

Official Journal of the European Union

L 361



English edition

Legislation

Volume 59

31 December 2016

Contents

II *Non-legislative acts*

DECISIONS

- ★ **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** (notified under document C(2016) 4886)⁽¹⁾ 1

⁽¹⁾ Text with EEA relevance

EN

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.

The titles of all other acts are printed in bold type and preceded by an asterisk.

This issue closes the L series for 2016.

II

(Non-legislative acts)

DECISIONS

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

*(notified under document C(2016) 4886)***(Only the Spanish text is authentic)****(Text with EEA relevance)**

THE EUROPEAN COMMISSION,

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

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

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

Whereas:

1. PROCEDURE

- (1) On 5 July 2011 the Spanish authorities notified to the Commission two State aid measures. Measure I concerned subsidies for dwellers of collective buildings who, in order to ensure the continuity of the reception of the Free-to-air (FTA) ⁽²⁾ channels so far broadcasted on the 790-862 MHz ('800 MHz') band, needed to upgrade the existing Digital Terrestrial Television (DTT) infrastructure or switch to another platform of their choice. Measure II foresaw compensation to public and private broadcasters for additional costs incurred due to the obligation to broadcast simultaneously during the process of the release of the Digital Dividend ⁽³⁾ ('simulcast').
- (2) Following written exchanges with the Spanish authorities on the notified measures, the Commission adopted on 25 April 2012 a decision ⁽⁴⁾ not to raise objections for Measure I and to initiate the formal investigation procedure laid down in Article 108(2) of the Treaty on the Functioning of the European Union ('Treaty') in relation to Measure II both as regards public and private broadcasters. The Commission decision to initiate the procedure ('opening decision') was published on 19 July 2012 in the *Official Journal of the European Union* ⁽⁵⁾. The Commission invited the interested parties to submit their comments on the measure in question.

⁽¹⁾ Commission Decision 2012/C-213/03 of 25 April 2012 (OJ C 213, 19.7.2012, p. 41).

⁽²⁾ Free-to-air (FTA) describes television and radio services broadcast in clear (unencrypted) form, allowing any person with the appropriate receiving equipment to receive the signal and view or listen to the content without requiring a subscription, other ongoing cost or one-off fee (e.g. Pay-per-view). In the traditional sense, this is carried on terrestrial radio signals and received with an antenna.

⁽³⁾ Corresponds to the 800 MHz band.

⁽⁴⁾ C(2012)2533 final.

⁽⁵⁾ See footnote 1.

- (3) The Spanish authorities provided their comments on the opening decision by letters dated 29 June 2012, 12 December 2012 and 6 June 2013. There were furthermore two teleconferences organised with the Spanish authorities: the first one on 24 June 2013 and the second one on 3 June 2014. In addition, three meetings took place with them: the first in June 2014, the second in December 2014 and the third in March 2015.
- (4) The Commission also received comments from Abertis Telecom ⁽⁶⁾ ('Abertis') by letter dated 7 August 2012, from Sociedad Gestora de Televisión NET TV ('NET TV') by letter dated 14 August 2012, from Broadcast Networks Europe ('BNE') by letter dated 17 August 2012, from the European Broadcasting Union ('EBU') by letters dated 20 August 2012 and 21 June 2013, and finally from SES Astra ('Astra') by letters dated 19 August 2012 and 30 October 2012. In the course of the investigation, several teleconferences and meetings were held: between the Commission and the EBU in June and December 2013 and in June and December 2014, and between the Commission and Astra in June, July and December 2013 and April and November 2014. The Spanish authorities provided observations on the comments of Astra on 12 December 2012.
- (5) On 3 September 2014 the Spanish authorities withdrew the notification concerning the compensation of simulcast costs incurred by public broadcasters (but not private broadcasters). They have informed the Commission that Royal Decree 677/2014 on the granting of direct grants to public broadcasters aimed to cover the mentioned compensation on the basis of the concept of Services of General Economic Interest ('SGEI'). The Decree was published in the Spanish Official Gazette ⁽⁷⁾ on 6 August 2014 ⁽⁸⁾.
- (6) The Spanish authorities did not submit any further modifications to the notification on Measure II.
- (7) Considering that the part of Measure II that concerned public broadcasters was withdrawn by the Spanish authorities in September 2014, the formal investigation procedure as regards that part of Measure II has become without object. Therefore, the Commission has decided to close the formal investigation procedure on that part of Measure II. This decision covers exclusively the notified compensation of simulcast costs to private broadcasters ('Measure').

2. DESCRIPTION OF THE MEASURE

2.1. Context

- (8) Reaping the benefits of the Digital Dividend by using wireless broadband to ensure coverage of all areas, including remote and rural regions, is an important objective of the Digital Agenda for Europe ⁽⁹⁾ and thus part of the Europe 2020 Strategy ⁽¹⁰⁾. To build their wireless networks, mobile operators require scarce radio frequencies to transmit their signals. If in Member States these frequencies are occupied by terrestrial TV networks, terrestrial broadcasters have to be moved either to another transmission platform (broadband, cable or satellite) or to another (unused) frequency in the available spectrum suited for this purpose. In 2009, the Commission recommended that Member States ensure that all terrestrial television broadcasting services cease using analogue transmission technology and support regulatory efforts aimed at making the valuable 800 MHz frequency band available for electronic communications services. This process is called the release of the Digital Dividend ⁽¹¹⁾ and concerns only the terrestrial television broadcasting services.
- (9) The release of the Digital Dividend generates transition costs for terrestrial broadcasters which include costs for simultaneous broadcasting of the signal on the old and the new frequency bands ⁽¹²⁾.

⁽⁶⁾ Abertis Telecom SA, currently Cellnex Telecom, SA.

⁽⁷⁾ Boletín Oficial del Estado.

⁽⁸⁾ Real Decreto 677/2014, de 1 de agosto, por el que se regula la concesión directa de subvenciones a prestadores del servicio público de comunicación audiovisual televisiva de ámbito estatal e autonómico, destinadas a compensar los costes derivados de la emisión simultánea y transitoria de sus canales de televisión durante el proceso de liberación de la banda de frecuencias 790-862 MHz.

⁽⁹⁾ Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions. COM(2010)245 final/2.

⁽¹⁰⁾ Europe 2020 — A strategy for smart, sustainable and inclusive growth. COM(2010)2020.

⁽¹¹⁾ Commission Recommendation 2009/848/EC of 28 October 2009 facilitating the release of the digital dividend in the European Union (OJ L 308, 24.11.2009, p. 24). The practical modalities for implementing this process are left to the Member States. The Commission's role is to ensure that it runs smoothly and in compliance with EU State aid law, in particular with the principle of technological neutrality.

⁽¹²⁾ Several Member States have granted State aid in the context of digitisation of broadcasting ('digital switchover'). In particular, aid was granted to support socially disadvantaged households for the purchasing of new decoders. Where the principles of technological neutrality, necessity and proportionality were respected, such measures could have been approved.

2.2. European policy on the release of the Digital Dividend

- (10) In the past years the broadcasting sector has undergone major changes as a result of the introduction of digital technologies. In comparison with analogue television, digital transmission of television provides for better use of the scarce frequency spectrum, allowing for more TV channels. The 2003 Commission Communication on the transition from analogue to digital broadcasting ⁽¹³⁾ underlined the benefits of switching over to digital broadcasting and initiated the debate on EU policy orientations on issues such as amount of spectrum to be released and its future use.
- (11) The switch from analogue to digital broadcasting resulted in the release of a part of the radio frequency ('RF') spectrum that until then was used for TV broadcasting. This was possible thanks to greater efficiency of the digital technology compared to the analogue one. The freed part of the spectrum resulting from this improvement has been called 'Digital Dividend'.
- (12) International agreements, such as those reached at the International Telecommunication Union (ITU) Regional Radiocommunication Conference (RRC-06) in June 2006 and the ITU World Radiocommunication Conference (WRC-07) in November 2007, concluded on the co-primary allocation of the 800 MHz band to mobile services in addition to broadcasting and fixed services ⁽¹⁴⁾. However, on the basis of previous allocation of these frequencies to broadcasting services during the early planning of the switch from the analogue to the digital technology some Member States, such as Spain, did not consider the possibility of reusing the freed 800 MHz spectrum for services other than terrestrial broadcasting.
- (13) Towards the end of 2007, in the light of the worldwide increase in RF spectrum demand and of the more efficient technologies, the Commission studied the possibilities and enormous potential, both commercial and in terms of innovation and growth, which the Digital Dividend could offer if it was used to provide advanced electronic communication services. The Commission concluded that reaping the full benefits of the Digital Dividend would require Member States' simultaneous assignment of the relevant spectrum for electronic communication services in the shortest possible timeframe ⁽¹⁵⁾.
- (14) The 2009 Commission Communication on transforming the Digital Dividend into social benefits and economic growth ⁽¹⁶⁾ recommended that the Member States should cease using the 800 MHz band for high-power broadcasting services and fully implement the EU technical harmonisation decision by a certain date agreed at the EU level.
- (15) Finally, Decision No 243/2012/EU of the European Parliament and of the Council ⁽¹⁷⁾ establishing a multiannual radio spectrum policy programme required that all Member States assign the 800 MHz band for electronic communications by 1 January 2013 ⁽¹⁸⁾. The decision authorised the Commission to grant specific derogations until 31 December 2015 in the event of exceptional national or local circumstances or cross-border frequency coordination problems ⁽¹⁹⁾.

⁽¹³⁾ Communication from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions on the transition from analogue to digital broadcasting (from digital 'switchover' to analogue 'switch-off'). COM(2003)541 final.

⁽¹⁴⁾ The co-primary allocation to mobile services in addition to broadcasting and fixed services was due as from 2015, or even before that date subject, where necessary, to technical coordination with other countries.

⁽¹⁵⁾ Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions — Reaping the full benefits of the digital dividend in Europe: a common approach to the use of the spectrum released by the digital switchover. COM(2007)700 final.

⁽¹⁶⁾ 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 final.

⁽¹⁷⁾ Decision No 243/2012/EU of the European Parliament and of the Council of 14 March 2012 establishing a multiannual radio spectrum policy programme ('RSPP') (OJ L 81, 21.3.2012, p. 7).

⁽¹⁸⁾ Commission Decision 2010/267/EU of 6 May 2010 on harmonised technical conditions of use in the 790-862 MHz frequency band for terrestrial systems capable of providing electronic communications services in the European Union (OJ L 117, 11.5.2010, p. 95).

⁽¹⁹⁾ Granting of specific derogations is foreseen in Article 6(4) of the decision. In the notification of the measures Spain relied on this exception and argued that a special derogation would apply to it due to the difficulties involved with liberating the spectrum: in particular, more than 1 300 planned TV channels (at national, regional and local level), complex Spanish orography requiring challenging spectrum planning, need of international coordination with neighbouring European and North African countries, etc. According to the statement of 13 March 2012 by the Minister for Industry, Energy and Tourism, Spain considered releasing the Digital Dividend one year earlier than foreseen in the notification, thus by the end of 2013. In reality, the Digital Dividend was released in Spain only on 31 March 2015.

