

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)

- Article 1 The State aid notified by the Kingdom of Spain aimed...
- Article 2 The Kingdom of Spain shall inform the Commission, within
two...
- Article 3 This Decision is addressed to the Kingdom of Spain.
Signature

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- (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.
- (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.
- (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

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- foreseen in the notification, thus by the end of 2013. In reality, the Digital Dividend was released in Spain only on 31 March 2015.
- (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...’.
- (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.
- (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.

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- (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.
- (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 Secretaria 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.’*
- (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).
- (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.
- (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.

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- (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 Secretaria 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.*
- (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.
- (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*.
- (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.
- (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.

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- (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 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.
- (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.
- (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 Aeroporia 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 Aeroporia Ypiresies AE v Commission*, T-268/06, ECLI:EU:T:2008:222, para. 66.
- (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/Brandenburg*, 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)2020final.
- (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.’
- (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.*
- (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.
- (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.
- (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/Brandebourg*, 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.
- (107) See footnote 80.

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