasting television services during a strike; Rulings of the Supreme Court (Judicial Review Court, 3rd Section) of 23 July 2009 (JUR 2009\381376), Legal Basis Two; and of 18th December 2009 (RJ 2010\2313), Legal Basis Three: 'it is unquestionably of public interest to guarantee the extension and universal cover of the state television channels in remote and isolated areas of the country (to be in parity with those which do not have these characteristics) which are not covered by the commitment made by the television concessionaires'.

⁽¹¹⁸⁾ See comments of Abertis on the Commission's opening decision, 31.1.2011.

Royal Decree 944/2005, as well as to the public contracts concluded between the public authorities and the operators concerned. In addition, all of the above mentioned parties referred to General Law 11/1998 on telecommunications and to General Law 32/2003 on telecommunications as alleged acts of attribution to operate the digital terrestrial network as SGEL. Some of those documents have been brought to the attention of the Commission and the EU Courts in the context of the above mentioned actions.

- (197) In its *Altmark* judgment, the Court stated that public service compensation does not constitute an economic advantage in the meaning of Article 107(1) of the EC Treaty if all of the following four conditions are met: 1) the recipient undertaking must actually have a public service mandate and the tasks and related obligations must be clearly defined; 2) the parameters of the compensation must be established in advance in an objective and transparent manner; 3) the compensation must not exceed the costs incurred in discharging the public service mandate; 4) in order to ensure the least costs to the community, the company which is to discharge public service obligations is chosen either through public procurement, or the costs of providing the service of general economic interest are determined on the basis of the costs of a typical, well-run undertaking.

First Altmark condition: Clear definition and assignment of public service obligations

- (198) Spanish law does not declare the operation of a terrestrial network to be a public service. The 1998 Telecommunications Law ⁽¹¹⁹⁾ states that the telecommunication services, including operation of networks supporting radio and television, are services of general economic interest but they do not have the status of public services, which are reserved only for a limited number of telecommunications services ⁽¹²⁰⁾. The Telecommunications Law in force at the time the measures were adopted ⁽¹²¹⁾ maintains the same qualification. The transmission services for the broadcasting of television, i.e. transport of signals through the telecommunications networks, are considered to be telecommunication services and as such are services of general interest but not public service ⁽¹²²⁾.
- (199) In any event, the provisions of the Telecommunications Law are technology neutral. Article 1 of the Law defines telecommunications as exploitation of networks and the provision of services of electronic communications and associated facilities. Telecommunications is the transmission of signals through any telecom network, and not through the terrestrial network in particular ⁽¹²³⁾. Moreover, Article 3 of the Law specifies as one of its objectives to encourage, to the extent possible, technological neutrality in regulation.
- (200) Although the law in force and applicable at the moment of transfer of funds to Iteazpi defined public broadcasting as public service, public broadcasting does not cover the operation of a particular supporting platform. The broadcasting service must be distinguished from the broadcasting networks operating service ⁽¹²⁴⁾. These are two separate activities carried out by different undertakings operating in different markets. There is no evidence that in addition to broadcasting, the law would have defined the operation of terrestrial network as a public service.

⁽¹¹⁹⁾ Ley 11/1998, de 24 de abril, General de Telecomunicaciones.

⁽¹²⁰⁾ These include services related to public defence and civil protection and operation of telephony network.

⁽¹²¹⁾ Ley 32/2003, de 3 de noviembre, General de Telecomunicaciones. On 11 May 2014, this law has been replaced by Ley 9/2014, de 9 de mayo, General de Telecomunicaciones.

⁽¹²²⁾ Article 2.1. of the Law states: 'The telecommunications services are services of general interest provided under the rules of free competition'.

⁽¹²³⁾ Annex II of the law 32/2003 contains precise, technologically neutral, definitions of the telecommunications and electronic communications network. 'Telecommunications: any transmission, emission or reception of signs, signals, writing, images and sounds or information of any nature by wire, radio electricity, optical means or other electromagnetic systems'. 'Electronic communications network means transmission systems and, where applicable, switching or routing equipment and other resources which permit the conveyance of signals by wire, radio, optical or other electromagnetic means, including satellite networks, fixed (circuit- and packet-switched, including Internet) and mobile terrestrial networks, electricity cable systems, to the extent that they are used for the purpose of transmitting signals, networks used for radio and television broadcasting, and cable television networks, irrespective of the type of information conveyed'.

⁽¹²⁴⁾ See paragraph 115 of the judgment in joined cases T-37/15 and T-38/15 *Abertis Telecom Terrestre, SA and Telecom Castilla-La Mancha, SA v European Commission*.

- (201) The Basque authorities argue that the assignment of the provision of this service of general economic interest to Itelazpi is explicitly contained in the Conventions concluded between the Basque Government, EUEL (Association of Basque Town Councils) and the three Basque Regional Councils.
- (202) In the Conventions, the Basque administration recognises that values such as universal access to information and plurality of information require the universalisation of free-to-air television and it undertakes to safeguard these values by extending the coverage of the state multiplexes ⁽¹²⁵⁾. However, no provision of the Conventions actually suggests that the operation of terrestrial network is considered to be a public service. Therefore, the Commission is of the view that the wording of the Conventions is not sufficient to set out the scope of the mission of the public service and it cannot be argued on that basis that transmission via terrestrial network is a public service.
- (203) As explained in recital (196), in their actions for annulment of the 2013 Decision, various parties claimed that operation of the digital terrestrial network has been attributed as an SGEI by an official act in a given region and brought the relevant documents to the Commission's attention. Having examined these documents during the Court proceedings, the General Court confirmed the Commission view that none of those documents constituted the required act of attribution ⁽¹²⁶⁾. The said General Court judgments have been confirmed by the Court of Justice ⁽¹²⁷⁾.
- (204) It is therefore concluded that under Spanish law the operation of terrestrial networks does not have the status of a public service. This conclusion has been confirmed by the General Court in cases T-462/13 ⁽¹²⁸⁾, T-465/13 ⁽¹²⁹⁾, T-487/13 ⁽¹³⁰⁾, T-541/13 ⁽¹³¹⁾ and in T-461/13 ⁽¹³²⁾. Moreover, the said judgments were confirmed by the Court of Justice in joined cases C-66/16 P to C-69/16 ⁽¹³³⁾ and in case C-81/16 ⁽¹³⁴⁾.
- (205) As a result, it has not been established that the first *Altmark* condition has been satisfied. The fact that the first *Altmark* criterion is not satisfied in this case, due to the lack of clear and precise definition of the service consisting in the operation of a terrestrial network as a public service, has been confirmed by several judgments of the General Court and the Court of Justice ⁽¹³⁵⁾.
- (206) The criteria provided by the *Altmark* judgement are cumulative, i.e. they all have to be fulfilled in order for the measure not to be considered State aid. In the absence of satisfaction of the first criterion, the financing granted to Itelazpi by the Basque Country authorities does not therefore qualify as compensation for the provision of a service of general economic interest. As explained in recital (62), the above assessment does not prejudice the assessment of the new measure introduced in the Basque Country on 2 December 2014 by the Agreement on the Service to extend coverage of national television channels in the Autonomous Community of the Basque Country.
- (207) In any event, if the Spanish legislation had declared the operation of a terrestrial network to be a public service (which it had not), this would constitute a manifest error, as explained below.
- (208) According to settled case-law, Member States enjoy a broad discretion for defining what they regard as SGEI, and the definition of such services by a Member State can be queried by the Commission only in the event of manifest error.

⁽¹²⁵⁾ Recitals 6 and 7 and Article 5 of the Conventions.

⁽¹²⁶⁾ See par. 62-72 of the judgment in T-462/13; par. 60-73 of the judgment in T-465/13; par. 102-115 of the judgment in T-487/13; par. 84-95 of the judgment in T-541/13; par. 66-71 of the judgment in T-461/13. Moreover, in all of the above mentioned judgments the General Court held that Law 11/1998 and Law 32/2003 did not define the transmission services for the broadcasting of television as an SGEI.

⁽¹²⁷⁾ See judgment in joined cases C-66/16 P to C-69/16 P; judgment in case C-81/16.

⁽¹²⁸⁾ Paragraphs 55-79 of the judgment in case T-462/13.

⁽¹²⁹⁾ Paragraphs 55-80 of the judgment in case T-465/13.

⁽¹³⁰⁾ Paragraphs 89-119 of the judgment in case T-487/13.

⁽¹³¹⁾ Paragraphs 65-95 of the judgment in case T-541/13.

⁽¹³²⁾ Paragraphs 53-78 of the judgment in case T-461/13.

⁽¹³³⁾ See paragraphs 67-76 of judgment in joined cases C-66 to 69/16.

⁽¹³⁴⁾ See paragraphs 38-54 of the judgment in case C-81/16.

⁽¹³⁵⁾ See judgments in T-451/13 (paragraphs 65-110); T-461/13 (paragraphs 53-78); T-462/13 (paragraphs 55-79); T-465/13 (paragraphs 55-80); T-487/13 (paragraphs 89/119); C-81/16 (paragraphs 38-54); Joined Cases C-66/16 P to C-69/16 P (paragraphs 67-76).