2.3. Evolution of the Digital Dividend in Spain

- (16) Spain completed its transition to DTT on 3 April 2010, which terminated analogue broadcasts. Given that the legal basis for the switchover from analogue to digital terrestrial broadcasting — the DTT National Technical Plan ('NTP') ⁽²⁰⁾ — dated back to 2005, at that time no plans had been made to use the spectrum (allocated by ITU for terrestrial TV) for other purposes. This fact had two consequences:
- The entire spectrum that was released after the analogue switch-off was exclusively reserved in 2005 for terrestrial television services, in order to increase the number of available channels.
 - The same year, the Spanish Government decided to use the band for the rollout of the first DTT transmitters to facilitate the introduction of the new digital terrestrial technology, without requiring prior clearing of the spectrum.
- (17) The NTP and subsequent regulatory measures divided the territory of Spain into three areas:
- (a) Area I — covers 96 % of the Spanish population, where broadcasters bore the switchover costs themselves. As regards this area, the switchover was compulsory due to the extensive coverage obligation contained in the broadcasters' licences and no State aid was provided in return. It was up to the broadcasters and/or the platform operators to invest in the digitisation of the network.
 - (b) Area II — covers around 2,5 % of the Spanish population in less urbanised and remote areas where broadcasters had no commercial interest in providing their upgraded service. Due to the opposition of broadcasters to participate financially in the upgrading of the transmission centres necessary to transmit their signals, the state funded the extension of coverage ⁽²¹⁾.
 - (c) Area III — covers the remaining part of the Spanish population and represents an area where due to topography it is not possible to provide the TV service via terrestrial platform and where it is done by satellite.
- (18) The digital switchover also imposed some costs on the viewers. Individual households located in Areas I and II had to pay for decoder devices to adapt their TV-sets to DTT. Residents of collective buildings had to pay in addition for adapting their reception infrastructure to the digital signal. The residents of Area III had in turn to acquire the satellite reception equipment, in some cases partially or totally financed by the regional or local authorities ⁽²²⁾.
- (19) In November 2007, more than two years after the approval of the NTP, the ITU decided to allocate the 800 MHz band to electronic communication services on a co-primary basis. On that date, the DTT coverage through the 800 MHz band had reached in Spain already between 80 % and 90 % of the population.
- (20) Spain then decided in May 2009 that it would designate the 800 MHz band for electronic communications. The announcement had regulatory backing through the Act on Sustainable Economy ⁽²³⁾. The Act provides that the 800 MHz frequency band shall be mainly used for the provision of advanced electronic communication services, in line with the harmonised uses agreed in the EU ⁽²⁴⁾. Article 51 of the Act on Sustainable Economy establishes the right of both public service and private broadcasters to financial compensation of all costs relating to the reallocation of spectrum usage needed for the liberation of the 800 MHz frequency band, most particularly the simulcast costs ⁽²⁵⁾. This provision of national law is thus the legal basis of the Measure.

⁽²⁰⁾ *Real Decreto 944/2005, de 29 de julio, por el que se aprueba el Plan técnico nacional de la televisión digital terrestre.*

⁽²¹⁾ The measures implemented by the Spanish authorities to extend the coverage of DTT in Area II were assessed in two Commission decisions: Commission Decision of 19 June 2013 on State aid implemented by the Kingdom of Spain for the deployment of digital terrestrial television in remote and less urbanised areas with the exception of Castilla-La Mancha (SA.28599) and Commission Decision of 1 October 2014 on State aid implemented by the authorities of Castilla-La Mancha for the deployment of digital terrestrial television in remote and less urbanised areas in Castilla-La Mancha (SA.27408).

⁽²²⁾ See for example Commission decision of 8 February 2012 in the case '*Captación de televisión digital en Cantabria*'.

⁽²³⁾ *Ley 2/2011, de 4 de marzo, de Economía Sostenible.*

⁽²⁴⁾ See footnotes 17 and 18.

⁽²⁵⁾ Article 51 of the Act on Sustainable Economy states that: 'The costs of reallocation of spectrum usage needed for the liberation of the 790-862 MHz frequency band shall be borne by the administration....'.

- (21) Given that the 800 MHz band was used by DTT broadcasters at the time of its repurposing for electronic communication services ⁽²⁶⁾, it was necessary to transfer those broadcasters from the channels which were used at the time to other channels located on the 694-790 MHz ('700 MHz') band. This process was set out as per Royal Decree 365/2010 ⁽²⁷⁾, which regulated the assignment of DTT multiplexes after the analogue switch-off.
- (22) Royal Decree 365/2010 entails the provision of five multiplexes ⁽²⁸⁾ to substitute those used in the 800 MHz band. This migration raised the following difficulties:
- Securing a transition period during which digital TV signals had to be broadcasted simultaneously on the 800 MHz and 700 MHz bands, as it was not possible to instantly migrate to the new multiplexes.
 - The new multiplexes correspond to RF channels previously not in use for DTT broadcasting. Due to this, in the majority of the multi-household buildings the TV reception infrastructure had to be adapted to the new situation.
- (23) Royal Decree 365/2010 established that broadcasting channels would have to be transferred to other frequencies below 790 MHz by the end of 2014. It also imposed upon broadcasters the obligation to simulcast on both frequency bands until the definitive assignment of multiplexes in the 700 MHz band.
- (24) In 2011 Spain decided to auction the 800 MHz band to telecommunication operators ⁽²⁹⁾. The telecommunication operators who were assigned the new frequencies paid for them by June 2012 and committed to achieve coverage (via any technologies or on another frequency band) allowing access at speeds of 30 Mbps or higher, at least to 90 % of population units of less than 5 000 inhabitants by the year 2020.
- (25) The Spanish authorities estimated that the Measure would last between 6 to 24 months depending on the territory within Area I but should come to an end no later than 31 December 2014 ⁽³⁰⁾. The total budget for the Measure was estimated at EUR 100-200 million ⁽³¹⁾. The compensation was not to exceed 100 % of the costs the broadcasters had to bear as a result of the simulcast obligation.

2.4. Market description

- (26) The Measure concerns the broadcasting industry, where there are two main groups of players, each one active at a different level of the broadcasting services product chain: (i) broadcasters of TV channels and (ii) platform operators.
- (27) 'Broadcasters' are the editors of TV channels. They purchase or produce in-house TV contents, bundle them in channels and provide them to the public through various platforms (i.e. satellite, DTT, cable, IPTV ⁽³²⁾). In addition to broadcasting via DTT, broadcasters may broadcast their pay-per-view or FTA channels through other platforms, for example Movistar+ on satellite.
- (28) Broadcasting of national, regional and local FTA channels, provided by the public broadcasters (RTVE at the national level) free of charge to the viewers, has been qualified as a public service by the legislator ⁽³³⁾. Conversely, providing of the FTA channels by the private broadcasters has not been qualified as a public service ⁽³⁴⁾. The private broadcasters were granted licences for broadcasting in the assigned frequencies, which expire at the earliest in 2025.

⁽²⁶⁾ In Spain the frequencies on the 800 MHz band were in fact used by broadcasters until 31 March 2015.

⁽²⁷⁾ *Real Decreto 365/2010, de 26 de marzo, por el que se regula la asignación de los múltiples de la Televisión Digital Terrestre tras el cese de las emisiones de televisión terrestre con tecnología analógica.*

⁽²⁸⁾ Multiplex is a signal generated by the aggregation of others signals to improve their transport and broadcast. At that time, there were in total eight multiplexes with national coverage (two for the public TV and six for the private TV).

⁽²⁹⁾ *Real Decreto 458/2011, de 1 de abril, sobre actuaciones en materia de espectro radioeléctrico para el desarrollo de la sociedad digital.*

⁽³⁰⁾ 31 December 2014 was the final date set by Royal Decree 365/2010 to free the 800 MHz band for telecommunication operators. Due to delays in the adaptation of the households for the change of frequencies, the Digital Dividend was liberated in Spain only on 31 March 2015.

⁽³¹⁾ Original estimation covering both public and private broadcasters.

⁽³²⁾ Internet Protocol Television.

⁽³³⁾ See the opening decision for details.

⁽³⁴⁾ The licence from the State includes the assignment of a frequency for terrestrial broadcasting. The national private broadcasters are Atresmedia (Antena 3+La Sexta), Mediaset España (Telecinco+Cuatro), Veo TV and Net TV. Apart from national private broadcasters, there are also several regional and local private broadcasters.

- (29) In order to ensure that the population can effectively benefit from the television services, Spanish law obliges both public and private broadcasters to ensure a minimum coverage via terrestrial network. These coverage obligations are attached to the public service mission entrusted to the public broadcasters and to the licences held by the private broadcasters. The public broadcasters have to cover at least 98 % of the Spanish population, while private broadcasters cover at least 96 % of the population.
- (30) 'Platform operators' are private or publicly controlled entities operating the technological infrastructure necessary to transport and broadcast to the public the channels produced by the broadcasters. Historically, the only platform available was the analogue terrestrial platform. As the technology advanced, more platforms have become available on the market, and currently there are four broadcasting platforms in Spain:
- (i) terrestrial, which until the release of the Digital Dividend distributed on the 800 MHz band around 30 national and a number of regional and local FTA channels as well as two pay-TV channels;
 - (ii) satellite, distributing on another radio frequency band than DTT ⁽³⁵⁾, where various offers are available (including FTA and pay-TV channels);
 - (iii) cable, distributing for subscription of various TV channels (including majority of the FTA channels available via DTT);
 - (iv) IPTV, which may be offered over FTTH and XDSL broadband connection of at least 8 Mbps to transmit the TV signal. It broadcasts for subscription TV channels, including majority of the FTA channels available via DTT.
- (31) DTT is the dominant platform in Spain and it is the main distributor of the FTA television. The terrestrial network consists of transporting infrastructure and broadcasting centres (which, in turn, consist of towers, transmitters etc.). Broadcasting centres are owned by national and regional platform operators and by public authorities (city-halls or regional governments). Due to technical restraints, terrestrial TV does not reach the entire population of Spain (e.g. some sparsely populated or mountainous locations do not receive the signal — Area III). However, thanks to the coverage obligations legally imposed on broadcasters (Area I) and to public funds deployed for the extension of the DTT network in remote and less urbanised areas (Area II), the DTT coverage reaches about 98,85 % of the population ⁽³⁶⁾. The remaining 1,15 % of the Spanish population is served by satellite. According to Astra, satellite is the only platform technically able to distribute the signal to the entire population of Spain ⁽³⁷⁾.
- (32) As for other platforms, according to the available data of the Spanish telecoms regulator ⁽³⁸⁾ ('CMT'), the already deployed network of cable TV could reach just above 20 % of the population and the already deployed broadband network (over FTTH and XDSL) could offer IPTV services to 16,5 % of the population ⁽³⁹⁾.
- (33) The service of transport and distribution of the DTT signal is provided by platform operators ⁽⁴⁰⁾, the main one being Abertis ⁽⁴¹⁾.

⁽³⁵⁾ While DTT broadcasters are using the Ultra High Frequency ('UHF') band, satellite operators are transmitting TV signals on the Super High Frequency ('SHF') band.

⁽³⁶⁾ 93,5 % of the population use the terrestrial platform for watching television. The remaining 5,35 % prefers to access television services via other platforms.

⁽³⁷⁾ The satellite platform consists of a terrestrial station, satellite and, at the level of the receiver, a satellite dish and a decoder. To expand satellite coverage in the region, the latter ground equipment needs to be installed on the customer's premises.

⁽³⁸⁾ *Comisión del Mercado de Telecomunicaciones*.

