

DECISIONS

COMMISSION DECISION

of 20 July 2010

on the State aid scheme C 38/09 (ex NN 58/09) which Spain is planning to implement for Corporación de Radio y Televisión Española (RTVE)

(notified under document C(2010) 4925)

(Only the Spanish text is authentic)

(Text with EEA relevance)

(2011/1/EU)

THE EUROPEAN COMMISSION,

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

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

Having regard to Protocol No 29 on the system of public broadcasting in the Member States annexed to the Treaty on European Union and to the Treaty on the Functioning of the European Union ⁽¹⁾,

Having called on interested parties to submit their comments pursuant to the provisions cited above ⁽²⁾ and having regard to their comments,

Whereas:

I. PROCEDURE

(1) On 22 June 2009, the Commission received a complaint drawing attention to plans of the Spanish government to amend the system of financing of the national radio and television broadcaster *Corporación de Radio y Televisión Española* (RTVE). On 5 August 2009 the Commission requested information from Spain concerning this amendment, in particular on the relationship between the new levies and the funding of RTVE. On 1 September 2009 the new Law 8/2009 of 28 August 2009 on financing *Corporación de Radio y Televisión Española* ⁽³⁾, amending Law 17/2006 of 5 June 2006 on state-owned radio and television ⁽⁴⁾, entered into

force. On 21 September, 22 and 26 October 2009 Spain submitted the requested information on the scheme to the Commission.

- (2) By letter dated 2 December 2009, the Commission informed Spain that it had decided to initiate the procedure laid down in Article 108(2) of the Treaty on the Functioning of the European Union (TFEU) in respect of the measure. The Commission decision to initiate the procedure was published in the *Official Journal of the European Union* ⁽⁵⁾. The Commission invited interested parties to submit their comments on the aid measure.
- (3) Spain responded to the decision to open the procedure by letter of 21 December 2009. The Commission received comments from interested parties. It forwarded them to Spain, which was given the opportunity to react; its comments were received by letter dated 23 March 2010.
- (4) The Commission asked additional questions by letters of 19 February and 19 May 2010, to which the Spanish authorities responded by letters of 22 March and 31 May 2010.

(5) On 18 March 2010, by a letter of formal notice pursuant to Article 258 TFEU, the Commission opened infringement proceedings on the grounds that the tax on electronic communications was contrary to Article 12 of Directive 2002/20/EC of the European Parliament and of the Council of 7 March 2002 on the authorisation of electronic communications networks and services (Authorisation Directive) ⁽⁶⁾, which lays down precise rules relating to the administrative charges that Member States can levy on companies providing a telecommunications service or network. The State aid investigation is without prejudice to the infringement procedure.

⁽¹⁾ OJ C 115, 9.5.2008, p. 312.

⁽²⁾ OJ C 8, 14.1.2010, p. 31.

⁽³⁾ Official State Gazette [*Boletín Oficial del Estado- BOE*] 210, 31.8.2009, p. 74003.

⁽⁴⁾ Official State Gazette 134, 6.6.2006, p. 21207.

⁽⁵⁾ See footnote 2.

⁽⁶⁾ OJ L 108, 24.4.2002, p. 21; concerning the infringement procedure see Commission press release IP/10/322.