- (209) However, Member States' power to define SGEIs is not unlimited and cannot be exercised arbitrarily for the sole purpose of removing a particular sector, from the application of the competition rules. Also, the margin of discretion of Member States to define SGEIs cannot be exercised in a way that would contravene the general principles of Union law, such as the principle of equal treatment ⁽¹³⁶⁾.
- (210) The principle of equal treatment is ensured as regards broadcasting networks operating services by means of the principle of technological neutrality, although this does not mean that selecting a specific technology for broadcasting networks operating services entails in any event a manifest error ⁽¹³⁷⁾.
- (211) As explained in recital (176), different platforms other than terrestrial ones, notably satellite, can provide services for the broadcasting of television signal in Area II.
- (212) In these circumstances, it is not possible to consider that terrestrial platforms are essential for the broadcasting of the television signal without violating the principle of technological neutrality ⁽¹³⁸⁾.
- (213) The possible definition of the operation of a terrestrial platform as SGEI would need to be duly justified in order not to contravene the principle of equal treatment and not to entail a discrimination vis-à-vis other platforms.
- (214) In this regard, it has to be recalled that at the time when the regional authorities carried out the extension of coverage, they had the choice of either organising a technologically neutral tender or selecting one particular technology if justified on the basis of the information available at that time.
- (215) As explained in recitals (254) to (264), none of the costs studies provided by the Spanish Authorities and the beneficiaries of the aid were produced ex ante by an independent expert and demonstrated that the satellite technology was clearly more expensive or did not fulfil essential qualitative requirements for the extension of coverage in Area II.
- (216) Moreover, as already mentioned and explained in detail in recital (176), there is no imperative technical requirements, which exclude the satellite technology for the extension of coverage in Area II.
- (217) In any event and as explained in recitals (198) to (204), there has been no act of attribution of the public authority entrusting the terrestrial platform operators with an SGEI mission, including a public service mandate and a clear definition of the tasks and related obligations.
- (218) In view of the above and despite the broad discretion of Member States for defining what they regard as services of general economic interest, if the Spanish legislation had declared the operation of a terrestrial network to be a public service (which it had not), this would contravene the principle of equal treatment and therefore constitute a manifest error.

Fourth Altmark condition: ensure the least costs to the community

- (219) In the absence of a tender, the fourth *Altmark* condition requires that the level of necessary compensation must be determined on the basis of an analysis of the costs which a typical undertaking, well run and adequately provided with means of transport so as to be able to meet the necessary public service requirements, would have incurred in discharging those obligations. For this purpose, the relevant revenues and a reasonable profit for discharging the obligations should be taken into account.

⁽¹³⁶⁾ See judgment in C-390/06, para. 51.

⁽¹³⁷⁾ See judgment in T-37/15, para. 123 and 124.

⁽¹³⁸⁾ See para. 123 of judgment in T-37/15.

- (220) In the Autonomous Communities where a public tender has been organised for the extension of coverage and this call did not comply with the principle of technological neutrality and, in particular, was not justified by any prior comparison of costs, such a procedure cannot be considered as satisfying the fourth *Altmark* criterion. A call for tender that – without any valid reason – hinders the participation of certain interested operators cannot be considered open, transparent and non-discriminatory ⁽¹³⁹⁾. Since the calls for tender were tailor-made for terrestrial operators, other platform operators – that could have carried out the extension of coverage – considered themselves automatically excluded from the procedure. Therefore the Commission concludes that in the areas where a public tender has been organised in breach of the principle of technological neutrality, the fourth *Altmark* condition cannot be seen as being fulfilled by the existence of a tender.
- (221) In the case of the Basque Country where there was no tender, the Basque authorities argue that the criterion is fulfilled due to the fact that Itelazpi itself is a well-run and suitably equipped company to perform the requested activities. On the basis of a cost comparison, the Basque authorities conclude that satellite provision would have been more expensive than upgrading Itelazpi's terrestrial network ⁽¹⁴⁰⁾. However, to fulfil the fourth *Altmark* criterion, a comparison with satellite technology is not sufficient to establish that Itelazpi is efficient. There could also have been other terrestrial operators which could have performed this service at lower cost.
- (222) In the light of the above it is concluded that in the case of the Basque Country too, the fourth *Altmark* condition has not been fulfilled. Given that these conditions are cumulative, it cannot be considered that the financing granted to Itelazpi by the Basque Country authorities does not constitute State aid because it fulfils the conditions for being deemed compensation for the provision of a service of general economic interest.
- (223) As regards the other cases where there was no tender, the Spanish authorities have provided no analysis of the costs which a typical undertaking, well-run and adequately provided with means to meet the public service requirements, would have incurred.

6.2.1.5. Distortion of competition

- (224) Spain and Abertis claim that DTT and satellite technology are two different markets. DTT is the main platform for free-to-air terrestrial television where the number of operators in the national market is determined by the number of licences granted by the Spanish government. Funding for free-to-air terrestrial television channels comes from advertising. As for satellite television, a large number of channels are available on the only pay-television platform in Spain, for which Astra is the network operator. These channels are funded by subscriptions, generally for a package of channels. The Spanish authorities also point out that in Spain the cost of satellite distribution for broadcasters is much higher than the cost of terrestrial broadcasting and therefore the free-to-air broadcasters, including regional and local broadcasters, are not interested in switching to this platform.
- (225) For several reasons it is concluded that the terrestrial and satellite platforms operate in the same market.
- (226) Firstly, in 2008 Astra competed for the extension of coverage of digital television in Cantabria and won the tender. In 2008, Astra held a series of meetings with the Autonomous Communities to present its offer to broadcast digital television channels, which had hitherto been broadcasted via terrestrial platform. Even though the contract with Cantabria was later terminated by the authorities, the interest of the satellite operator in providing services in competition with the terrestrial platform suggests that there is a possibility for satellite operators to provide similar services.

⁽¹³⁹⁾ Communication from the Commission on the application of the European Union State aid rules to compensation granted for the provision of services of general economic interest (OJ C8, 11.1.2012, p. 4).

⁽¹⁴⁰⁾ No elements was provided by Itelazpi so as to support its allegation.

- (227) Secondly, the satellite operator Hispasat (subsidiary of Abertis) provides services in some parts of Area II ⁽¹⁴¹⁾ and the satellite platform is exclusively used in Area III. Other Member States also use satellite services to cover more remote areas of their countries with the free-to-air channels ⁽¹⁴²⁾.
- (228) Thirdly, several public and private channels distributed via the terrestrial platform, and which reach all the country, are also broadcasted via satellite platforms, including Astra itself ⁽¹⁴³⁾.
- (229) Fourthly, concerning the regional channels, some of them are available or were available in the recent past via satellite platform. This contradicts the statement that the regional broadcasters are not interested in satellite.
- (230) Fifthly, the Commission also notes Astra's argument concerning the capacity of satellite to deliver 1 380 channels and delimitate them geographically. Astra claims that there are no limitations for satellite to broadcast such a number of channels. Moreover, the figure of 1 380 regional channels seems to be inflated. While this is the maximal number of frequencies available throughout Spain for national, regional and local channels, the number of licences granted was in fact much lower (see footnote 24). In addition, not all the broadcasters that received a license actually broadcast on the frequencies assigned.
- (231) Sixthly, some broadcasters have declared a preference for terrestrial transmission because they have acquired rights to broadcast content only for the terrestrial platform. This, however, does not mean that there are different markets for terrestrial and satellite transmission. As they have acquired content rights for the terrestrial platform, if necessary, broadcasters could do the same for the satellite. Furthermore, if a satellite platform is selected on the basis of a public tender, as in the case of Area III, a 'must carry obligation' could be imposed on the broadcasters. Moreover, according to Article 31 of the General Law 7/2010 on the audio-visual media services, licensees of audio-visual media services are required to negotiate the sale of their main broadcasting channels to television broadcasting service providers using any technology. Broadcasters have an obligation to negotiate with platform operators and any dispute arising out of such negotiations may be brought before the CNMC (see recital (184)).
- (232) Finally, according to data from May 2010 ⁽¹⁴⁴⁾, the coverage of DTT in Spain reaches 98,85 % of the population while only 93,5 % of the households watch television via the terrestrial platform. Thus, 5 % of households have access to DTT but choose not to use it, as most of them are subscribed to pay-TV via satellite.
- (233) In conclusion, as satellite and terrestrial broadcasting platforms are in competition with each other, the measure, for the deployment and operation and maintenance of DTT in Area II entails a distortion of competition between the two platforms. It should be noted that other platforms, especially IPTV, are also disadvantaged due to the measure. Although broadband has not yet reached the entirety of Area II, it is very likely that in the future it will extend its coverage significantly.

6.2.1.6. Effect on trade

- (234) The measure has an impact on intra-Union trade. According to case law of the Union Courts, when '*State financial aid or aid from State resources strengthens the position of an undertaking as compared with undertakings competing in intra-Community trade, the latter must be regarded as affected by that aid*' ⁽¹⁴⁵⁾.
- (235) Network operators are active in a sector in which trade exists between Member States. Abertis forms part of an international group of companies that competes in intra-Community trade, so does the complainant, Astra. The measure for the deployment and operation and maintenance of DTT in Area II therefore affects trade between Member States.

⁽¹⁴¹⁾ Hispasat provides these services in support of the DTT network in Area II.

⁽¹⁴²⁾ As, for example, France.

⁽¹⁴³⁾ For example, Antena 3, Cuatro, Telecinco, La Sexta, La Siete, Teleduarte, TVE, La2, Canal 24 horas.

⁽¹⁴⁴⁾ Analysis of the television market submitted by Spain in the notification of the measure: Compensation for damages for liberation of the digital dividend in Spain, SA.32619 (2011/N).

⁽¹⁴⁵⁾ T-55/99 *Confederación española de transporte de Mercancías (CETM) v Commission of the European Communities*, ECLI:EU:T:2000:223.

6.2.2. Conclusion on the presence of aid

- (236) In view of the arguments put forward above, the Commission considers that the measure fulfils the criteria laid down in Article 107(1) TFEU. Under these circumstances, the measure has to be considered as State aid within the meaning of Article 107(1) TFEU.