⁽³⁹⁾ In 2010 there were 855 584 households that contracted IPTV, and 1 586 573 were subscribed to cable. The total population of Spain was 47 021 031. For more details, see the yearly report of CMT at <http://informeannual.cmt.es/>

⁽⁴⁰⁾ Other DTT platform operators are, at a regional level, Itelazpi, Nasertic and TelecomCLM.

⁽⁴¹⁾ As noted in recital 25 of the opening decision, the Spanish competition authority (Comisión Nacional de los Mercados y la Competencia, CNMC) found that Abertis had abused its dominant position on the markets of provision of the DTT distribution and related retail transport services (CNMC Expediente S/0207/09 Transporte de Televisión). Abertis is obliged to allow access to its network of broadcasting of DTT signals, because it is an asset that cannot be replicated and one that is essential for the provision of the service of transport and broadcasting of the DTT signal. Abertis also provides these DTT transport and broadcasting services to broadcasters where it has a dominant position. After a detailed analysis of the costs and incomes of Abertis, the CNMC found that, at the prices at which the company provides the service of access to its centers, and given the terms that it has agreed with customers in the retail market, competitors who are as efficient as Abertis have no margin for survival in the markets of transport and distribution of the DTT signal.

- (34) Around 10,8 % of the Spanish population ⁽⁴²⁾ are subscribed to pay-TV. Most of the FTA channels available on DTT are also broadcasted (for free or as part of a paid package) on alternative platforms. The second predominant platform for pay-TV is satellite ⁽⁴³⁾, for which there are two main platform operators — Hispasat and Astra.

2.5. Legal framework for private (commercial) broadcasting in Spain

- (35) The rights and obligations of private broadcasters which broadcast via terrestrial platform are set out in a series of legal acts: concessions granted to them for the provision of television services, their respective renewals and subsequent licences. Those private broadcasters which wished to use the scarce frequency first received concessions, following a tender process launched by the authorities. In order to participate in the competition for concessions, they had to present offers fulfilling the conditions specified in the invitation to tender ⁽⁴⁴⁾. The broadcasters were then granted the right to broadcast their channels on the frequencies via the terrestrial network, whose capacity is limited and has to be regulated by the State. The concessions were renewed and in 2010 transformed into licences that will expire, at the earliest, in 2025 ⁽⁴⁵⁾. The State is bound by the duration of the licences, and can only revoke them in case of non-respect of the obligations by the broadcasters ⁽⁴⁶⁾. The broadcasters can give back the licences if they are not able to fulfil their obligations.
- (36) The private broadcasters are obliged to provide the service via terrestrial network to a minimum percentage of population, set in the NTP at 96 %. Royal Decree 365/2010 stipulated that in the context of the release of the Digital Dividend the broadcasters are obliged to provide the simulcast on both frequencies, until the new multiplexes are definitively assigned ⁽⁴⁷⁾.
- (37) The initial concessions granted to private broadcasters for the provision of television services, their respective renewals and subsequent licences did not contain any reference to the right to compensation for the cost of migration or reallocation of spectrum usage. Moreover, the NTP provided that the authorities could establish special conditions for broadcasting, not foreseen in the concessions, in the case of necessity to change the mode of broadcasting resulting from the evolution of the market or technological development ⁽⁴⁸⁾. The NTP did not establish the right to compensation for private broadcasters in such a case.

3. FORMAL INVESTIGATION PROCEDURE

3.1. Grounds for initiating the procedure

- (38) In the opening decision, the Commission noted, firstly, that the Measure seemed to meet all the criteria of Article 107(1) of the Treaty and could, therefore, be regarded as State aid within the meaning of that provision.
- (39) According to the opening decision, the direct beneficiaries of the Measure are both public and private DTT broadcasters.

⁽⁴²⁾ 'Otro indicador de esta tendencia fue el aumento en más de un millón del número de abonados a la televisión de pago, que por primera vez superó los 5 millones de clientes.' CNMC Informe Económico Sectorial de las Telecomunicaciones y el Audiovisual 2015, p. 3.

⁽⁴³⁾ Distribution of viewers amongst pay-TV platforms in 2014 was as follows: IPTV — 38,8 %, satellite — 30,2 %, cable — 23,7 % and DTT — 4,5 %. Source: http://data.cnmc.es/datagraph/jsp/inf_anual.jsp

⁽⁴⁴⁾ Resolución de 25 de enero de 1989, de la Secretaría general de Comunicaciones, por la que se publica el acuerdo por el que se aprueba el pliego de bases del concurso para la adjudicación del servicio público de televisión, en gestión indirecta, y se dispone la convocatoria del correspondiente concurso público; Título III, derechos y obligaciones de los concesionarios.

⁽⁴⁵⁾ Ley 7/2010, de 31 de marzo, General de la Comunicación Audiovisual, provided the legal basis for the transformation of the enabling title for the provision of audiovisual services. The valid concessions were transformed into licences by means of individual agreements with the broadcasters concerned — see agreement of 11 July 2010 with Antena 3, Telecinco, La Sexta and Veo and agreement of 28 May 2010 with Sogecable.

⁽⁴⁶⁾ For example if the broadcasters cease emission for 15 days or more.

⁽⁴⁷⁾ The Spanish authorities informed the Commission on 11 February 2016 that the obligation of private broadcasters to simulcast was abolished by Royal Decree 805/2014 of 19 September 2014 approving the new National Technical Plan for DTT. This regulatory measure provides that the private broadcasters can consider simulcasting during the release of the Digital Dividend but are not obliged to do so. This modification was, however, not notified to the Commission.

⁽⁴⁸⁾ Disposición adicional decimocuarta. Condiciones especiales de emisión: 'En función de la evolución del mercado, de las posibilidades tecnológicas y del desarrollo de la televisión digital terrestre, el Gobierno podrá decidir el establecimiento de condiciones especiales de emisión en línea con las prácticas de los principales países europeos, no previstas en los actuales contratos concesionales.'

- (40) The opening decision furthermore considered DTT platform operators, in particular Abertis, to be potential indirect beneficiaries of the Measure.
- (41) The Commission expressed doubts whether the Measure would justify the compensation covering a cost that would normally have to be included in the budget of the broadcasters and thus questioned its compatibility. It took a preliminary view that the Measure would privilege certain undertakings and distort competition on the internal market. The Commission concluded that 'on the basis of existing information, such support may not be compatible unless adequate measures are taken in particular to address the distortive effect on competition between platform operators'.
- (42) The Commission therefore requested Spain to submit its comments concerning the Measure and to provide all information useful for its assessment.
- (43) Additional factual details on the grounds for initiating the formal investigation procedure are contained in the opening decision, which should be considered an integral part of this Decision.

3.2. Comments from the Spanish authorities

Comments of the Spanish authorities on the opening decision

- (44) According to the Spanish authorities, the Measure does not constitute State aid, given that the beneficiaries would not receive any advantage when moving to the lower frequency band. From this perspective, the Measure constitutes compensation within the meaning of Article 106(2) of the Spanish Constitution, according to which the State is obliged to indemnify for any damage caused by an administrative action. In any event, if the Measure is found to constitute State aid, it would be compatible with the internal market pursuant to Article 107(2)(b) of the Treaty — as the release of the Digital Dividend is, according to the Spanish authorities, an exceptional occurrence.
- (45) Alternatively, the Measure could be declared compatible with the internal market pursuant to Article 107(3)(c) of the Treaty, since according to the Spanish authorities the Measure: (i) supports the European policy on transforming the Digital Dividend into social benefits and economic growth; (ii) remedies a market failure; (iii) is the appropriate instrument, since it will apply only to those broadcasters who are compelled to incur unwanted costs due to the imposition of simultaneous broadcasting and the compensation will be strictly limited to the amount of these exceptional expenses; (iv) has an incentive effect since if there was no aid, broadcasters may be reluctant to take part in the reallocation of spectrum and to ensure simulcast; (v) is proportionate, as it only covers the additional costs incurred by broadcasters due to the reallocation of channels; (vi) is technologically neutral, since other platforms are not affected by the change of channels necessary to liberate the Digital Dividend; and (vii) would not distort competition, since if the broadcasters had to assume the costs without compensation, this would frustrate their expectations of growth and would benefit participants in other markets.
- (46) In the opening decision, the Spanish authorities were invited to submit comments concerning the Measure and to provide, inter alia, the following information: (i) documents (such as correspondence with broadcasters, declarations) demonstrating their inability to finance the simulcast period from their own resources; (ii) proof (such as tender, *ex ante* analysis of the costs/benefits, public consultation on the subject, etc.) which would justify the choice of terrestrial platform (reallocation of the terrestrial broadcasting to lower terrestrial frequency band) to solve the frequency scarcity problem; (iii) a summary of rights and obligations broadcasters have under the current licences, concessions, conditions under which these licences/concession can be modified and the consequences of such modifications (for the State as well as for the broadcasters); (iv) a detailed overview of the costs linked to the adjustment of infrastructure each broadcaster is financing from its own resources; (v) an explanation on the impact of the timing of the release of the Digital Dividend; and (vi) more information about the eligibility of the broadcasters of the pay-TV channels currently broadcasted via DTT.
- (47) The Spanish authorities replied that most of this information was already provided prior to the launch of the formal investigation procedure. The Spanish authorities made specific comments on the question regarding the

required evidence that would justify the choice of the terrestrial platform to solve the frequency scarcity problem by arguing that this issue goes beyond the assessment of neutrality of the Measure and that they are not obliged to justify intended compensatory measures clearly compatible with Union law. The Spanish authorities maintained the same line of arguments in relation to the private broadcasters' licences in the sense that it is the State's right to impose non-technologically neutral licences to ensure the prescribed 96 % coverage obligation in Area I. They also stated that even if these licences do not foresee the right of private broadcasters to compensation for any costs related to the release of the Digital Dividend, these licences also do not exclude such compensation. Moreover, they have explained that all private broadcasters providing audiovisual services in the public interest without a licence are free to choose from the available platform technologies. This right also applies to private broadcasters holding a licence but only beyond the 96 % coverage obligation and in a complementary manner.

- (48) As regards technological neutrality more specifically, the Spanish authorities argued that their notification respected this principle in the sense that the private broadcasters were free to choose whatever platform to ensure the simulcast obligation (satellite, cable, ADSL, optic fibre or DTT). They have specified, however, that the Measure applies exclusively to the period of simulcast and not beyond. Once the simulcast (transitory) period is over, the obligation of these broadcasters to ensure the geographical coverage via DTT, as foreseen in the valid licences, remains in place. In addition, the Spanish authorities explained that the obligation of private broadcasters to ensure the 96 % coverage obligation in Area I via DTT does not mean that exactly this percentage of Spanish population would actually receive the programmes of the terrestrial broadcasters via DTT reception systems. This is because the area of coverage of alternative technologies can overlap with that of DTT ⁽⁴⁹⁾.
- (49) The Spanish authorities concluded that the Measure does not grant to private broadcasters operating on the DTT platform any economic advantage as it limits itself to the reimbursement of the exceptional costs of simulcast that are directly triggered by their obligation to liberate the 800 MHz band.