II. DETAILED DESCRIPTION OF THE MEASURE

The current system of financing public broadcasting in Spain

- (6) The current system of financing public broadcasting in Spain by RTVE, as established by Law 17/2006, was approved by the Commission in decisions in 2005 and 2007⁽⁷⁾. Law 17/2006 entrusts the RTVE with a public service mission. Section I of that law (in particular Articles 2 and 3) defines the public service mission of RTVE and specifies that the mission for television and radio services respectively would be performed by the companies RTVE (*Radio Televisión Española*) and RNE (*Radio Nacional de España*). Section II, Chapter IV, regulates the financial and economic framework conditions under which RTVE will operate its public service tasks. In particular, Article 33 stipulates that RTVE will receive annual budgetary payments as compensation for the fulfilment of its public service tasks. This compensation shall not exceed the net cost of the public service provided by RTVE and RNE respectively. Section II, Chapter VI regulates external control by the Parliament, the audiovisual authority and the Court of Auditors.
- (7) The annual budgeted expenses for running RTVE were EUR 1 177 million in 2007, EUR 1 222 million in 2008, and EUR 1 146 million in 2009. During these last years RTVE received a public service compensation of around EUR 500 million per year (2006: EUR 575 million; 2007: EUR 433 million; 2008: EUR 500 million; 2009, however, with already reduced advertising revenues: EUR 726 million).

The reform of the financing of RTVE

- (8) Law 8/2009 amends Law 17/2006 with regard to the definition of the public service mission and the possible commercial activities of RTVE. It adds further elements to the public service mission which were approved by the Commission in 2005. In particular, it limits the acquisition of broadcasting rights for sports events of general interest or great interest for society, except for the Olympics and Paralympics, to 10 % of the total annual budget for external supplies, purchases and services (Article 9(1)(i)). It states obligations with regard to programmes for children (Article 9(1)(d)) and limits the broadcasting of films produced by the major international producers for first release at peak times to 52 films per year (Article 9(1)(m)).
- (9) The new law provides in particular that the use of advertising, teleshopping, sponsorship and pay-per-view services as sources of revenue will be discontinued by the end of 2009. These commercial revenues shall be

replaced by funds generated by existing or new charges on commercial broadcasters and telecommunication operators. Spain expects that the measure will relieve pressure from commercial operators, increase their revenues from advertising and eliminate a potential source of market distortion. RTVE will retain as sources of commercial income the provision of services to third parties and the sale of its own productions (altogether around EUR 25 million).

- (10) So far, annual advertising revenues accounted for around EUR 600 million (2007: EUR 667 million; 2008: EUR 565 million). With the disappearance of this commercial income, the net costs for RTVE's public service broadcasting mission will be nearly identical to the annual budgeted expenses of operating the broadcaster. Accordingly, Spain intends to compensate for the abolition of these revenues by raising its own contribution from public funds up to the annual budgeted expenses of operating RTVE, reduced only by the minor remaining commercial revenues of EUR 25 million mentioned in the previous paragraph.
- (11) As overall annual income of RTVE, Article 3(2) of the new law provides, for the years 2010 and 2011, for a maximum amount of EUR 1 200 million, for the years 2012-2014 a maximum increase in this amount of 1 % and for the subsequent years an increase based on the annual consumer price index. When determining these amounts, Spain estimated, in comparison with the annual budgeted expenses of RTVE in previous years, additional annual expenditure of EUR 104 million to fill the air time previously reserved for advertising with other audiovisual productions.

Fiscal measures linked to the reform

- (12) According to Spain's budgetary planning, this overall amount of annual income will be composed of allocations from the general state budget, according to the scheme provided for in Law 17/2006, of about EUR 500 million, which is in line with the amount contributed in previous years, and through new income generated from three fiscal measures introduced or modified by Articles 4, 5 and 6 of the new law:
- (a) A tax of 3 % of the revenues of free-to-air TV broadcasters and of 1,5 % of revenues of pay-TV broadcasters. These contributions must not exceed 15 % (for free TV) and 20 % (for pay-TV) of the total annual support for RTVE. Any surplus tax revenue beyond these percentages will go to the general state

⁽⁷⁾ Cases E 8/2005, State aid in favour of the Spanish national broadcaster RTVE, and NNS/07, financing of workforce reduction measures of RTVE.

budget. The tax applies only to entities established in Spain. Services imported from another Member State are not subject to this tax.