6.3. Compatibility assessment

6.3.1. General considerations

- (237) The Commission actively supports the transition from analogue to digital broadcasting. The advantages of the digital switchover were underlined in the Action Plan eEurope 2005 and in the two Communications on the digital switchover ⁽¹⁴⁶⁾. The Commission also recognises that the digital switchover could be delayed if left entirely to market forces.
- (238) Member States may use aid to overcome a specific market failure or to ensure social or regional cohesion ⁽¹⁴⁷⁾. However, it must be shown in each specific case that the aid in question is an appropriate instrument to address the problem, is limited to the minimum necessary and does not unduly distort competition. Similarly, the Switchover Communication provides that in the specific area of digitisation, public intervention would be justified under two conditions: firstly, where general interests are at stake; secondly, in the event of a market failure, that is, market forces alone fail to deliver in terms of collective welfare. It also specifies that in any case, public intervention should be supported by a sound market analysis.
- (239) The Switchover Communication also indicates that the transition to digital broadcasting represents a major industrial challenge that must be led by the market. In principle, each network should compete on its own strengths. In order to safeguard this principle, any public intervention should aim to be technologically neutral. Exceptions from this principle can be envisaged only if the intervention targets a specific market failure or imbalance and is at the same time appropriate, necessary and proportionate to overcome these difficulties.
- (240) If left to the market, in view of their disadvantaged social situation, there is a risk that not all parts of the population can benefit from the advantages of digital television. With respect to this social cohesion problem, Member States may want to make sure that all citizens have access to digital television once analogue television is switched off. Since the digital switchover entails costs for consumers and requires a change in habits, Member States may want to assist in particular the disadvantaged groups of society such as elderly people, low-income households or people living in peripheral regions.

⁽¹⁴⁶⁾ COM(2002)263 final, 'eEurope 2005: An information society for all', COM(2003)541 final, *Communication from the Commission on the transition from analogue to digital broadcasting (from digital 'switchover' to analogue 'switch-off')* and COM(2005)204 final, *'Communication from the Commission on accelerating the transition from analogue to digital broadcasting'*.

⁽¹⁴⁷⁾ See 'Less and better target state aid: a roadmap for state aid reform 2005-2009', COM(2005)107 final.

- (241) In several State aid decisions, based on the Communications on the digital switchover, the Commission applied the State aid rules in this sector ⁽¹⁴⁸⁾. Member States have several possibilities to grant public funding for the switchover to ensure that all geographical areas continue to have appropriate television coverage. This includes funding for the roll-out of a transmission network in areas where otherwise there would be insufficient television coverage ⁽¹⁴⁹⁾. Such funding may however be granted only if it does not entail an unnecessary distortion between technologies or companies and is limited to the minimum necessary.

6.3.2. *Legal basis for assessing the compatibility of the envisaged measure*

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

6.3.3. **Article 107(3)(c) TFEU**

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

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

6.3.3.1. *Objective of common interest*

- (244) The aid scheme is aimed at accelerating the digital switchover process in Spain and ensuring the continuity of television reception to residents of certain remote and rural areas. In this respect, the measure is targeted to allow people living in those areas to watch television. Access to media, including television transmission, is important for citizens to exercise their constitutional right to access information. The Commission has recognised the importance and the benefits of the digital transmission in the Action Plan eEurope 2005 ⁽¹⁵⁰⁾ as well as in its two Communications on the transition from analogue to digital broadcasting ⁽¹⁵¹⁾. Furthermore, in its Communication i2010 – *A European Information Society for growth and employment* ⁽¹⁵²⁾, the Commission has pointed out that the planned switch-off of analogue terrestrial television by 2012 will improve access to spectrum in Europe. As digital broadcasting uses spectrum more efficiently, it frees up spectrum capacity for other users, such as new broadcasting and mobile telephony services, which will in turn stimulate innovation and growth in the television and electronic communications industries.

⁽¹⁴⁸⁾ See, amongst others, N622/03 Digitalisierungsfonds – Austria (OJ C 228, 17.9.2005, p.12); Commission Decision 2006/513/EC of 9 November 2005 on the State Aid which the Federal Republic of Germany has implemented for the introduction of digital terrestrial television (DVB-T) in BerlinBrandenburg (OJ L 200, 22.7.2006, p. 14); Commission Decision 2007/258/EC of 20 December 2006 on the measure No C24/04 (ex NN 35/2004) implemented by Sweden for the introduction of digital terrestrial television (OJ L 112 of 30.4.2007, p. 77); Commission Decision 2007/374/EC 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 (OJ L 147, 8.6.2007, p. 1); N270/06 Subsidies to digital decoders with API – Italy, (OJ C 80, 13.4. 2007, p.3); N107/07 Subsidies to IdTV – Italy (OJ C 246, 20.10.2007); Commission Decision 2008/708/EC of 23 October 2007 on the State aid C 34/06 (ex N 29/05, ex CP 13/04) which the Federal Republic of Germany is planning to implement for the introduction of digital terrestrial television (DVB-T) in North Rhine-Westphalia (OJ L 236, 3.9.2008, p. 10); SA.28685 Captación de Televisión Digital en Cantabria – Spain, , (OJ C 119, 24.4. 2012).

⁽¹⁴⁹⁾ See Decision 2006/513/EC, recital 132.

⁽¹⁵⁰⁾ COM(2002)263 final, 'eEurope 2005: An information society for all'.

⁽¹⁵¹⁾ COM (2003)541 final, 'Communication from the Commission on the transition from analogue to digital broadcasting (from digital 'switchover' to analogue 'switchoff')', and COM(2005)204 final, 'Communication from the Commission on accelerating the transition from analogue to digital broadcasting'.

⁽¹⁵²⁾ COM(2005)541 final, 1 June 2005.

(245) It is therefore concluded that the measure is targeted at a well-defined objective of common interest.

6.3.3.2. Well-defined aid

Market failure

(246) As stated by the Spanish authorities, it is generally recognised that there is a risk that not all sectors of the population can benefit from the advantages of digital television (problem of social and regional cohesion). A market failure might exist where market players do not take sufficiently into account the positive effects of digital switchover on society as a whole because they do not have the economic incentives to do so (positive externalities). Moreover, with respect to social cohesion, Member States may want to make sure that all citizens have access to digital television once analogue television is switched off and may therefore also consider measures to ensure that all geographical areas continue to have appropriate television coverage.

(247) In the opening decision, the Commission recognised that there is a market failure in that the broadcasters are unwilling to bear the additional costs of the extension of coverage beyond their statutory obligations. Moreover, neither the satellite platforms nor private households have carried out investments ensuring the reception of digital channels via satellite by all the inhabitants of Area II. Therefore, the Commission recognises that people whose usual residence is in a rural area may be totally excluded from the free-to-air digital television signal reception if the digital coverage is left entirely to market forces and that public intervention can be beneficial through financial supports to individuals.

Technological neutrality, appropriateness and proportionality of the measure

(248) In digital switchover cases, the principle of technological neutrality is well enshrined in several Commission decisions ⁽¹⁵³⁾. It has been upheld by the General Court and the Court of Justice ⁽¹⁵⁴⁾.

(249) The choice of technology should normally be established by a technologically neutral tender, as happened in other Member States ⁽¹⁵⁵⁾. As pointed out in Section 2.2, the vast majority of tenders have not been technologically neutral, since they refer either explicitly through the definition of the object of the tender and/or implicitly, in the description of the technical specifications, to terrestrial technology and DTT. Only DTT operators could fulfil these requirements (and only such operators have in fact participated in these tenders). Spain argues that tender references to DTT, or specifications referring to DTT equipment and transmission centres do not mean that the use of such centres was compulsory for the bidders. These references cannot reasonably be interpreted as indicated by Spain.

(250) First, according to the 2019 Itelazpi Study, the Spanish government policy had imposed a restriction on Area II, requiring the use of DTT. The 2019 Itelazpi Study states that in order to operate another technology, a regional government would have had to discuss with the national government the removal of this restriction for Area II ⁽¹⁵⁶⁾. No regional government has made an attempt to discuss such a removal of the restriction.

⁽¹⁵³⁾ See above, footnote 148.

⁽¹⁵⁴⁾ Cases T-8/06 - *FAB Fernsehen aus Berlin GmbH v Commission*, Judgment of 6 October 2009 (paragraphs 70-84), ECLI:EU:T:2009:386; C-544/09P - *Germany v Commission*, Judgment of 15 September 2011 (paragraphs 77-83), ECLI:EU:C:2011:584; T-177/07, *Mediaset SpA v Commission*, Judgment of 15 June 2010 (paragraph 109), ECLI:EU:T:2010:233; and C-403/10 P - *Mediaset SpA v Commission*, Judgment of 28 July 2011 (paragraphs 100 – 108), ECLI:EU:C:2011:533. See also judgments in cases T-462/13 (paragraphs 102-139), T-465/13 (paragraphs 94-117), T-487/13 (paragraphs 128-140), T-541/13 (paragraphs 119-129) and T-461/13 (paragraphs 94-112) which judgments were upheld by the Court of Justice in joined cases C-66/16 P to C-69/16 and in case C-81/16. See also judgment in T-808/14 (paragraphs 139-149) and judgment in joined cases T-37/15 and T-38/15 (paragraphs 157-166) which judgments were upheld by the Court of Justice in C-91/17 P, C-92/17 and C-114/17P.

⁽¹⁵⁵⁾ See footnote 21.

⁽¹⁵⁶⁾ FTI Consulting: Providing Digital Television Services in the Basque Region of Spain, page 12, 20, 44, 9.5.2019. Provided by Itelazpi.