Reactions of the Spanish authorities on the comments of Astra

- (50) As mentioned in recital 4, the Spanish authorities submitted observations on the comments of Astra presented during the formal investigation. They have emphasised that Astra does not provide additional information beyond the arguments contained in the opening decision.
- (51) The Spanish authorities have highlighted that Astra's criticism goes clearly beyond the scope of the notified Measure that is limited to a temporary compensation to private broadcasters for the costs incurred for simultaneous broadcasting. In the opinion of the Spanish authorities, Astra aims at modifications to the Spanish regulatory framework for the transmission of TV channels in Area I that is not subject of the notification. The Spanish authorities also explained that in practice the Measure applies not only to private broadcasters using the DTT technology but to all broadcasters of FTA channels that exist in Spain. This is because there are no exclusive broadcasters on alternative platforms, and in particular on satellite. Satellite is used for the broadcasting of pay-TV channels (FTA foreign channels and international versions of certain channels), grouped in Canal+ ⁽⁵⁰⁾. Against this background, the Spanish authorities consider that in any case the broadcasters of FTA DTT channels and the platform Canal+ based on satellite are not part of the same market.
- (52) The Spanish authorities then reacted in detail on Astra's opinion that the Measure has no backing in Union law, with reference to Decision No 243/2012/EU and Directive 2002/20/EC of the European Parliament and of the Council ⁽⁵¹⁾ (the 'Authorisation Directive').
- (53) As regards their arguments with reference to Decision No 243/2012/EU, they pointed out that according to its Article 6(5) 'Member States may, where appropriate and in conformity with Union law, ensure that the direct cost of migration or reallocation of spectrum usage is adequately compensated in accordance with national law'. The Spanish authorities read this provision in conjunction with recital 18 which states that 'Member States should be allowed, where appropriate, to introduce compensatory measures relating to migration costs.'

⁽⁴⁹⁾ For example, according to the Spanish authorities, in Spain the users of the satellite pay-TV platform receive normally the DTT channels via the satellite platform for practical reasons.

⁽⁵⁰⁾ Only pay-TV platform that includes also the majority of DTT FTA programmes.

⁽⁵¹⁾ Directive 2002/20/EC of the European Parliament and of the Council of 7 March 2002 on the authorisation of electronic communications networks and services (OJ L 108, 24.4.2002, p. 21).

- (54) As for the arguments concerning the Authorisation Directive, the Spanish authorities argued with Astra's reading of Article 14. According to this provision, 'Member States shall ensure that the rights, conditions and procedures concerning general authorisations and rights of use or rights to install facilities may only be amended in objectively justified cases and in a proportionate manner'. This article also prescribes that 'Member States shall not restrict or withdraw rights to install facilities before expiry of the period for which they were granted except where justified and where applicable in conformity with relevant national provisions regarding compensation for withdrawal of rights'.
- (55) In this context, the Spanish authorities argued that contrary to what is stated in the opening decision, the broadcasters' licences do not exclude the compensation for the simulcast costs because these were not foreseeable costs at the moment of the granting of licences ⁽⁵²⁾. As for the compatibility of the Measure with Union law, the Spanish authorities disagree with the examples of precedents of the case law of EU Courts quoted in recitals 65-67 of the opening decision in relation to the Measure, because: (1) the compensation foreseen by the Measure is a direct consequence of the imposed simulcast obligation; (2) the latter obligation is compatible with Decision No 243/2012/EU that, as explained, foresees the right to compensation; (3) the legal framework for the compensation was adopted as a consequence of the imposition of the simulcast obligation; (4) the costs generated by this obligation correspond exactly with the scope of the compensation.
- (56) With a view of the planned liberation of the 700 MHz band by 2020, the Spanish authorities are of the opinion that a negative Commission decision on the Measure can create an obstacle for the smooth running of that EU initiative.

Compensation of simulcast costs incurred by public broadcasters

- (57) In September 2014, following the adoption of Royal Decree 677/2014, the Spanish authorities withdrew the notification concerning the compensation of simulcast costs incurred by public broadcasters. The Royal Decree identifies nine public broadcasters. One covers the entire territory of Spain (RTVE) and eight have a regional character. For all these public broadcasters, with a clearly defined public service remit, the simulcast was declared mandatory in order to allow the adaptation of the reception systems of households without the loss of service. The total amount of public funding was lower than the one originally foreseen in the 2011 notification and the duration of simulcast was shortened as well ⁽⁵³⁾. The Spanish authorities informed the Commission that the Royal Decree complies with Commission Decision 2012/21/EU ⁽⁵⁴⁾ and therefore does not need to be notified.
- (58) As regards the simulcast compensation for private broadcasters ⁽⁵⁵⁾, the Spanish authorities have not withdrawn this part of the notification under the Measure.

3.3. Comments from interested parties

- (59) All interested parties identified in recital 4, with the exception of Astra, have presented arguments against the preliminary conclusions of the Commission on the Measure.

3.3.1. Comments from Astra

- (60) The privately owned satellite operator Astra considers that the Measure clearly constitutes State aid, is in breach of the principle of technological neutrality and would strengthen the dominant DTT platform operator Abertis. It considers Abertis as an indirect beneficiary of the Measure.
- (61) As for the impact of the Measure, Astra believes that notwithstanding its limitation to the simulcast compensation, in practice it would cover all expenses of broadcasters related to the release of the Digital Dividend.

⁽⁵²⁾ In 1989.

⁽⁵³⁾ The aid amounted to approximately EUR 10 million and the duration of simulcast was between 3 and 6 months.

⁽⁵⁴⁾ 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).

⁽⁵⁵⁾ Contrary to public broadcasters, private broadcasters do not have a public service remit and their geographical coverage obligation is also narrower.

- (62) Astra agrees with the Commission that the obligation of private broadcasters to simulcast results from national law (regulatory measure) and as such does not trigger the right to compensation. According to Astra, the NTP provides that public authorities can establish special conditions for broadcasting not foreseen in the licences as a consequence of market regulation or technical development without the right to compensation.
- (63) Astra also points to the fact that the DTT broadcasters were aware of the release of the Digital Dividend and the related transfer of frequencies before the adoption of Royal Decree 365/2010. The Measure would exclusively benefit these broadcasters, to the detriment of broadcasters using other platforms.
- (64) Concerning the legal assessment of the Measure, Astra disagrees that the Measure constitutes an exceptional occurrence that would justify the application of Article 107(2)(b) of the Treaty. It also disagrees that the Measure fulfils the requirements of Article 107(3)(c) of the Treaty, as it would distort competition between platform operators due to its non-technologically neutral character. In this respect, Astra highlights that the direct beneficiaries of the Measure have clear incentive to simulcast without compensation in order to keep their audience and publicity revenues; not taking into account their additional advantages from the release of the Digital Dividend (e.g. which offers the possibility to view TV through mobile telephony on the freed 800 MHz band). Astra also argues that the Spanish authorities have failed to produce an independent study justifying the Measure as appropriate, necessary and proportionate aid.
- (65) In conclusion, Astra favours the opening of the Spanish TV market in Area I and allowing competition on the merits between alternative technological platforms.

3.3.2. *Comments from Abertis*

- (66) Similarly to the Spanish authorities, Abertis also does not qualify the Measure as State aid due to the lack of selective economic advantage and distortion of competition. If the Commission would decide to qualify the Measure as State aid, it should declare it compatible under Article 107(3) of the Treaty.
- (67) Abertis informs that it would neither benefit nor loose from the choice of technology used by broadcasters during simulcast. It considers that the simulcast compensation could actually increase competitiveness between the platforms to the benefit of the broadcasting market and consumers.
- (68) Abertis defends the effectiveness of the DTT technology but does not agree that the use of this particular technology during the simulcast will determine the platform to be used by the broadcasters in the future. On the other hand, Abertis admits that the DTT signal will continue to be transmitted exclusively via the DTT technology under the conditions enshrined in the broadcasters' licences.
- (69) In conclusion, Abertis does not agree with the preliminary conclusions of the Commission on the Measure.

3.3.3. *Comments from the EBU*

- (70) Also the EBU does not consider the Measure to constitute State aid. If the Commission would decide to qualify the Measure as State aid, it should declare it compatible under Article 107(3) of the Treaty as it respects the principle of technologically neutrality.
- (71) The EBU requests the Commission to limit the assessment to the factual objective and effects of the Measure, i.e. ensuring the simulcast during the DTT migration process in the context of release of the Digital Dividend. According to the EBU, the Digital Dividend is not a consequence of a regulatory act by the relevant public authority for the broadcasting sector: it does not relate to the way the DTT service has to be provided, it does not derive from the market or technological development and it does not necessarily affect the whole DTT industry.
- (72) The EBU does not agree that the Measure could confer any real advantage to DTT broadcasters or platform operators and requests the Commission to take into account the significant investment that the Spanish broadcasters have already made in adopting their services to the DTT technology and infrastructure during the switch from analogue to digital TV.

- (73) According to the EBU, private DTT broadcasters have legitimate expectations to the simulcast compensation as such compensation was provided for in national law and valid licences.
- (74) The EBU believes that no real alternative exists to the DTT technology enabling compliance with the prescribed coverage obligation of broadcasters. The DTT platform represents a separate market from other platforms, as their use and operation are not substitutable.
- (75) In conclusion, the EBU does not agree with the preliminary conclusions of the Commission on the Measure.

3.3.4. *Comments from BNE*

- (76) BNE presents the opinion that the Measure does not constitute State aid. If the Commission would decide to qualify the Measure as State aid, it should declare it compatible under Article 107(3) of the Treaty and in any case technologically neutral.
- (77) According to BNE, the costs of release of the Digital Dividend for broadcasters do not only include the additional costs of broadcasting during simulcast (to be paid to the respective DTT platform operator) but also costs resulting from the required change of transmission frequencies in the terrestrial network. The DTT platform operators will neither benefit nor be harmed by the Measure, as it would not change the obligation of broadcasters to broadcast on the DTT platform with retained coverage on lower frequencies.
- (78) BNE calls on the Commission to limit its assessment to State aid issues and not question the treatment of the DTT technology in comparison with the satellite technology. BNE believes that the broadcasters would lose the incentive to leave the 800 MHz band freed by the Digital Dividend within the foreseen timetable in the absence of the Measure. This would hence lead to a market failure.
- (79) In conclusion, BNE does not agree with the preliminary conclusions of the Commission on the Measure.

3.3.5. *Comments from NET TV*

- (80) NET TV requests the Commission not to qualify the Measure as State aid and if yes, then declare it compatible with the internal market.
- (81) NET TV doubts that the broadcasters would be obliged to continue fulfilling their public interest obligation in order to keep their licences in the absence of the Measure. This is because they would not receive any advantage from moving to another frequency. Therefore the responsibility of the administration to compensate the broadcasters for the simulcast costs is justified.
- (82) The simulcast costs are 'impossible' costs for NET TV, considering its low market share and SME status. They claim this could lead to the exit of NET TV from the relevant market.
- (83) In conclusion, NET TV does not agree with the preliminary conclusions of the Commission on the Measure.

4. ASSESSMENT OF THE MEASURE

4.1. **Existence of aid**

- (84) The Commission has examined whether the Measure in question can be qualified as State aid within the meaning of Article 107(1) of the Treaty, which provides that 'any aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods, shall, in so far as it affects trade between Member States, be incompatible with the internal market'.
- (85) It follows that in order to be qualified as State aid, the following cumulative conditions have to be met: (1) the measure has to be granted out of State resources, (2) it has to confer an economic advantage to undertakings, (3) the advantage has to be selective and distort or threaten to distort competition, (4) the measure has to affect trade between Member States.

4.1.1. State resources and imputability to the State

- (86) As already established in recital 39 of the opening decision, the contested Measure is to be funded directly from the Spanish budget through the revenues obtained from the auctioning of the freed frequencies to the telecommunication operators. The Spanish authorities did not contest the finding of the opening decision that the Measure should be funded directly from budgetary resources.
- (87) The Measure, as described in Section 2.3, is decided by the State and financed directly from the central State budget. The Commission therefore concludes that it is imputable to the State and involves the use of State resources.