- (251) Second, Spanish central government's favouring of the DTT technology and the tender references to DTT prevented any bidder to make a proposal based on another technological solution. Thus, the Spanish government's formal argument ignores the commercial reality. Participating in tenders is resource intensive and therefore costly for any bidder. Splitting up the intervention in Area II in several hundred individual tenders has multiplied the costs, which amount to a significant entry barrier to any bidder wishing to cover the entire Area II. The combination of central government interventions in favour of DTT technology, as explained in recitals (138) and (139), specific tender references to DTT and the need to enter into hundreds of different tender procedures therefore sent a strong signal to other platform operators that participating in such tenders would not be commercially justified. It is therefore concluded that these references in the vast majority of cases made it impossible for operators of other platforms to compete ⁽¹⁵⁷⁾.
- (252) The advantage of a technologically neutral tender is that the aid granting agency could have chosen between different bids, including possible discounts offered by the bidders. On the other hand, dispensing with such a tendering procedure may be justified if an *ex-ante* study demonstrates that, taking into account all possible discounts which could be envisaged from potential bidders, any other technology was clearly more expensive or did not fulfil essential qualitative requirements ⁽¹⁵⁸⁾. Such a cost study should be carried out by an independent expert and it has to fulfil certain quality requirements (it should demonstrate a significant cost difference, the study's results have to be robust and the data has to be verifiable). In that case the authority could avoid the cost and loss of time of going through a public tender procedure ⁽¹⁵⁹⁾.
- (253) This holds even more so in the current case, as in 2008 the satellite operator Astra had already won a tender of the Autonomous Region of Cantabria over other bidders (see recital (13)). As that tender was technologically neutral, this provides evidence that at the time DTT probably did not have such a required cost or quality advantage. Furthermore, satellite technology is used for transmission in the entire Area III and in Area II as a support service to DTT infrastructure ⁽¹⁶⁰⁾. This also seems to indicate that in principle satellite technology is suitable for the transmission of television signals in Area II.
- (254) Against that evidence which contradicts the assumption that DTT technology would have a clear cost advantage, a cost study to support a decision favouring a particular technological solution by avoiding a technologically neutral tender, should be particularly unequivocal. It should fulfil at least the following five cumulative conditions: (1) the study has to be carried out *ex-ante* ⁽¹⁶¹⁾, (2) it should be carried out by an independent expert, (3) it should demonstrate a significant cost difference ⁽¹⁶²⁾, (4) the results have to be robust ⁽¹⁶³⁾ and (5) the data have to be verifiable.
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- ⁽¹⁵⁷⁾ Although in the technologically neutral initial tender of Cantabria three consortia put in a bid which was built on a satellite solution (Castilla-La-Mancha Telecom, Telefónica and Astra), none of these companies – or any other non-DTT platform operator – participated again in any of the subsequent tenders.
- ⁽¹⁵⁸⁾ Such a study served as a justification for a choice of a particular technology in a broadband case, see Commission Decision N222/2006 – Aid to bridge the digital divide in Sardinia, (OJ C 68, 24.3.2007).
- ⁽¹⁵⁹⁾ The United Kingdom chose DTT for the provision of local television on the basis of an *ex-ante* study carried out by its regulator OFCOM and on the basis of an *ex-ante* consultation of market players. On this basis, the Commission did not insist on carrying out a technologically neutral tender. SA.33980 (2012/N) – Local television in the UK, http://ec.europa.eu/competition/state_aid/cases/244689/244689_1425664_116_2.pdf.
- ⁽¹⁶⁰⁾ For instance, in the case of Itelazpi and Cellnex, some DTT transmission sites are unable to receive multiplex signals over the terrestrial network and receive multiplex signals from Hispasat satellites. Compare 2015 Itelazpi Study, page 20.
- ⁽¹⁶¹⁾ Only if the study is carried out before making the choice of a particular technological solution (*ex-ante*), an authority can claim that its decision to forego a technologically neutral tender has been based on such a study.
- ⁽¹⁶²⁾ Cost estimates are based on assumptions and therefore entail uncertainty. To justify an *ex-ante* technological choice, the cost estimates have to be conservative. They have to include possible cost reductions which may be achieved by potential bidders on the basis of their market position or possible synergies. They should also reflect possible discounts a bidder may offer to enter a new market.
- ⁽¹⁶³⁾ The cost comparison is robust if the overall result does not change if underlying assumptions change within a reasonable range.

- (255) During the investigation, the Spanish authorities have presented various cost studies allegedly showing that the use of DTT technology would be less costly than the use of satellite technology. All of these cost comparisons suffer from the fact that they only focus on the installation cost. Most of them do not take into account Operation and Maintenance cost (O&D) at all. Following the deployment of DTT, however, it has become clear that the use of the latter technology has produced significant O&D expenditures which the Spanish authorities have financed by granting continuous O&D aid to DTT operators (until today). A cost comparison of different technologies should take into account all relevant cost, i.e. including also such O&D expenditure.
- (256) The *ex-ante* 2007 Spain Study, as discussed in recital (119), does not sufficiently demonstrate the superiority of the terrestrial platform over satellite. On the contrary, the study concludes that the choice of a particular technological solution for the extension of coverage is to be analysed on a region-by-region basis, taking into account the topographic and demographic particularities of every region. This conclusion advocates instead the need to carry out a technologically neutral tender to determine which platform is the most suitable. The General Court confirmed that the 2007 Spain Study did not sufficiently demonstrate the superiority of the terrestrial platform over the satellite platform. Moreover, the General Court held that the analysis carried out in the 2007 Spain Study did not justify the failure to observe the principle of technological neutrality ⁽¹⁶⁴⁾.
- (257) In the course of the investigation, some of the Autonomous Communities submitted internal calculations comparing the costs of using both technologies to extend the coverage. However, in addition to uncertainty about the date of these calculations ⁽¹⁶⁵⁾, none of them was detailed and robust enough to justify the choice of terrestrial technology to extend the coverage ⁽¹⁶⁶⁾. What is more, none of them was carried out by an independent expert. In November 2010, the Autonomous Region of Galicia reported on meetings held with Astra in 2009 and provided a cost comparison which included data provided by ASTRA in such discussions. That cost comparison has been subject of the appeal brought by the Autonomous Region of Galicia against the 2013 Decision and the General Court did not accept these calculations as justifying that the terrestrial technology was superior to the satellite technology ⁽¹⁶⁷⁾. That cost comparison does not take into account the cost of providing DTT reception equipment to end-customers. Such costs are significant, as the switch to DTT required that each household receives an antenna and a decoder.
- (258) Concerning the two cost studies submitted by Cellnex (Abertis), it has to be noted that they were performed in 2010, long after the investigated measures were put into effect. Irrespectively of whether they could be considered independent and sufficiently robust, the fact that they are subsequent to the contested measures means that such studies cannot be cited in support to the argument that the Spanish government failed to hold a technologically neutral tender. In addition, the results of these studies are contradicted by cost estimations provided by Astra which allegedly demonstrate that satellite technology is more cost effective ⁽¹⁶⁸⁾.

⁽¹⁶⁴⁾ See judgment in case T-461/13 (par. 118-120); judgment in case T-462/13 (par. 113-114) ; judgment in case T-465/13 (par. 104-105); T-541/13 (par. 132-133).

⁽¹⁶⁵⁾ The internal calculations do not have a date and may well have been carried out ex post. They were provided to the Commission long after the investigation had started and years after the measure was put into effect (i.e. Galicia in 2010, Navarra, Madrid, La Rioja, Valencia in 2011, Aragon in 2012).

⁽¹⁶⁶⁾ Murcia provides a cost comparison of 15 October 2008 which allegedly demonstrates that, compared to DTT, costs of deploying satellite exceed by 70 % for the municipality and 100 % for citizens. However, the cost comparison is not verifiable, as it provides no annexes with data and calculations. The comparison does not take into account that in a tender (as in the case of Cantabria), a satellite operator can offer discounts and it does not take into account that in the case of DTT technology, apart from installation, there arise significant O&D cost.

⁽¹⁶⁷⁾ See the reasoning of the General Court in case T-463/13 *Comunidad Autónoma de Galicia v. Commission*, par.128-129.

⁽¹⁶⁸⁾ Iteiazpi's submission of 13 June 2019 acknowledges Astra's cost studies. It claims that these studies have several defects without, however, explaining what defects there are and to what extent they would be decisive for Astra's overall conclusions. In its submission of 13 June 2019, Cellnex Telecom criticises in more detail several of Astra's cost assumptions (page 24-26). As the Commission does not rely in particular on any specific report they are not further discussed.

- (259) Another study was submitted by the Spanish authorities on 8 November 2012, thus more than 4 years after the Spanish government had launched aid for the DTT infrastructure ⁽¹⁶⁹⁾ ('2012 Spain Study'). The Commission notes that the 2012 Spain Study has been submitted in the context of another case ⁽¹⁷⁰⁾ and it was registered in the present case at the request of the Spanish authorities. The study compares the cost of adapting the television reception equipment in each dwelling, for the entire Spanish population, as a result of making the 'digital dividend' available. The 2012 Spain Study is not relevant in this case, since it does not relate to the extension of DTT coverage in Area II or to any of the costs financed by the aid under consideration. Moreover, the timing prevents that the government's decision in favour of DTT was based on the 2012 Spain Study. In addition, the 2012 Spain Study also has the deficiency that it does not provide the data source. Thus, the data used are not verifiable.
- (260) Further *ex-post* studies were submitted in 2019, i.e. about 10 years after the Spanish government took the measures to roll out DTT in Area II. The Cataluña Study assessed the different technologies envisaged for the provision of digital television in Area II. The study is based on data for the year 2008. The study came to the conclusion that the most viable technologies were terrestrial and satellite; and that between these two technologies the DTT technology was the least expensive for the citizens.
- (261) That study was carried out in 2017, well after the investigated measures were put into effect. The fact that it is posterior to the contested measures excludes such study from justifying the Spanish government's omission of a technologically neutral tender. In addition, the findings of the study are not robust ⁽¹⁷¹⁾.
- (262) On 13 June 2019, the beneficiary of DTT aid of the Autonomous Region of the Basque country, Itelazpi, provided two studies allegedly demonstrating that the cost of providing digital television signals via a DTT network is more cost efficient than providing such signals via a satellite network. The first study had been prepared for Itelazpi in 2015 while the second one is from 2019.
- (263) The 2015 Itelazpi Study estimates the incremental costs of providing coverage for national multiplexes via DTT and satellite options (excluding regional services). The study excludes common costs of both national and regional services, as Itelazpi's existing site infrastructure, management and other support services. It includes transmission equipment, consumer set-top boxes and communal antenna systems.
- (264) Also these studies have been prepared a long time after the actual decision had been made. Irrespective of the validity of their results, they therefore cannot be taken as a basis for the government's initial selection of a particular technology ⁽¹⁷²⁾. Moreover, the results of the cost studies are mainly driven by underlying assumptions which are not robust ⁽¹⁷³⁾. They also do not fulfil the quality requirements set out above in recital (254) ⁽¹⁷⁴⁾.

⁽¹⁶⁹⁾ Analysys Mason: Evaluación de los costes sobrevenidos de las diferentes tecnologías para poder recibir la cobertura actual del servicio de televisión tras la liberación del dividendo digital. 20 de septiembre de 2012.

⁽¹⁷⁰⁾ SA.32619 (2012/C (ex 2011/N)) notified by the Kingdom of Spain for the compensation of certain costs for the release of the digital dividend (OJ L 361, 31.12.2016, p. 1).

⁽¹⁷¹⁾ For instance, there is a non-rigorous analysis for the instalments costs in individual houses. The study assumes that all individual houses have almost all the equipment for the DTT access, in contrast with satellite. The consequence of this assumption is an increase in costs for satellite technology compared to DTT. Although it is mentioned in the study that the instalment equipment required for both technologies are similar, for DTT the study calculates only EUR 30 costs for a decoder, while for the satellite technology it takes into account a cost of EUR 588. Of this EUR 588, EUR 270 are included for the purchase of two satellite receivers. The difference of treatment of DTT and satellite also becomes apparent in the total cost calculations. Over EUR 71 million are accounted for the adaptation of individual houses for satellite, while zero are the adaptations costs for DTT technology.

⁽¹⁷²⁾ Indeed, Itelazpi did not claim that either the central government or the regional government of the Basque Country had based its decision on the data used in this study.

⁽¹⁷³⁾ For instance, the 2015 and 2019 Itelazpi Studies assume that the provision of satellite services would be done on the basis of renting existing satellite transponder capacity from the satellite platform and operate the satellite connection itself. They do not consider the possibility that, as in the Cantabria tender, a satellite operator may enter the market itself. The calculation is therefore biased against satellite technology as it excludes the possibility of any quantity discounts or possible price negotiations which would typically happen in a tender process. In the case of an open tender, as demonstrated in relation to the Cantabria tender, the satellite operator could base its bid on a completely different price calculation. More specifically, the cost calculations are biased. For instance, they use current satellite set-top boxes prices in the calculation of satellite costs which are significantly higher than the costs in some other EU countries (page 10 of the 2015 Itelazpi Study and page 45 of the 2019 Itelazpi Study). It thereby neglects the possibility of quantity discounts a satellite operator may benefit from if it operates in several Member States.

⁽¹⁷⁴⁾ The cost calculations cannot be verified. With regard to DTT cost, the study refers to Itelazpi internal data. Such data have not been annexed to the study. With regard to satellite cost, the study refers to Astra without, however, indicating where and in what context Astra has provided such data.

- (265) To conclude, the Spanish government did not carry out technologically neutral tenders. Its choice of the DTT technology was not based on an independent, robust *ex-ante* study which would justify the absence of an open tendering procedure.
- (266) Furthermore, the investigated measure cannot be considered appropriate.
- (267) The fact that some households in Area II receive free-to-air channels via satellite ⁽¹⁷⁵⁾ demonstrates that terrestrial technology is not always the most efficient and appropriate platform. It is also noted that satellite solution has been used in some other Member States ⁽¹⁷⁶⁾.
- (268) Moreover, the fact that Astra competed in and won the technologically neutral tender for extension of digital television coverage in Cantabria suggests, at least, that satellite platform can provide this service ⁽¹⁷⁷⁾.
- (269) The appropriateness of the measure is still being questioned. While the transition from analogue television to DTT in the 800 MHz band was completed in Spain on 3 April 2010, in 2011 it was decided to auction the 800MHz band frequencies. As a result, it was necessary to transfer broadcasts to other channels located below 790 MHz, no later than by 1 January 2014. As this created additional costs, on 5 November 2011 Spain notified two measures for households and broadcasters with a budget of EUR 600-800 million in Area I. In August 2016, the Commission found that these measures constituted incompatible aid ⁽¹⁷⁸⁾. Such cost would not have arisen if other platforms (IPTV, cable or satellite) had been chosen.
- (270) What is more, it had been pointed out that new mobile services (LTE, 4G) use a frequency that is close to the spectrum used by DTT and therefore these mobile services might interfere with DTT signals, as a result of which households need to buy costly filters to protect their DTT signal from this interference ⁽¹⁷⁹⁾. It cannot be ruled out that similar interferences are a more general problem undermining the future appropriateness of terrestrial broadcasting, especially in the context of greater and wider roll-out of NGA networks.
- (271) Spain put forward two other arguments in support of the view that satellite transmission would be more expensive than DTT. Firstly, in their agreements with certain providers, broadcasters have territorial restrictions. To ensure such conditional access would be more expensive for satellite technology. Secondly, satellite technology would not be equipped to broadcast a large number of regional channels. These allegations have not been substantiated and are contradicted by the fact that Astra's Cantabria contract contained a professional system of conditional access. Moreover, according to Astra's cost calculations, satellite technology would still be cheaper even if separate agreements had to be entered into with each of the Spanish regions. As regards regional broadcasting, Astra maintains that the Spanish government's number of 1 380 channels is hugely inflated ⁽¹⁸⁰⁾. Again, according to its own calculations, the satellite option would be cheaper even if regional and local channels were included.
- (272) There is also evidence that the regional governments were aware that a technological alternative existed to the extension of the terrestrial platform. The investigation revealed that early in the process some regions met Astra representatives. At these meetings, Astra presented to them a proposal for a satellite solution, which, however was not further explored by the regional governments.

⁽¹⁷⁵⁾ Hispasat, co-owned by Abertis and by the Spanish government, provides services in certain Autonomous Communities in parts of Area II. For example, in the Canary Islands 16 villages located in Area II receive free-to-air television via satellite. In Castilla y Leon the same concerns around 9 000 people. As Abertis is in charge of the control of the satellite receivers in all terrestrial sites and it does not allow other satellite operators to interconnect with such receivers, only Hispasat can offer such DTT transport services to feed terrestrial towers.

⁽¹⁷⁶⁾ E.g. France, United Kingdom, Italy, Slovakia.

⁽¹⁷⁷⁾ As further underlined by the judgement of the national court. See above, footnote 16.

⁽¹⁷⁸⁾ See Decision (EU) 2016/2395.

⁽¹⁷⁹⁾ Ofcom, 'Second consultation on coexistence of new services in the 800 MHz band with digital terrestrial television', <http://stakeholders.ofcom.org.uk/consultations/second-coexistence-consultation/>.

⁽¹⁸⁰⁾ According to Astra's estimations, the total number of local channels currently broadcasted is limited to 415 channels. The Commission's own calculations suggest that the number of channel stated by Spain is somewhat overstated.

- (273) As regards proportionality, when designing the intervention for Area II, it would have been appropriate for the central government to first carry out a cost comparison (or tender) at the national level. As the main cost of the satellite network arises from its satellite capacity, this platform operates with significant economies of scale ⁽¹⁸¹⁾. Astra's negotiations with the regional governments show that it offered significant price reductions if several regions jointly entered into a contract. Further price reductions could therefore have been expected if a national tender had been carried out. Instead, by carrying out decentralised and non-harmonised measures, sometimes even at the municipal level, a technology with such economies of scale was already put at a significant disadvantage. As a result, the total amount of State aid necessary to provide digital television services to households in Area II increased. While it is for Spain to decide on its administrative organisation, when providing central government funding, instead of pushing for the use of DTT, the Spanish government could at least have encouraged the Autonomous Communities to take into account in their tenders possible cost saving efficiencies available from particular platforms.
- (274) In conclusion, the Commission considers that the investigated measure did not respect the principle of technological neutrality. As explained above, the measure is not proportional and it is not an appropriate instrument for ensuring the coverage of free-to-air channels to the residents of Area II. The conclusion that the measure did not respect the principle of technological neutrality has been confirmed by the judgments in cases T-462/13 ⁽¹⁸²⁾, T-465/13 ⁽¹⁸³⁾, T-487/13 ⁽¹⁸⁴⁾, T-541/13 ⁽¹⁸⁵⁾ and T-461/13 ⁽¹⁸⁶⁾ which judgments were confirmed by the Court of Justice in joined cases C-66/16 P to C-69/16 P and in case C-81/16 P.

6.3.3.3. Operation and maintenance of network

- (275) Concerning the financing granted for operation and maintenance of the subsidised networks, following the completion of digitisation and until the period indicated in Section 2.3 (i.e. until the time when the measures under investigation have been modified), as this is ancillary to the deployment aid, it cannot be considered technologically neutral. It has been directed to the conservation of the centres that broadcast a signal via terrestrial platforms. Such aid is therefore also incompatible.

6.3.3.4. Avoiding unnecessary distortions

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

6.3.3.5. Conclusion regarding Article 107(3)(c) of TFEU

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

6.3.4. Article 106(2) TFEU

- (278) The Article 106(2) exception that can apply to State compensation for the costs of providing public service cannot be invoked neither in this case in general, nor in the case of the Basque Country in particular. The Commission considers that the national (or regional) authorities have to define the SGEI clearly and entrust it to a particular undertaking. As assessed in recitals (198) to (204), it is considered that the Spanish and Basque authorities did not clearly define the operation of a terrestrial platform as a public service. This conclusion has been confirmed by the

⁽¹⁸¹⁾ The satellite signal can be broadcast over the entire Spanish territory. However, in the case of the terrestrial platform, geographic extension requires the installation of additional repeaters and/or relay towers.