4.1.2. Economic advantage

- (88) In its previous decisions, the Commission has found that commercial broadcasting ⁽⁵⁶⁾ as well as the operation of television transmission networks ⁽⁵⁷⁾ constitute an economic activity.
- (89) The Spanish authorities and all interested parties apart from Astra consider that private broadcasters do not receive any advantage when moving to the lower frequency band and that they are merely compensated for the extra costs they have to bear following a regulatory change.
- (90) Article 51 of the Act on Sustainable Economy establishes the right of both public service and private broadcasters to financial compensation of all costs relating to the reallocation of spectrum usage needed for the liberation of the 800 MHz frequency band, most particularly the simulcast costs. The Spanish authorities argued, during the formal investigation, that this legislative provision is based on Article 106(2) of the Spanish Constitution ⁽⁵⁸⁾, according to which compensation should be characterised as patrimonial liability of the public administration which would result in a general obligation to indemnify for any damage caused by an administrative action, even when it is not possible to determine responsibilities.
- (91) The Commission notes in this regard that the initial concessions granted to private broadcasters for the provision of television services, their respective renewals and subsequent licences did not contain any reference to the right to compensation for the cost of migration or reallocation of spectrum usage. Moreover, the NTP provided that the authorities could establish special conditions for broadcasting, not foreseen in the concessions, in the case of necessity to change the mode of broadcasting resulting from the evolution of the market or technological development in line with the practices of other EU Member States. The Commission also notes that the NTP did not establish the right to compensation for private broadcasters in such a case.
- (92) Furthermore, Article 10 of the Resolution of 25 January 1989 ⁽⁵⁹⁾ on which the concessions and subsequent licences of the private broadcasters with public service obligation are based, contains an obligation for the broadcasters to provide the broadcasting service with continuity and also to bear all the costs derived from the original concessions and the current licences.
- (93) As the Commission explained in recitals 65-70 of the opening decision, the case-law of Union Courts confirms that the costs stemming from the implementation of a legal obligation are normally borne by the undertakings

⁽⁵⁶⁾ Commission Decision N632/2009 — *Nichtkommerzieller Rundfunk-Fonds Austria*, paras. 22 ff; Commission Decision 97/606/EC of 26 June 1997 pursuant to Article 90(3) of the EC Treaty on the exclusive right to broadcast television advertising in Flanders (OJ L 244, 6.9.1997, p. 18), para. 5.

⁽⁵⁷⁾ Commission Decisions N622/2003 *Digitalisierungsfonds Austria*, para. 16; C25/2004 *DVB-T Berlin Brandenburg*, para. 62; C34/2006 *DVB-T North-Rhine Westphalia*, para. 83; C52/2005 *Mediaset*, para. 96.

⁽⁵⁸⁾ Article 106(2) of the Spanish Constitution provides that 'The individuals, under the terms established in Law, shall be entitled for indemnification for any damage suffered to any of their assets and rights, except in the cases of force majeure, as long as such damage is a consequence of the activities of the public service.'

⁽⁵⁹⁾ *Resolución de 25 de enero de 1989, de la Secretaría general de Comunicaciones, por la que se publica el acuerdo por el que se aprueba el pliego de bases del concurso para la adjudicación del servicio público de televisión, en gestión indirecta, y se dispone la convocatoria del correspondiente concurso público, Título III, derechos y obligaciones de los concesionarios.*

affected and thus any compensatory measure in this regard is considered to be State aid ⁽⁶⁰⁾. By way of example, in its *Fleuren Compost BV v Commission* judgment ⁽⁶¹⁾ the ECJ held that 'it is irrelevant that the objective of that scheme is to assist undertakings to meet their legal obligations as regards protection of the environment. According to settled case-law, Article 107(1) of the Treaty does not distinguish between measures of State intervention by reference to their causes or aims but defines them in relation to their effects. Leaving aside the question whether the Environmental Guidelines apply in the present case [...] the fact that aid granted under the BPM scheme promotes regard for the environment is not sufficient to exclude it outright from being categorised as aid for the purposes of Article 107 of the Treaty'.

- (94) Similarly, in *France v Commission* ⁽⁶²⁾ the ECJ specified that the costs of undertakings arising from regulatory measures are included by their nature in the budgets of undertakings. It stated: 'it should be recalled that the costs for undertakings [...] arise from collective agreements, concluded between employers and trade unions, which undertakings are bound to observe, either because they have acceded to those agreements or because those agreements have been extended by regulation. Such costs are included, by their nature, in the budgets of undertakings'.
- (95) As the regulatory charges are by their nature included in the budgets of undertakings, they are normally caught by the State aid rules. In *Cassa di Risparmio di Firenze* ⁽⁶³⁾, the ECJ stated in this respect: 'The definition of aid is more general than that of a subsidy because it includes not only positive benefits, such as subsidies themselves, but also measures which, in various forms, mitigate the charges which are normally included in the budget of an undertaking and which thus, without being subsidies in the strict sense of the word, are similar in character and have the same effect'.
- (96) In the case at hand, the Measure foresees a compensation of costs that the private broadcasters would normally have to bear from their own budget. The Measure allows those broadcasters to fulfil the obligations imposed on them by law and therefore keep their licences, audience and related advertising revenues. It also significantly reduces their overall transition costs. However, in the absence of the Measure the broadcasters would also be obliged, by the regulatory act, to fulfil the obligation of providing the broadcasting service with continuity and thus to bear all the costs derived from the licences. In these circumstances it may be concluded that they receive an advantage which they would not have in the absence of the Measure.
- (97) The Spanish authorities also argued that the compensation of broadcasters for the simulcast is foreseen in Union law, notably in Decision No 243/2012/EU, and therefore does not result in any undue economic advantage to the beneficiaries of aid under the Measure. The Commission notes that Article 6(5) of Decision No 243/2012/EU allows Member States to consider the possibility of granting compensation of direct costs of migration or reallocation of spectrum usage under the following conditions: (i) the compensation must be an appropriate measure and (ii) it has to comply with Union law, including Union law in the area of State aid. In the case at hand, the possibility for the Member State to compensate for the direct costs associated with the migration or reallocation of spectrum usage cannot fall outside State aid control.
- (98) Finally, the Commission notes that private broadcasters are not subject to any legal obligation to provide simulcast services ⁽⁶⁴⁾.
- (99) The Commission therefore concludes that the Measure confers an economic advantage within the meaning of Article 107(1) TFUE to private broadcasters. They receive a subsidy which effectively reduces the cost they would normally have to bear.

⁽⁶⁰⁾ Judgment of 10 January 2006, *Cassa di Risparmio di Firenze*, C-222/04, ECLI:EU:C:2006:8, para. 131; Judgment of 20 November 2003, *GEMO SA*, C-126/01, ECLI:EU:C:2003:622, para. 28; Judgment of 22 November 2001, *Ferring SA*, C-53/00, ECLI:EU:C:2001:627, paras. 19 ff; Judgment of 8 November 2001, *Adria-Wien Pipeline*, C-143/99, ECLI:EU:C:2001:598, para. 38; Judgment of 7 March 2002, *Italy v Commission*, C-310/99, ECLI:EU:C:2002:143, para. 251; Judgment of 14 January 2004, *Fleuren Compost BV v Commission*, T-109/01, ECLI:EU:T:2004:4, para. 54; Judgment of 5 October 1999, *France v Commission*, C-251/97, ECLI:EU:C:1999:480, para. 40.

⁽⁶¹⁾ Judgment of 14 January 2004, *Fleuren Compost BV v Commission*, T-109/01, ECLI:EU:T:2004:4, para. 54.

⁽⁶²⁾ Judgment of 5 October 1999, *France v Commission*, C-251/97, ECLI:EU:C:1999:480, para. 40.

⁽⁶³⁾ Judgment of 10 January 2006, *Cassa di Risparmio di Firenze*, C-222/04, ECLI:EU:C:2006:8, para. 131.

⁽⁶⁴⁾ See footnote 47.

- (100) The quantifiable advantage to the direct beneficiaries, private DTT broadcasters, would represent the total amount of the public funds made available for carrying out the simulcast obligation.
- (101) Also, with regard to the determination of the beneficiary of a measure, it is established that ‘consideration needs to be given not only to the immediate recipient of the subsidy, but also to the effects of the subsidy extending beyond that relationship’ ⁽⁶⁵⁾. This means that the beneficiary of the Measure can be any entity which actually benefited from it ⁽⁶⁶⁾.
- (102) In this respect it is worth noting that in the Mediaset case, the Court confirmed that ‘Article 107 of the Treaty prohibits aid granted by a State or through State resources in any form whatsoever, without drawing a distinction as to whether the aid-related advantages are granted directly or indirectly’ ⁽⁶⁷⁾.
- (103) Similarly, in its Spanish Preferential dispatch of indigenous coal plants decision ⁽⁶⁸⁾, confirmed by the General Court ⁽⁶⁹⁾, the Commission found that despite the fact that there was a legal obligation to buy from the coal miners and that the compensation was set only after the imposition of the obligation in question, Spanish coal producers were indirect beneficiaries of the aid. The Commission acknowledged that their advantage stemmed from the obligation on generators to buy their coal which was compensated by the subsidies granted to electricity producers using indigenous coal.
- (104) It can be argued that the DTT platform operators are in a similar position to that of the coal mines’ owners in the Spanish coal case where the Spanish authorities imposed an obligation on generators (here broadcasters) to buy coal from Spanish coal mines (here to contract simulcast services with DTT platform operators).
- (105) Against this background, in the opening decision the Commission considered the DTT platform operators to be potential indirect beneficiaries of the Measure. The formal investigation has confirmed that position, in particular on the basis of the following considerations.
- (106) First, because of the regulatory intervention of the NTP which obliged private DTT broadcasters to cover 96 % of the population on the basis of DTT, and contrary to what is argued by the Spanish authorities, Abertis and NET TV, private broadcasters will be more inclined to continue using this platform. In fact, according to their licences, DTT broadcasters are not authorised to use other alternative platforms (i.e. satellite, cable or IPTV) to ensure the prescribed minimum geographical coverage in Area I ⁽⁷⁰⁾.
- (107) Second, as a consequence of the simultaneous broadcasting, the DTT platform operators obtain an additional advantage in the form of guaranteed revenues, which they would not have received without the Measure. Indeed, absent the Measure, private broadcasters may have provided the simulcast service to a lesser extent. In fact, private broadcasters could have even decided not to provide the service at all ⁽⁷¹⁾.
- (108) Although the Measure applies regardless of whether the beneficiary holds a dominant position or not, when the beneficiary has a strong market share or is dominant, compensatory measures have even a greater impact ⁽⁷²⁾.

⁽⁶⁵⁾ Opinion of Advocate General Lenz of 23 May 1996, *Ijssel-Vliet*, C-311/94, ECLI:EU:C:1996:209, para. 9.

⁽⁶⁶⁾ Judgment of 21 March 1991, *Italy v Commission*, C-303/88, ECLI:EU:C:1991:136, para 57.

⁽⁶⁷⁾ Judgment of 15 June 2010, *Mediaset v Commission*, T-177/07, ECLI:EU:T:2010:233, para. 75; subsequently confirmed by Judgment of 28 July 2011, *Mediaset v Commission*, C-403/10, ECLI:EU:C:2011:533.