⁽¹⁸²⁾ See paragraphs 102-139.

⁽¹⁸³⁾ See paragraphs 94-117.

⁽¹⁸⁴⁾ See paragraphs 128-140.

⁽¹⁸⁵⁾ See paragraphs 119-129.

⁽¹⁸⁶⁾ See paragraphs 94-112.

General Court in cases T-462/13 ⁽¹⁸⁷⁾, T-465/13 ⁽¹⁸⁸⁾, T-487/13 ⁽¹⁸⁹⁾, T-541/13 ⁽¹⁹⁰⁾ and in T-461/13 ⁽¹⁹¹⁾. Moreover, the said judgments were confirmed by the Court of Justice in joined cases C-66/16 P to C-69/16 ⁽¹⁹²⁾ and in case C-81/16 ⁽¹⁹³⁾.

6.4. New unlawful aid

- (279) Abertis suggests that the deployment of terrestrial broadcasting network in Area II was financed almost entirely by the Spanish regions using public funds based on legislation dating back to 1982, i.e. prior to the date of accession of Spain to the European Economic Community in 1986. Therefore, according to Abertis, the scheme could be considered part of the ongoing public financing of the operation of local terrestrial networks and should therefore be considered as existing aid.
- (280) The financing of the extension of the terrestrial network by the regions indeed started in the early 1980s, but at that time there were no private broadcasters on the market. The extended infrastructure served therefore only the needs of the public broadcaster who, in any event, had the obligation to provide its signal to the majority of the population. Moreover, at that time the terrestrial television was the only platform for transmitting the television signal in Spain. As a result, the extension of the only available network did not create distortion of competition with other platforms.
- (281) Since then the legislation and the technology developed, leading to new broadcasting platforms and new market players, in particular private broadcasters. Since the beneficiary and the overall circumstances of the public financing have changed substantially, the investigated measure cannot be regarded as an alteration of purely formal or administrative nature. It is rather an alteration affecting the actual substance of the original scheme and therefore is to be considered as a new aid scheme ⁽¹⁹⁴⁾. In any case, the switch from analogue to digital television has become possible only due to recent technological advance and it is therefore a new phenomenon. The Spanish authorities should therefore have notified this new aid.

6.5. Conclusion

- (282) It is considered that the financing granted by Spain (including aid granted by the Spanish Autonomous Communities and the local corporations) to terrestrial network operators for the upgrade and digitisation of their network to provide free-to-air television channels in Area II constitutes aid within the meaning of Article 107(1) TFEU. The aid is not compatible with the common market, to the extent the criteria of technological neutrality was not complied with. Furthermore, the aid was not notified ⁽¹⁹⁵⁾ to the Commission as required by Article 108(3) TFEU and was unlawfully put into effect without Commission authorisation. It must therefore be recovered from the terrestrial network operators.
- (283) In addition, the Commission considers that the aid for operation and maintenance of the digitised network granted without tenders or following technologically non-neutral tenders, granted until the period indicated in Section 2.3 (i.e. until the time when the scheme under investigation has been modified) is also incompatible. Furthermore, this aid was not notified to the Commission as required by Article 108(3) TFEU and was unlawfully put into effect without Commission authorisation.
- (284) Any future State aid for maintenance and operation needs to be notified and has to respect the principle of technological neutrality.

⁽¹⁸⁷⁾ Paragraphs 55-79 of the judgment in case T-462/13.

⁽¹⁸⁸⁾ Paragraphs 55-80 of the judgment in case T-465/13.

⁽¹⁸⁹⁾ Paragraphs 89-119 of the judgment in case T-487/13.

⁽¹⁹⁰⁾ Paragraphs 65-95 of the judgment in case T-541/13.

⁽¹⁹¹⁾ Paragraphs 53-78 of the judgment in case T-461/13.

⁽¹⁹²⁾ See paragraphs 67-76 of judgment in joined cases C-66 to 69/16.

⁽¹⁹³⁾ See paragraphs 38-54 of the judgment in case C-81/16.

⁽¹⁹⁴⁾ Cases T-195/01 and T-207/01, Gibraltar, ECLI:EU:T:2002:111, paragraphs 109-111.

⁽¹⁹⁵⁾ With the exception of Murcia, that notified the measure after it had already been implemented.

7. RECOVERY

7.1. Need to eliminate aid

- (285) According to the Treaty on the Functioning of the European Union and the established case law of the Union Courts, the Commission is competent to decide that the Member State concerned is to alter or abolish aid when it has found that it is incompatible with the internal market ⁽¹⁹⁶⁾. The Court has also consistently held that the obligation on a Member State to abolish aid regarded by the Commission as being incompatible with the internal market is designed to re-establish the previously existing situation ⁽¹⁹⁷⁾.
- (286) In this context, the Court has established that this objective is attained once the recipient has repaid the amounts granted by way of unlawful aid, thus forfeiting the advantage which it had enjoyed over its competitors on the internal market, and the situation prior to the payment of the aid is restored ⁽¹⁹⁸⁾.
- (287) In line with the case law, Article 16(1) of Regulation (EU) 2015/1589 states that ‘where negative decisions are taken in cases of unlawful aid, the Commission shall decide that the Member State concerned shall take all necessary measures to recover the aid from the beneficiary.’
- (288) Thus, given that the financing of the digitisation of terrestrial platform and subsequent maintenance and operation were implemented in breach of Article 108(3) TFEU, and are to be considered as unlawful and incompatible aid, it should be recovered in order to re-establish the situation that existed on the internal market prior to their granting. Recovery should cover the time from the date when the aid was put at the disposal of the beneficiary until effective recovery. The amount to be recovered should bear interest until effective recovery, to be calculated in accordance with the provisions of Chapter V of Commission Regulation (EC) No 794/2004 ⁽¹⁹⁹⁾.

7.2. State aid recipients and quantification of the aid

- (289) Platform operators are direct beneficiaries where they directly receive funds for the upgrading and extension of their networks and for the operation and maintenance. Where the aid was paid to public undertakings which subsequently carried out tenders for extension of coverage, the selected platform operator is considered to be the indirect beneficiary. The unlawful and incompatible aid should be recovered from the platform operators whether they are direct or indirect beneficiaries.

7.2.1. Qualification of the tenders

- (290) A technologically neutral tender is a tender which fulfils two cumulative conditions: (i) the tender explicitly refers to extension of coverage of digital television (and not to digital terrestrial television) and (ii) the technical specifications admit technologies other than terrestrial. A tender cannot be considered technologically neutral if its technical specifications require the purchase or use of hardware for the transmission or transport of digital terrestrial television signal.
- (291) In the cases where the unlawful aid was granted following a technologically non-neutral tender, the Member State must qualify the tenders as falling into category of supply of hardware or extension of coverage, according to the conditions set out below.
- (292) Tenders for the extension of coverage entrust the winning company with the mission of providing (including building) an operative DTT network. To this end, necessary tasks include design and engineering of the network, transport of the signal, deployment of the network and supply of the necessary equipment. Tenders for extension of coverage also include the cases where a supply of equipment takes place and the network operator is entitled to operate, use or take advantage of that equipment, irrespective of the ownership of the equipment. Moreover, the tenders for extension of coverage usually include ancillary contracts related to the digitisation of transmission centres or the building of new transmission centres (such as for example housing adaptation works, supply of energy, ‘strict maintenance’, leasing contracts, safety and health studies.)

⁽¹⁹⁶⁾ Judgment of 12 July 1973, *Commission v Germany*, C-70/72, ECLI:EU:C:1973:87, paragraph 13.

⁽¹⁹⁷⁾ Judgment of 21 March 1990, *Belgium v Commission*, C-142/87, ECLI:EU:C:1990:125, paragraph 66.

⁽¹⁹⁸⁾ Judgment of 17 June 1999, *Belgium v Commission*, C-75/97, ECLI:EU:C:1999:311, paragraphs 64 and 65.

⁽¹⁹⁹⁾ 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 (OJ L 140, 30.4.2004, p. 1).

- (293) In tenders for the supply of hardware, the winning company is requested to provide equipment necessary for the upgrading of the network. To this end, necessary tasks include the supply, installation and activation of the equipment, as well as training of the staff. No recovery is required for these tenders of supply of equipment. In other words, mere hardware providers are under no obligation to pay back the aid. However, whenever a tender results in the digitisation of an existing terrestrial network, including as the case may be the provision of equipment which is operated, used or taken advantage of by a network operator, that aid shall be recovered from the network operator, since that tender should be qualified as a tender for extension of coverage.
- (294) Having classified these tenders for an extension of coverage, Spain has to recover the aid granted following a technologically non-neutral tender. Apart from the tenders, which the Commission itself considers technologically neutral, if Spain considers that other tenders fulfil the two conditions, it will provide the Commission the related tender documents.

Example

Amongst the tenders revised by the Commission, a tender organised by the Autonomous Community of Extremadura is provided as an example of technologically non-neutral tender for extension of coverage ⁽²⁰⁰⁾. Despite the title of the tender, which only refers to the supply of hardware, the object of the tender did in fact include the design and deployment of the network ⁽²⁰¹⁾. The specifications of the tender make it technologically not neutral ⁽²⁰²⁾, despite the insertion of a clause that is at first sight a clause of technological neutrality ⁽²⁰³⁾.

Another example of a technologically non-neutral tender for extension of coverage is the tender organised by the public undertaking 'Agencia de Informática y Comunicaciones de la Comunidad de Madrid' (AICCM) in the Autonomous Community of Madrid ⁽²⁰⁴⁾. In this case, both the title and the contents of the tender imply that it is a tender for extension ⁽²⁰⁵⁾ only directed to the terrestrial platform ⁽²⁰⁶⁾.