⁽⁶⁸⁾ Commission Decision of 29 September 2010 N178/2010 — Spain — Public service compensation linked to a preferential dispatch mechanism for indigenous coal power plants.

⁽⁶⁹⁾ Judgment of 3 December 2014, *Castelnou Energía, SL v Commission*, T-57/11, ECLI:EU:T:2014:1021.

⁽⁷⁰⁾ As, by contrast with alternative technology platforms, the scarce terrestrial resources (i.e. frequencies) are required to be shared for multiple uses such as television, mobile broadband and telephony transmissions, this regulatory intervention has created additional costs which would not necessarily have arisen if from the outset the transmission of digital television using other platforms had been possible.

⁽⁷¹⁾ See footnote 47.

⁽⁷²⁾ Commission Decision of 23 September 2004 SA N 370/2004, France — *Aide à la restructuration de la société Imprimerie nationale*.

- (109) In the present case, the DTT platform operators benefit from the fact that private broadcasters are compensated for the provision of the simulcast service via DTT and that they will continue using the DTT platform. Hence, any compensation to broadcasters for the simulcast TV transmission generates a perpetuation of that advantage since the broadcasters pay the DTT platform operators for simultaneously transmitting their programmes on the 800 MHz and 700 MHz bands during the transition period.
- (110) Because the Measure guarantees the benefits resulting from the provision of the simulcast services to broadcasters, and given the additional advantage for DTT platform operators in the form of guaranteed revenues, the Commission concludes that the DTT platform operators are indirect beneficiaries of the Measure.

4.1.3. *Selectivity of the Measure*

- (111) In accordance with Article 107(1) of the Treaty, to be considered State aid, a measure must be specific or selective in that it favours only certain undertakings or the production of certain goods.
- (112) The Measure is selective since it is specifically aimed at private undertakings that currently operate in the sector of television broadcasting transmission services via the DTT technology. As a result, the contested Measure only benefits companies operating on the DTT platform as compared to other companies that operate on alternative platforms such as satellite or cable.
- (113) Hence, the Commission concludes that the Measure providing for the compensation for additional costs incurred due to the simulcast obligation constitutes a selective measure within the meaning of Article 107(1) of the Treaty.

4.1.4. *Distortion of competition and effect on trade between Member States*

- (114) State measures fall within the scope of Article 107(1) of the Treaty in so far as they distort or threaten to distort competition by favouring certain undertakings or the production of certain goods and affect trade between Member States. According to the case law of Union Courts, the concept of 'effect on trade between Member States' is linked to the notion of distortion of competition and both are often inextricably linked. In this regard, the Court has stated that 'the two conditions for the application of Article 107(1) of the Treaty, namely that trade between Member States must be affected and competition distorted, are as a general rule inextricably linked. In particular, where State financial aid strengthens the position of an undertaking as compared with other undertakings competing in intra-Community trade, the latter must be regarded as affected by that aid' ⁽⁷³⁾.
- (115) Further, in accordance with the *Philip Morris* ⁽⁷⁴⁾ case law, the impact on trade is presumed when the State-granted aid strengthens the position of a company in relation to other competitors in intra-EU trade.
- (116) As explained above, the Measure favours the DTT broadcasters and indirectly the DTT platform operators. The beneficiaries of the contested Measure compete with other alternative providers (satellite, cable, IPTV) that will not benefit from State funding. Therefore, the Measure will result in distortions of competition among broadcasters and among platform operators.
- (117) The Commission considers that the markets for commercial broadcasting and the operation of television transmission networks are open to competition within the EU ⁽⁷⁵⁾.
- (118) Broadcasters operate on the advertising markets and purchase content rights across borders, competing with companies from other Member States. The Spanish markets for broadcasting and operation of television networks also host foreign players (e.g. content providers and advertisers).
- (119) Platform operators compete on a cross-border level with each other as well as with other platform operators of electronic communications.

⁽⁷³⁾ Judgment of 4 April 2001, *Regione Friuli Venezia Giulia v Commission*, T-288/97, ECLI:EU:T:2001:115, para. 41.

⁽⁷⁴⁾ Judgment of 17 September 1980, *Phillip Morris v Commission*, C-730/79, ECLI:EU:C:1980:209, para. 11.

⁽⁷⁵⁾ See footnotes 56 and 57.

- (120) In light of the above, the Commission concludes that the Measure distorts competition and has an effect on trade between Member States within the meaning of Article 107(1) of the Treaty.

4.1.5. Conclusion on the existence of aid

- (121) On account of the preceding considerations, the Commission concludes that the Measure fulfils the criteria laid down in Article 107(1) of the Treaty and must be considered State aid within the meaning of that Article.

4.2. Compatibility assessment

4.2.1. General considerations

- (122) Since 2002, the Commission has actively supported the digitisation of broadcasting in the EU. The ‘eEurope 2005 Action Plan’⁽⁷⁶⁾, the ‘i2010 initiative’⁽⁷⁷⁾, the Communication on the transition from analogue to digital broadcasting, as well as the Commission’s commitment to complete the phasing-out of analogue transmissions in the EU in 2012 constitute clear evidence of the Commission’s strategy in this respect.
- (123) However, aware of the risks associated with the digitisation process, the Commission has repeatedly stressed that regulation in this area should neither impose nor discriminate in favour of the use of a specific digital platform, but abide by the principle of technological neutrality. This means that each platform should compete according to its capabilities, in particular its ability to offer the maximum benefit to consumers.
- (124) In line with the general approach to the use of aid to overcome a specific market failure or to ensure social or regional cohesion⁽⁷⁸⁾, the Commission Communication on the transition from analogue to digital broadcasting provides that, in the specific area of digitisation, public intervention would be justified under two conditions: first, where general interests are at stake and second, in the event of market failure, i.e. 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. The 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 be technologically neutral⁽⁷⁹⁾.
- (125) The Commission applied the State aid rules in this sector in several decisions, based on the principles of its Communication on the digital switch-over⁽⁸⁰⁾.
- (126) In Spain, the central government has coordinated the transition from analogue to digital broadcasting and has in effect supported the DTT platform to the detriment of alternative platforms⁽⁸¹⁾.

⁽⁷⁶⁾ Communication from the Commission to the Council, the European Parliament, the Economic and Social Committee and the Committee of the Regions — the eEurope 2005 action plan: an information society for everyone. COM(2002)263 final.

⁽⁷⁷⁾ Communication from the Commission to the Council, the European Parliament, the Economic and Social Committee and the Committee of the Regions entitled ‘i2010 — a European Information Society for growth and employment’. COM(2005)229 final.

⁽⁷⁸⁾ See for example the State aid action plan — Less and better targeted State aid: a roadmap for State aid reform 2005-2009. COM(2005) 107 final, p. 4.

⁽⁷⁹⁾ This approach was confirmed by the General Court in the judgments of 26 November 2015, *Spain v Commission*, T-461/13, ECLI:EU:T:2015:891; *Basque Country and Itelazpi v Commission*, T-462/13, ECLI:EU:T:2015:902; *Galicia v Commission and Reteval v Commission*, T-463/13 and T-464/13, ECLI:EU:T:2015:901; *Catalonia and CTTI v Commission*, T-465/13, ECLI:EU:T:2015:900; *Navarra v Commission*, T-487/13, ECLI:EU:T:2015:899; and finally *Abertis Telecom and Retevisión v Commission*, T-541/13, ECLI:EU:T:2015:898.

⁽⁸⁰⁾ See, among others, N622/03 *Digitalisierungsfonds — Austria* (OJ C 228, 17.9.2005, p. 11); 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 Berlin-Brandenburg — Germany (OJ L 200, 22.7.2006, p. 14); Commission Decision 2007/258/EC of 20 December 2006 on the measure No C 24/2004 (ex NN 35/2004) implemented by Sweden for the introduction of digital terrestrial television (OJ L 112, 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. 1); N107/07 Subsidies to IdTV — Italy (OJ C 246, 20.10.2007, p. 1); 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, p. 1); N671b/2009 — Digital switch-over in Slovakia (OJ C 39, 8.2.2011, p. 1).

⁽⁸¹⁾ See footnote 21.

4.2.2. Compatibility assessment under Article 107(2)(b) of the Treaty

- (127) Article 107(2)(b) of the Treaty states that aid ‘to make good the damage caused by natural disasters or exceptional occurrences’ is compatible with the internal market. In the case at hand, the Spanish authorities argue that the release of the Digital Dividend should be considered as an exceptional occurrence.
- (128) However, when considering exceptions from the general principle laid down by Article 107(1) of the Treaty that State aid is incompatible with the common market, the EU Courts hold that the notion of ‘exceptional occurrence’ contained in Article 107(2)(b) of the Treaty must be interpreted restrictively ⁽⁸²⁾. Hitherto, the EU Courts have accepted as exceptional occurrences wars, internal disturbances or strikes and, with certain reservations and depending on their extent, major nuclear or industrial accidents and fires which result in widespread loss ⁽⁸³⁾. In contrast, the EU Courts do not consider as such any foreseeable or unforeseeable events which come under risks normally borne by undertakings ⁽⁸⁴⁾. The same applies to events based on political, entrepreneurial or other mistakes, or events attributed to normal entrepreneurial or other risks of an undertaking.
- (129) The decision of the Spanish authorities to liberate the Digital Dividend required reallocation of the spectrum with an impact on the obligations of companies active in the broadcasting sector. However, as these obligations stem undoubtedly from regulatory measures, they cannot be considered as exceptional events. As analysed above, the obligations and costs bound with legal obligations are normally borne by the undertakings active in the given sector and are included by their nature in the budgets of these undertakings ⁽⁸⁵⁾.
- (130) Therefore the Commission does not share the view that the Measure aims to make good costs incurred by exceptional occurrences and therefore it does not consider the Measure compatible under Article 107(2)(b) of the Treaty.

4.2.3. Compatibility assessment under Article 107(3)(c) of the Treaty

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

⁽⁸²⁾ See, among others, Judgment of 11 November 2004, *Spain v Commission*, C-73/03, ECLI:EU:C:2004:711, para. 37; Judgment of 23 February 2006, *Atzeni v Regione autonoma della Sardegna*, C-346/03 and C-529/03, ECLI:EU:C:2006:130, para. 79; Judgment of 14 July 2011, *Commission v Italy*, C-303/09, ECLI:EU:C:2011:483, para. 7; and Judgment of 25 June 2008, *Olympiaki Aeroporoi Ypiresies AE v Commission*, T-268/06, ECLI:EU:T:2008:222, para. 52.

⁽⁸³⁾ See, for instance, Judgment of 12 November 2008, *Cantieri Navali Termoli SpA v Commission*, T-70/07, ECLI:EU:T:2008:486, para. 59.

⁽⁸⁴⁾ See Judgment of 12 November 2008, *Cantieri Navali Termoli SpA v Commission*, T-70/07, ECLI:EU:T:2008:486, para. 81.

⁽⁸⁵⁾ See Judgment of 25 June 2008, *Olympiaki Aeroporoi Ypiresies AE v Commission*, T-268/06, ECLI:EU:T:2008:222, para. 66.