⁽²⁰⁰⁾ Supply, installation and start-up of the necessary equipment to provide the service of transport and broadcasting of DTT, for 6 national multiplexes (state global network, single frequency network) and an autonomous community multiplex, in locations in Extremadura under Phase II of the National Plan for Transition to DTT. Case SU-28/2009.

⁽²⁰¹⁾ Supply, installation and start-up of the necessary equipment to provide the service of transport and broadcasting of DTT for 6 national multiplexes (Red Global Estatal (state global network) Red de Frecuencia Unica (single frequency network)) and an autonomous community multiplex (hereinafter RGE, SFN and AUT) in locations under Phase II of the National Plan for Transition to DTT. It includes the following activities: (a) design of the technical broadcasting and distribution networks that will support the service; (b) planning of supply of the necessary equipment for the proposed network; (c) roll-out of the network, including the installation and start-up of the necessary equipment and infrastructure. This supply will be made on a turnkey basis.

⁽²⁰²⁾ Page 2, paragraph 5 - 'The main objective to be pursued is to extend and guarantee a percentage as close as possible to 100 % of coverage of Digital Terrestrial Television (DTT) to all citizens in the districts coming under Extremadura Phase II. No limitations are established as regards the network architecture or the technology/ies to be used provided the minimum requirements established are met.

Page 10 paragraph 7 - Bidders should include in their bids the architecture of the proposed distribution network, which must be consistent with the broadcasting network. For each multiplex, the best solution for this service is sought, always subject to criteria of economic and technological optimisation.

⁽²⁰³⁾ Other tenders identified by the Commission as falling into the same category are tender 2009/000127 organised by the Junta de Andalucía and tender S-004/10/10 organised by Junta de Extremadura.

⁽²⁰⁴⁾ Technical specifications for the contract for 'Drafting of projects, supply, installation and start-up of the necessary infrastructure and communications for extension of the Digital Terrestrial Television (DTT) signal coverage in the Madrid autonomous community.' To be concluded by the ordinary simplified procedure on a multi-criteria basis. File reference (*número de expediente*) ECON/000572/2008.

⁽²⁰⁵⁾ Page 3, paragraph 3 - '(...) supply, installation and start-up of the necessary infrastructure and communications for extension of the Digital Terrestrial Television (DTT) signal coverage in the Madrid autonomous community, including all the work relating to performance of the related technical projects, measurement, maintenance, operation and management of the installations making up the service for the infrastructure deployed, and work necessary to disseminate institutional information to promote Digital Terrestrial Television.'

Page 9, paragraph 8 - 'The broadcasting network proposed to provide digital terrestrial television coverage, based on the timetable for switch-off and the budget allocation available, will be specified.'

⁽²⁰⁶⁾ Page 4, paragraphs 2 and 8 - 'The main objective to be pursued through the execution of the work detailed below is to extend and guarantee a percentage as close as possible to 100 % of coverage of Digital Terrestrial Television (DTT) to all citizens in the autonomous community of Madrid. To facilitate DTT reception in the coverage areas, it is advisable for the broadcasting centres to have sites compatible with the orientation of the existing satellite dishes in buildings, so that citizens do not have to install new dishes or reorientate the existing dishes. Bidders should therefore state how they will address this issue in the proposed solution.' Page 12, paragraph 4 - 'The micro broadcaster/micro transmitter will be designed in accordance with the following specifications'...

(295) The tenders are to be qualified not only according to their title, but above all according to their content, as the title alone does not make it possible to clearly define their scope.

(296) The aid granted after non-neutral tenders for extension of coverage have been held will then be subject to recovery.

7.2.2. State aid recipients and recovery

(297) Below are the different categories of aid beneficiaries. On the basis of the information received from Spain, the Autonomous Communities and the approximate aid categories are listed in tables. Since Spain has not provided full information on the aid beneficiaries, Spain must classify the beneficiaries in the different categories below and provide the Commission with the relevant supporting evidence. As already underlined in recital (233), the regime as such is discriminatory.

(298) In addition, the vast majority of tenders for extension reviewed by the Commission were qualified as not respecting the principle of technological neutrality. Nevertheless, the Commission has also shown that it cannot be ruled out that in exceptional individual cases the tender was technologically neutral.

(299) Spain must therefore indicate and provide sufficient evidence on particular tenders that were technologically neutral, based on conditions specified in recital (294) above.

(300) Where Autonomous Communities have organised non-neutral tenders for extension of coverage, as in the case of Extremadura referred to in the above example, the winners of such tenders are direct beneficiaries of the unlawful aid subject to recovery. The sum to be recovered equals the full amount received by the winners of the tenders for the extension, and for all ancillary services (such as housing, adaptation works, supply of energy, etc.), if any. For avoidance of doubt, where the same infrastructure or services serve or have served both the transmission of private channels in Area II and public channels in Area I, the Spanish Authorities should not exclude recovery because of the double use of the infrastructure or service but should identify the *pro quota* expense related to Area II and recover the aid concerned. From the information received from Spain, the Commission has found that (at least) the Autonomous Communities of Andalucía, Extremadura, Murcia, La Rioja and the Valencian Community have carried out non-neutral tenders for the extension of coverage.

Undertakings subject to recovery	Recovery	Method by which the aid is provided	Autonomous Community concerned (at least)
Direct beneficiaries Winner(s) of the technologically non-neutral tender(s) for extension of coverage organised by the autonomous communities	Full amount received under the technologically not neutral tender(s) for extension of coverage	Transfer of funds to the beneficiary selected in the tender(s)	— Andalucía — Extremadura — Murcia — La Rioja — Valencian Community

(301) In the cases where unlawful aid was granted for the upgrade of the terrestrial network to town councils acting as network operators, the town councils are direct beneficiaries of the aid. The sum to be recovered equals the full amount received by the town councils from the central and regional authorities for the extension of coverage of their network. On the basis of the information received from Spain, the Commission has found that this applies at least to some of the municipalities located in the Autonomous Communities of Andalucía, Canarias and Murcia (not exhaustive list). If the town council entered into a contract for the extension of coverage, including the supply of the necessary hardware, with a company that is a network operator, then the beneficiary of the aid is the network operator and the sum to be recovered is the full amount of the public funds received by the network operator.

Undertakings subject to recovery	Recovery	Method by which the aid is provided	Autonomous Community concerned (at least)
Direct beneficiaries Town councils acting as network operators	Full amount received from the authorities for extension of coverage	Transfer of funds to the beneficiary	— Andalucía — Canarias — Murcia

Example

- (302) In Murcia, using the money received from the region and MITyC, the town councils organised almost all of the identified 143 tenders. To the extent that the tenders have not been assigned to network operators and are not *de minimis*, they would fall under this category.
- (303) In the cases of Autonomous Communities where a public undertaking acting as a network operator carried out the extension of coverage of the network, such an undertaking is considered to be direct beneficiary and is subject to recovery. The Commission has identified Aragón telecom, Gestión de Infraestructuras Públicas de Telecomunicaciones del Principado de Asturias, S.A., Multimedia de les Illes Balears S.A., Instituto Tecnológico de Canarias, Sociedad Regional de Cantabria I+D+I (IDICAN), Fundación Centro Tecnológico en Logística Integral de Cantabria (CTL), Promoción de Viviendas, Infraestructuras y Logística, S.A in Castilla y León (Provilsa), Redes de Telecomunicación Galegas Retegal, S.A. (Retegal), Obras Publicas y Telecomunicaciones De Navarra, S.A. (Opnatel), Itelazpi S.A., Centre de Telecomunicacions i Tecnologies de la Informació (CTTI) in Cataluña and Agencia de Informática y Comunicaciones de la Comunidad de Madrid (AICCM) to be companies falling into this category. The sum to be recovered is the full amount of funds received from the authorities for the extension.
- (304) In these cases, however, it is not ruled out that the public undertakings carried out part of the extension themselves, and partly contracted the extension to a network operator through a tender. In the latter case the unlawful aid was actually transferred to the companies who won the tenders, and they are therefore effective, although indirect, beneficiaries of the aid. Thus, to avoid double recovery, the unlawful aid is to be recovered from the effective beneficiaries, i.e. (a) from the public undertaking for the amount received for the extension minus funds transferred to network operators following technologically non-neutral tenders for extension of coverage and (b) from the network operators for the amounts contracted following a technologically not neutral tender for extension of coverage organised by the public undertaking concerned.

Undertakings subject to recovery	Recovery	Method by which the aid is provided	Autonomous Community concerned/ public undertaking concerned/ approximate amount received by the public undertaking for the extension of coverage
Direct beneficiaries Public undertaking	Full amount received from the authorities for extension of coverage (minus funds transferred to network operators following technologically non-neutral tenders for extension of coverage, if applicable)	Time of transfer of funds from the authorities	— Aragón (Aragón Telecom, EUR 9 million) — Asturias (Gestión de Infraestructuras Públicas de Telecomunicaciones del Principado de Asturias SA, EUR 14 million) — Balearic Islands (Multimedia de Illes Balears SA, EUR 4 million) — Canary Islands (Instituto Tecnológico de Canarias, EUR 3,7 million)
AND if applicable			

Indirect beneficiaries Winner(s) of the technologically non-neutral tenders for extension of coverage organised by the public undertaking	Full amount received under the technologically not neutral tenders for extension of coverage	Transfer of funds to the beneficiary selected in the tender	— Cantabria (Idican; CTL, EUR 3 million) — Castilla y León (Provilsa, EUR 44 million) — Cataluña (CTTI, EUR 52 million) — Galicia ⁽²⁰⁷⁾ (Retegal, EUR 17 million) — Madrid (AICCM, EUR 3,6 million) — Navarra (Opnatel, EUR 7 million) — Basque Country (Itelazpi, EUR 10 million)
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Example

- (305) In the case of Madrid, where a tender organised by the public undertaking (AICCM) was provided by the Commission as an example of a technologically non-neutral tender for extension of coverage (see recital (294), the amount of EUR 3 622 744 granted to the contracted company Retevisión S.A. must be recovered in its entirety from Retevisión, as winner of the non-neutral tender, and subtracted from the amount to be recovered from AICCM, the public undertaking which is the direct beneficiary ⁽²⁰⁸⁾.
- (306) Regarding the aid for the maintenance and operation of DTT networks the Commission considers that the operators of these networks are the beneficiaries of maintenance and operation aid. The aid has therefore to be recovered from those network operators.
- (307) In the cases where the individual beneficiaries received funding not exceeding thresholds specified in the Regulation (EC) No 1998/2006 ⁽²⁰⁹⁾, such funding is not considered State aid if all the conditions set by this Regulation are fulfilled, and is not subject to recovery.
- (308) Recovery should be put into effect from the time when the advantage occurred to the beneficiaries, i.e. when the aid was put at the disposal of the beneficiary and should bear recovery interest until effective recovery.
- (309) It has to be noted that, as mentioned in recital (9), after the adoption of the 2013 Decision, the Commission gave time to Spain until 31 October 2014 to organise technologically neutral tenders, on the condition that all Autonomous Communities organised such tenders within the deadline. However, this condition has not been fulfilled and therefore the above transitional period has no relevance for the purposes of recovery: the unlawful aid granted between 19 June 2013 and 31 October 2014 has to be recovered by Spain.

⁽²⁰⁷⁾ In Galicia, although the municipalities were registered as network operators, Retegal was the undertaking that acquired the equipment and carried out the extension of coverage of the network. Therefore Retegal should be considered as the beneficiary of the aid.

⁽²⁰⁸⁾ Other tenders identified by the Commission as falling into the same category are, amongst others, two tenders organised by Provilsa in March 2009 won by Retevisión SA and Telvent Energía S.A.; tender SE/CTTI/06/08 organised by CTTI and won by Abertis S.A., tender Contratación del suministro de la fase II y III para la extensión de la TDT en Aragón organised in June 2009 by Aragón Telecom and won by Abertis.

⁽²⁰⁹⁾ Regulation (EC) No 1998/2006 has been replaced by Regulation (EU) No 1407/2013 on the application of Articles 107 and 108 of the Treaty on the Functioning of the European Union to *de minimis* aid ('2013 de minimis Regulation'). The 2013 de minimis Regulation shall apply to aid granted before its entry into force if the aid fulfils all the conditions laid down in that Regulation. According to Article 7(3) of the 2013 de minimis Regulation, any individual de minimis aid granted between 1 January 2007 and 30 June 2014 and which fulfils the conditions of Regulation (EC) No 1998/2006 shall be deemed not to meet all the criteria in Article 107(1) of the Treaty and shall therefore be exempt from the notification requirement in Article 108(3) of the Treaty.

8. CONCLUSION

- (310) The Commission finds that the Kingdom of Spain has unlawfully implemented the aid for the operators of the terrestrial television platform for the extension of coverage of digital terrestrial television in remote and less urbanised areas of Spain in breach of Article 108(3) TFEU. The aid, including the (on-going) aid for operation and maintenance, is to be recovered from the platform operators which are the direct or indirect beneficiaries. This includes local corporations where they act as a platform operator.

HAS ADOPTED THIS DECISION:

Article 1

The State aid granted to the operators of the terrestrial television platform for the deployment, maintenance and operation of the digital terrestrial television network in Area II, unlawfully put into effect by Spain in breach of Article 108(3) of the Treaty on the Functioning of the European Union is incompatible with the internal market, except for the aid which was granted in compliance with the criterion of technological neutrality.

Article 2

Individual aid granted under the scheme referred to in Article 1 does not constitute aid if, at the time it is granted, it fulfils the conditions laid down by the regulation adopted pursuant to Article 2 of Council Regulation (EU) No 994/98 ⁽²¹⁰⁾ which is applicable at the time the aid is granted.

Article 3

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

Article 4

1. Recovery of the aid granted under the scheme referred to in Article 1 shall be immediate and effective.
2. Spain shall ensure that this Decision is implemented within 4 months following the date of notification of this Decision.

Article 5

1. Within 2 months following notification of this Decision, Spain shall submit the following information:
 - (a) the list of beneficiaries that have received aid under the scheme referred to in Article 1 and the total amount of aid received by each of them under the scheme, broken down into the following categories: (i) winners of the technologically non-neutral tenders for extension of coverage organised by the autonomous communities and town councils, (ii) town councils acting as network operators; (iii) public undertakings acting as network operators; (iv) winners of the technologically non-neutral tenders for extension of coverage organised by the public undertaking;

⁽²¹⁰⁾ Council Regulation (EC) No 994/98 of 7 May 1998 on the application of Articles 92 and 93 of the Treaty establishing the European Community to certain categories of horizontal State aid, OJ L 142, 14.5.1998, p. 1. This Regulation has been replaced by Council Regulation (EU) 2015/1588 of 13 July 2015 on the application of Articles 107 and 108 of the Treaty on the Functioning of the European Union to certain categories of horizontal State aid (OJ L 248, 24.9.2015, p. 1).

- (b) the total amount (principal and recovery interests) to be recovered from each beneficiary;
- (c) a detailed description of the measures already taken and planned to comply with this Decision;
- (d) documents demonstrating that the beneficiaries have been ordered to repay the aid.

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

Article 6

This Decision is addressed to the Kingdom of Spain.

Done at Brussels, 10 June 2021.

For the Commission
Margrethe VESTAGER
Member of the Commission

Public spending in Area II on DTT deployment, by Spanish regions (Autonomous Communities, except Castile-La Mancha)

BUDGET (in EUR)								
Region (Autonomous Community)	Ministry of Industry, Trade and Tourism Direct subsidies ⁽¹⁾	Ministry of Industry, Tourism and Trade Preferential loans ⁽¹⁾	Regional funds ⁽¹⁾	Local funds ⁽¹⁾	Recurring cost (2009-2011) ⁽¹⁾	Total funds	Total amount of tenders organised ⁽²⁾	Total public expenditure ⁽³⁾
ANDALUSIA	4 668 500,00	1 220 690,00	8 712 873,00	491 203,00	2 250 479,00	15 093 266,00	3 678 242,17	15 093 266,00
ARAGON	5 900 000,00	8 700 000,00	5 400 000,00	-	5 000 000,00	20 000 000,00	16 281 754,30	20 000 000,00
ASTURIAS	-	13 430 787,00	353 535,00	-	2 129 698,00	13 784 322,00	13 784 322,00	13 784 322,00
BALEARICS	-	-	913 034,00	-	763 034,00	913 034,00	3 294 429,02	3 294 429,02
CANARY ISLANDS	2 905 766,26	1 130 595,85	1 792 402,57	-	-	5 828 764,68	5 284 331,67	5 828 764,68
CANTABRIA	3 229 500,00	3 851 949,80	622 449,00	-	860 850,00	7 703 898,80	6 355 613,68	7 703 898,80
CASTILE AND LEON	13 830 850,00	20 316 585,73	10 324 906,71	-	6 716 000,00	37 756 342,44	37 756 342,44	37 756 342,44
CATALONIA	13 838 368,00	26 024 223,00	NO DATA	NO DATA	-	39 862 591,00	52 316 794,34	52 316 794,34
CEUTA	54 000,00	91 786,17	10 000,00	-	NO DATA	155 786,17	50 000,00	155 786,17
EXTREMADURA	2 238 250,00	7 800 000,00	18 718,00	-	-	10 056 968,00	9 549 379,74	10 056 968,00
GALICIA	6 083 300,00	5 000 000,00	6 003 336,00	-	873 000,00	17 086 636,00	12 644 112,98	17 086 636,00
MADRID	554 200,00	-	3 068 444,00	-	-	3 622 644,00	3 622 744,00	3 622 644,00
MELILLA	254 000,00	NO DATA	2 000,00	NO DATA	NO DATA	256 000,00	-	256 000,00
MURCIA	135 750,00	-	2 478 700,00	40 188,00	212 371,00	2 654 638,00	2 788 407,32	2 788 407,32
NAVARRRE	316 850,00	-	6 675 028,00	-	4 256 508,39	6 991 878,00	6 991 878,00	6 991 878,00
RIOJA	1 229 350,00	3 000 000,00	3 737 425,00	-	944 000,00	7 966 775,00	5 766 775,00	7 966 775,00

BASQUE COUNTRY	2 487 800,00	-	9 802 703,00	2 425 000,00	1 508 308,00	14 715 503,00	179 000,00	14 715 503,00
COMMUNITY OF VALENCIA	1 822 250,00	13 384 248,94	818 280,30	586 234,17	679 500,00	16 611 013,41	15 412 499,00	16 611 013,41

⁽¹⁾ Amounts reported by the Spanish central and regional authorities during the investigation. For the period 2012-2018, only a few regional authorities reported information on recurring costs: Galicia reported that no costs were incurred; Andalusia reported EUR 6 422 670,89; Asturias EUR 3 943 818,48; Catalonia EUR 22 879 421,63; Murcia EUR 521 968,10 and La Rioja EUR 5 223 287,03 respectively.

⁽²⁾ Amount of funds transferred to the winners of the tenders notified to the Commission.

⁽³⁾ Only the data from four regions (in green) allow the amount of State aid to be defined precisely since (i) the declared amount of funds granted by the authorities and (ii) the total of the funds transferred following the tenders communicated to the Commission are the same. Given the difficulty of obtaining precise information from other regions, the amount of State aid granted in a particular region is assumed to be the **higher** of the two declared amounts: (i) the total of the funds granted by the authorities or (ii) the total of the funds transferred following the tenders communicated to the Commission.

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