- (133) In addition to the balancing test, the Commission Communication on the transition from analogue to digital broadcasting sets criteria to be respected when paying subsidies in the digital switchover process; in particular the national measures have to respect the principle of technological neutrality ⁽⁸⁶⁾.
- (134) The respect of the principle of technological neutrality as established in this Commission Communication when assessing the legality of State aid has also been endorsed by the EU Courts ⁽⁸⁷⁾.
- (135) The Commission is of the view that the principle of technological neutrality is also relevant in relation to the release of the Digital Dividend. Consideration of that issue will form part of the assessment of the case at hand.

A. Objective of common interest

The aid is in line with Union policy on the Digital Dividend

- (136) The Commission recognised the importance of the Digital Dividend in its first Communication on the Digital Dividend ⁽⁸⁸⁾, where it stated that the Digital Dividend needed to be seen from the broadest sense of global balance between supply and demand of the radio frequency spectrum and highlighted the need for Europe to guarantee the best possible use of the Digital Dividend. The promotion of coordinated use of the Digital Dividend was further strengthened in the Communication on transforming the Digital Dividend into social benefits and economic growth ⁽⁸⁹⁾.
- (137) The release of the Digital Dividend is an important factor contributing to the achievement of the objectives of the Digital Agenda for Europe ⁽⁹⁰⁾, which constitutes one of the flagship initiatives of the Europe 2020 strategy ⁽⁹¹⁾. One of the objectives of the aforementioned European Digital Agenda is to guarantee universal bandwidth coverage with increasing speeds, for which it was proposed to use certain frequencies of the Digital Dividend for wireless broadband ⁽⁹²⁾. In that regard, Decision No 243/2012/EU requests that all Member States provide the 800 MHz band for electronic communications as of 1 January 2013. The Commission was authorised to grant exceptions until 2015 in the event of exceptional national or local circumstances.
- (138) In the light of the above considerations, it can be concluded that the Measure contributes to the achievement of a well-defined policy objective.

⁽⁸⁶⁾ See in particular Section 2.1.3.

⁽⁸⁷⁾ See, for instance, Judgment of 15 June 2010, *Mediaset v Commission*, T-177/07, ECLI:EU:T:2010:233. That judgment states in paragraph 127 that aid to 'consumers does not justify the discrimination between different platforms in so far as there is no need to guide consumers towards one digital platform'. The judgment had been upheld by the Court of Justice, in its Judgment of 28 July 2011, *Mediaset v Commission*, C-403/10, ECLI:EU:C:2011:533. See also Judgment of 15 September 2011, *Germany v Commission*, C-544/09, ECLI:EU:C:2011:584, where the Court found in paragraph 80 that in the case at stake it was not demonstrated that the support of one technology over another was necessary to solve a structural problem. Furthermore, in the Judgment of 6 October 2009, *Germany v Commission*, T-21/06, ECLI:EU:T:2009:387, in the case *DVB-T — Berlin/Brandebourg*, the Court has addressed technological neutrality in paragraph 69 and has specified that all transmission platforms e.g. cable, satellite or terrestrial networks should be taken into account when switching from analogue to digital broadcasting. Most recently, in the Judgments of 26 November 2015, *Spain v Commission*, T-461/13, ECLI:EU:T:2015:891; *Basque Country and Itelazpi v Commission*, T-462/13, ECLI:EU:T:2015:902; *Galicia v Commission* and *Retegal v Commission*, T-463/13 and T-464/13, ECLI:EU:T:2015:901; *Catalonia and CTTI v Commission*, T-465/13, ECLI:EU:T:2015:900; *Navarra v Commission*, T-487/13, ECLI:EU:T:2015:899; and finally *Abertis Telecom and Retevisión v Commission*, T-541/13, ECLI:EU:T:2015:898, the Court dismissed all the actions and confirmed the Commission's decision in SA.28599 on the deployment of DTT in Spain. The Court found in particular that the Commission was correct in holding that the measures at issue could not be considered as State aid compatible with the internal market, in particular since they did not respect the principle of technological neutrality.

⁽⁸⁸⁾ COM(2007)700 final.

⁽⁸⁹⁾ COM(2009)586 final.

⁽⁹⁰⁾ COM(2010)245 final/2.

⁽⁹¹⁾ COM(2010)2020 final.

⁽⁹²⁾ 'A forward-looking European spectrum policy should, while accommodating broadcasting, promote efficient spectrum management, by mandating the use of certain digital dividend frequencies for wireless broadband by a fixed future date, by ensuring additional flexibility (also allowing spectrum trading) and by supporting competition and innovation.'

The market failure

- (139) In its State Aid Action Plan ⁽⁹³⁾ the Commission explains its general approach to State aid geared to sustainable growth, competitiveness and cohesion. It points out that Member States may use State aid to overcome a specific market failure or to ensure social or regional cohesion. In such cases, it must however be shown that aid is the appropriate instrument to address the issue, is limited to the minimum necessary and does not distort unduly competition.
- (140) The Spanish authorities have argued that the Measure remedies a market failure in the electronic communications market, namely the scarcity in available spectrum for the adequate provision of electronic communications services, especially for the development of applications of for next-generation (4G) wireless broadband services. This scarcity has been recognised by the Commission already in its Communication on the transition from analogue to digital broadcasting and therefore it recommended in 2009 to liberate the 800 MHz frequency band which is very suitable for the electronic communication services.
- (141) The release of the Digital Dividend shows similarities with the digital switchover where the analogue terrestrial frequencies had to be released and the broadcasting was switched to digital terrestrial frequencies. The Commission recognised in the digital switchover cases ⁽⁹⁴⁾ that the market failure could arise, for example, if the market players were unwilling to agree on a common timetable to switch from one bandwidth to another (coordination problem) or where market players would not take into account the positive effects of this process for society as a whole because they do not have the right incentives to do so (positive externalities).
- (142) The positive externalities produced by the release of the Digital Dividend are directed to the electronic communications operators as well as to the economy in general and not specifically to the broadcasters.
- (143) In this regard, it should be recalled that the Measure is aimed to compensate private broadcasters for the additional costs incurred due to the obligation to provide the simulcast.
- (144) Therefore, for the purposes of assessing State aid, the issue of market failure relates to the continuity of services provided by private broadcasters.
- (145) In this respect it should be noted that, unlike public broadcasters, private broadcasters do not have a public service remit.
- (146) It is also necessary to take into account that, if broadcasters did not carry out the simulcast, they would still be required to transfer their channels to new frequencies, which could result in a considerable loss of audience until all the antennas were adapted. In other words, the loss of audience constitutes a sound business motivation for broadcasters to carry out the simulcast even absent a regulatory obligation. In fact, if broadcasters were to bear this burden, they would ensure that the simulcast period is as limited as possible while ensuring the maximum possible number of viewers at the end of this period, thus aligning their interests with those of the Spanish authorities without the need for public funding. This is confirmed by the fact that in the meantime the switch to the 700 MHz band has already been accomplished and private broadcasters have already paid for the cost of simulcast ⁽⁹⁵⁾.
- (147) Moreover, the Spanish authorities have in the meantime abolished the obligation of private broadcasters to simulcast in Royal Decree 805/2014 ⁽⁹⁶⁾, thus confirming the Commission's reasoning from the opening decision that the loss of audience constitutes a sound business motivation for broadcasters to carry out the simulcast and/or that the provision of simulcast may not be necessary and/or can be financed by broadcasters.
- (148) In light of the above considerations the Commission concludes that it has not been established that a market failure exists. No other well-defined objective of common interest has been claimed by either the Spanish authorities or the interested parties.

⁽⁹³⁾ COM(2005) 107 final.

⁽⁹⁴⁾ See footnote 80.

⁽⁹⁵⁾ Based on the information received in September 2015 from the Spanish authorities.

⁽⁹⁶⁾ Real Decreto 805/2014, de 19 de septiembre, por el que se aprueba el Plan Técnico Nacional de la Televisión Digital Terrestre y se regulan determinados aspectos para la liberación del dividendo digital.

- (149) In the absence of a well-defined objective of common interest, the Measure is not compatible with the internal market according to Article 107(3)(c) TFEU.
- (150) Nevertheless, the other elements of the balancing test (described above) will be considered below. As will be shown, they also speak against the claim of compatibility of the Measure with the internal market.

B. Well-designed aid

Aid is the appropriate instrument

- (151) Public authorities have different means to manage the release of the Digital Dividend. In the present case, the Spanish authorities decided to impose a simulcast obligation and compensate DTT broadcasters' additional costs arising from that obligation.
- (152) More specifically, the Spanish authorities planned in Royal Decree 365/2010 the reallocation of frequencies and its timing. The Royal Decree imposed on broadcasters the obligation to broadcast simultaneously on both the old and the new frequency bands (i.e. 800 MHz and 700 MHz bands) until they are assigned definitive multiplexes ⁽⁹⁷⁾ in the lower 700 MHz frequency band, i.e. until the number of the reception infrastructures (broadcasting antennas) suitable for the new multiplexes is the same as for the previous multiplexes (assigned in the switchover phase). Later on, in the Act on Sustainable Economy the Spanish authorities recognised the right of broadcasters to financial compensation of the costs associated with the simulcast obligation.
- (153) And yet, the regulatory obligation was in itself sufficient to achieve the desired objective of ensuring simultaneous broadcasting on a number of frequencies during a transitional period. Indeed, as explained in recital 147, the market development in Area I made the Spanish authorities aware that even the regulatory obligation to provide simulcast was not necessary to ensure a smooth release of the Digital Dividend. In the light of the above considerations the Commission concludes that the Measure is not an appropriate instrument.

Incentive effect and necessity

- (154) Regarding the incentive effect and necessity of the Measure, it needs to be examined whether private broadcasters would spontaneously decide to broadcast simultaneously and whether they would do so within the same timeframe without State aid.
- (155) The Spanish authorities continued to argue during the formal investigation that private broadcasters would not be willing to broadcast simultaneously: they have already financed the costly switchover from analogue to digital TV broadcasting and have resolved problems arising from that switchover e.g. interferences on the digital terrestrial channels originally assigned to them; and they would not receive any additional benefit when moving to another frequency band.
- (156) In spite of the above assertions, it has not been duly demonstrated that broadcasters would oppose simultaneous broadcasting in the absence of aid. In fact, their market behaviour proved the contrary.
- (157) In the Commission's view, the broadcasters' obligation under the licences to provide the service with continuity and quality implies self-financing of the simulcast broadcasting during a temporary period of time ⁽⁹⁸⁾. In the opening decision the Commission considered in this respect that imposing on the broadcasters the obligation to provide simulcast at their own expense via a regulatory act seems sufficient to ensure a smooth release of the Digital Dividend. The fact that even this explicit obligation was later abolished, as explained in recital 147, only proves that the private broadcasters' commitment to ensure the continuity of service under the licences requires self-financing of the simulcast broadcasting and that in any event these broadcasters have sufficient incentives on their own to provide the service in question and hence and that the Measure is not necessary.

⁽⁹⁷⁾ In the switch from analogue to digital broadcasting, Spain has assigned to the broadcasters transitory multiplexes (phase I). After the liberation of the Digital Dividend, they have been assigned definitive multiplexes (phase II).

⁽⁹⁸⁾ This naturally did not prevent the Spanish authorities from obliging the broadcasters to simulcast on both frequency bands until the definitive assignment of multiplexes in the 700 MHz band in order to ensure a smooth release of the Digital Dividend.

- (158) In the light of the above considerations the Commission concludes that the Spanish authorities have failed to demonstrate the incentive effect and necessity of the Measure.

Proportionality

- (159) In the context of a balancing exercise, it is important to assess whether the measure adopted by the authorities is proportional to the need to overcome a market failure and foster competition on the market. As regards proportionality, in its DVB-T *Brandenburg* decision ⁽⁹⁹⁾, the Commission found it necessary to compare the adopted measure with possible alternatives: 'Regulation should neither impose nor discriminate in favour of the use of a particular digital platform such as cable, satellite, terrestrial or DSL TV thus adhering to the principle of "technological neutrality". As stated in the Framework Directive, this does not preclude a Member State from taking proportionate steps to promote certain specific services where this is justified, for example digital television as a means for increasing spectrum efficiency. This means that each platform should in principle compete on its own strengths, but that intervention targeting in correcting market failures that are specific to one platform can be envisaged. In the end, the platforms should prevail which offer the greatest benefit to consumers'. The Commission concluded in that case that the aid was neither necessary nor proportionate.
- (160) In the case at hand the Commission takes note that the Measure is limited to the extraordinary expenses that the private broadcasters will have to incur due to the simulcast obligation within the scope of their 96 % coverage obligation in Area I. The amount of compensation is established to cover exclusively the costs associated with the simulcast obligation.
- (161) The Spanish Government intended to compensate 100 % of the additional costs related to simulcast broadcasting. The Spanish authorities have argued that compensation of 100 % of the additional costs was necessary due to the financial situation of the broadcasters who have financed the digital switchover from own means. Moreover, they have stated that without the financing through the Measure certain local broadcasters would have gone bankrupt. However, the Spanish authorities have not submitted sufficiently convincing evidence to justify the support to such an extent.
- (162) In the opening decision the Commission considered that it was also not possible to exclude that the possible market failure could have been remedied with less aid, either aimed only at the undertakings which can prove necessity of the support or by shortening the simulcast period. This approach was, however, not considered by the Spanish authorities from the outset.
- (163) The Spanish authorities have also not provided convincing evidence, and in particular a cost study, which would prove that the choice to reallocate the 800 MHz multiplexes to another terrestrial frequency band was the least expensive and the most expedite solution for the release of the Digital Dividend.
- (164) In the light of the above considerations the Commission concludes that the Spanish authorities have failed to demonstrate that the Measure would be proportionate and limited to the minimum necessary.

Technological neutrality

- (165) The Commission has emphasised on several occasions the importance of technological neutrality in the transition to digital broadcasting. In its Communication on the transition from analogue to digital broadcasting the Commission expressed its intent to act in line with 'the spirit of "new regulatory framework for electronic communications", which is based on market initiative and technological neutrality' ⁽¹⁰⁰⁾. Therefore, any intervention by the Member States should avoid unduly distorting competition between platforms, in order to allow every platform to compete 'on its own strengths' in a 'regulatory level playing field'.

⁽⁹⁹⁾ 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 Berlin-Brandenburg (OJ L 200, 22.7.2006, p. 14).

⁽¹⁰⁰⁾ Section 2.1.3.

- (166) In the same vein, Article 9(3) of Directive 2002/21/EC of the European Parliament and of the Council ⁽¹⁰¹⁾ obliges Member States to ensure that all types of technology used for electronic communications may be used in the radio frequency bands, declared available for electronic communications services in their National Frequency Allocation Plan in accordance with Union law. It is true that the same provision allows Member States to provide for proportionate and non-discriminatory restrictions to the types of radio network or wireless access technology used for electronic communications services where this is necessary to ensure, inter alia, (c) technical quality of service or (f) the fulfilment of a general interest objective such as the avoidance of inefficient use of radio frequencies or safety of life. However, in the present case the Spanish authorities did neither claim nor demonstrate that the Measure would justify an exception to the principle of technological neutrality on those grounds.
- (167) On the contrary, the Spanish authorities argued that the Measure is technologically neutral in the sense that the private broadcasters are free to choose any available technological platform for the provision of simulcast. This argument was verified by the Commission during the formal investigation, where it found that such a scenario is prevented by the current licences which impose on the private broadcasters the use of the DTT technology to ensure the 96 % geographical coverage in Area I.
- (168) The Commission decisions in the field of State aid for the digital transition confirm this approach. In its decisions in the cases *DVB-T-Berlin Brandenburg* ⁽¹⁰²⁾ and *Digital decoders* ⁽¹⁰³⁾, confirmed by the General Court ⁽¹⁰⁴⁾, as well as in its decisions against Spain on the deployment of the DTT in Area II ⁽¹⁰⁵⁾, confirmed by the General Court ⁽¹⁰⁶⁾, the Commission has indicated that: (1) the DTT technology is not superior to other technologies, (2) if support was given to that platform, this would constitute an unjustified exception to the principle of technological neutrality, and (3) discrimination in breach of the principle of technological neutrality prevents a given measure from being declared compatible with the internal market.
- (169) As explained above, private broadcasters pay for the transmission of their contents to DTT platform operators who therefore indirectly benefit from the measure. Hence the respect of the principle of technological neutrality has to be examined in relation to the platform operators.
- (170) In Spain, the technological choice was made at the very beginning of the administrative process, when Royal Decree 365/2010 was approved. While the Royal Decree was exclusively based on reallocation to a lower terrestrial frequency band, and, in particular, the transfer of DTT broadcasts to the frequencies below the 800 MHz band by the end of 2014, it was not until the adoption of the Act on Sustainable Economy in 2011 that the release of that band to telecommunication operators was established and that the financial compensation of the costs of the simulcast broadcasting to the exclusive benefit of the DTT platform to the detriment of alternative platforms was enshrined in national law.
- (171) The Spanish authorities argued that the Measure consists only of compensation for damages due to the reallocation of terrestrial frequencies. Other platforms (such as satellite, cable, IPTV, etc.) are not affected as they do not need to make the change in channels necessary to release the Digital Dividend and therefore the compensatory Measure is not necessary for them. They have further argued that satellite is not suitable to transmit local and regional programmes in the same manner as the DTT platform and added that some premium contents purchased by the broadcasters can only be broadcasted on the Spanish territory or even only via terrestrial broadcasting.
- (172) The Commission notes with respect to these arguments that on the level of platform operators, there exist different transmission platforms which could provide alternative solutions to remedy the scarcity of frequencies in the relevant Spanish market. In case of satellite transmission, for example, there would be no need to readapt

⁽¹⁰¹⁾ Directive 2002/21/EC of 7 March 2002 on a common regulatory framework for electronic communications networks and services (Framework Directive) (OJ L 108, 24.4.2002, p. 33).

⁽¹⁰²⁾ State aid C 25/2004, *DVB-T Berlin Brandenburg*.

⁽¹⁰³⁾ State aid C 52/2005, *Digital decoders*.

⁽¹⁰⁴⁾ Judgment of 6 October 2009, *Germany v Commission in the case DVB-T — Berlin/Brandenburg*, T-21/06, ECLI:EU:T:2009:387; and Judgment of 15 June 2010, *Mediaset v Commission*, T-177/07, ECLI:EU:T:2010:233.

⁽¹⁰⁵⁾ See footnote 21.

⁽¹⁰⁶⁾ See footnote 79.

the spectrum on the UHF band. Furthermore, as it stems from the information provided by the Spanish authorities, they did not carry out any *ex ante* investigation (e.g. via a public consultation or a tendered study) inviting stakeholders to comment on these issues, nor did they carry out a cost/benefit study comparing alternative solutions. In effect, no alternative to reallocation of frequencies was considered.

- (173) Instead, as also explained in more detail in recitals 179-181, the Measure distorts competition between different platforms (i.e. different technological solutions) if costs inherent to the use of one particular platform are compensated. Considering that alternative platforms do not produce similar costs related to the repurposing of the spectrum and are not dependent on the scarce radio frequencies on the UHF band, the Measure does not support the most efficient technological solution.
- (174) In the light of the above considerations the Commission concludes that the Spanish authorities have failed demonstrating that the Measure would be technologically neutral.

C. Extent of distortion of competition and effect on trade between Member States

- (175) The Commission has assessed a number of State measures related to the digital switchover⁽¹⁰⁷⁾. The Commission explained that Member States have several possibilities to grant public funding for the switchover, including the simulcast, provided that the measures do not entail an unnecessary distortion between technologies or companies, are proportionate and limited to the minimum necessary. By analogy with the digital switchover, the same conditions should apply for the Measure notified by the Spanish authorities.
- (176) In the case at hand, due to the fact that there are direct and indirect beneficiaries of the support, the distortion of competition may take place at different levels.

Distortion of competition at the level of private broadcasters

- (177) As already concluded, the private broadcasters using the DTT platform receive an advantage as they are compensated for the costs which they would have to normally bear. The Measure alters their behaviour under normal market conditions. Indeed, without the compensation, as argued by the Spanish authorities, some of the involved broadcasters would be unable to finance the simulcast and go bankrupt which would result in returning of their licence. In such a case, other broadcasters could apply for the available licence. Thanks to the Measure, however, the terrestrial private broadcasters maintain their present situation and also scarce terrestrial licences, thus the Measure prevents other broadcasters entering the market. The only conclusion that can be drawn on the basis of the information before the Commission is that the measure protects the position of existing market players.
- (178) Therefore, the Measure distorts competition at the level of private broadcasters to an extent contrary to the common interest.

Distortion of competition at the level of platform operators

- (179) By compensating broadcasters' costs from simulcasting through the DTT infrastructure, they are encouraged to continue using the terrestrial platform instead of considering whether switching to another platform would be in their interests. This leads to distortion of competition at the level of transmission platforms.
- (180) In addition, the DTT operators in Area I benefit from the regulatory intervention of the NTP which obliges broadcasters to cover 96 % of the population on the basis of DTT. Also, according to their licences, broadcasters are not authorised to use any other alternative platform (i.e. satellite, cable or IPTV) to ensure the prescribed minimum geographical coverage. Otherwise they would lose their licences. As a result, the majority of the simulcast expenditure will *de facto* be spent for the use of Abertis's DTT platform given the latter's market position. This advantage goes to the detriment of other technological platforms which compete on the same market, such as the satellite technology.

⁽¹⁰⁷⁾ See footnote 80.

- (181) Therefore, the Measure distorts competition at the level of platform operators to an extent contrary to the common interest.

Assessment

- (182) In the light of the above considerations the Commission concludes that the advantage granted to both the DTT private broadcasters and the DTT platform operators goes to the detriment of other private broadcasters and alternative technological platform operators which compete on the same market and distorts competition on different levels to an extent contrary to the common interest.

Conclusion

- (183) It is concluded that the Measure is not an appropriate, necessary, proportionate and technologically neutral instrument, and that it distorts competition and affects trade between Member States to an extent contrary to the common interest.

5. CONCLUSION

- (184) The Commission finds that the Measure aimed at the compensation of the simulcast costs of private broadcasters in the context of the release of the Digital Dividend does not meet the requirements of Article 107(3) of the Treaty and is thus incompatible with the internal market,

HAS ADOPTED THIS DECISION:

Article 1

The State aid notified by the Kingdom of Spain aimed at the compensation of the simulcast costs of private broadcasters in the context of the release of the Digital Dividend does not meet the requirements of Article 107(3) of the Treaty and is thus incompatible with the internal market. The State aid shall accordingly not be implemented.

Article 2

The Kingdom of Spain shall inform the Commission, within two months of notification of this Decision, on the measures taken to comply with it.

Article 3

This Decision is addressed to the Kingdom of Spain.

Done at Brussels, 5 August 2016.

For the Commission
Margrethe VESTAGER
Member of the Commission