- (b) A tax of 0,9 % on gross operating revenues (excluding those obtained in the wholesale reference market) of telecommunications services operators registered with the register of operators of the Spanish telecoms regulator, Comisión del Mercado de las Telecomunicaciones, in any of the following services: fixed telephony, mobile telephony and Internet access provision. Operators subject to the tax must be operating nationwide or in more than one Autonomous Community and must provide audiovisual services or another service that includes advertising. This contribution must not exceed 25 % of the total annual support for RTVE. Any surplus tax revenue beyond this percentage will go to the general state budget. The tax applies only to entities established in Spain. Services imported from another Member State are not subject to this tax.
- (c) A share of 80 %, up to a maximum amount of EUR 330 million, of the already existing levy on radio spectrum use as established by Law 32/2003 of 3 November 2003. The remainder will be attributed to the general budget. This percentage can be modified in accordance with the General State Budget laws.
- (13) Articles 5 and 6 of Law 17/2006 expressly state that the taxes on commercial TV and telecommunications operators are collected 'for the purpose of contributing to the financing of RTVE'. Furthermore, the preamble expressly establishes this link between the new taxes and the financial compensation for withdrawing RTVE from the advertising market.
- (14) Should the revenue from these three tax sources not be sufficient to cover the gap of EUR 700 million between the traditional public service compensation (EUR 500 million) and the overall costs of running RTVE, which have so far been covered by commercial revenues, Article 2(2) of Law 8/2009 establishes that the missing funds would be contributed from the general state budget, in accordance with Article 33 of Law 17/2006 which obliges the government to cover the net costs of the public service obligations of RTVE. This means that the financing of the net costs of the public services provided by RTVE, up to a maximum amount of EUR 1 200 million, will be assured, independently of the revenue generated by the taxes.
- (15) Spain confirmed that the contribution from the taxes on TV broadcasters and telecommunications operators should not necessarily be used only to fund RTVE.

Spain has established the maximum amounts which may be contributed by the taxes. Any surplus revenue will be attributed to the general state budget and may thereby be used to cover other expenses. Furthermore, up to these maximum amounts, Spain may decide what amount from the tax it actually intends to allocate for RTVE. The budgetary planning for 2010, for example, provides for less than half the possible maximum contribution to be allocated to RTVE.

Other new financial provisions

- (16) In order to avoid overcompensation, Article 8 of the new law provides for a reserve fund into which is paid the part of the revenues allocated by the government which exceeds the actual net costs of the public service obligation. This reserve is limited to 10 % of the annual budgeted expenses of RTVE. Any revenues in excess of these 10 % will go back to the Treasury. The reserve will be used to cover possible losses incurred in previous years. If it has not been spent within 4 years, it will be recovered by reducing the public service compensation for the following year accordingly.
- (17) Furthermore, in accordance with Articles 37 and 39 to 41 of Law 17/2006, external control by auditors, the Government Audit Office, the Parliament, the audiovisual authority and the Court of Auditors will ensure that RTVE receives no compensation exceeding the actual net costs plus the 10 % reserve. Any revenue from the few remaining commercial activities will reduce the public service compensation (Article 7(1) of Law 8/2009).

Grounds for initiating the procedure

- (18) The issues analysed in this decision are those elements of the changes to the existing RTVE financing system concerning which the Commission expressed doubts in the decision to open the formal investigation procedure.
- (19) As the Commission stated, the main feature of the changes in the financing of RTVE and the almost complete discontinuation of commercial activities of RTVE is that the part of RTVE's revenues hitherto generated by these commercial activities will be replaced with revenues originating from taxes specifically introduced or amended for that very purpose. The clear references in Law 8/2009 indicate that the amount of the taxes has been set with a view to contributing a certain predetermined part to the financing of RTVE. This link between the financing and the proceeds from the new taxes suggests that the taxes are hypothecated to the aid

granted to RTVE, in the sense that the revenue from the taxes is necessarily allocated for the financing of this aid to RTVE and has a direct impact on the amount of the aid.

- (20) The Court has repeatedly held that where the method of financing forms an integral part of the measure, the Commission must necessarily also take into account that method in its consideration of the aid measure⁽⁸⁾. Where a charge specifically intended to finance aid proves to be contrary to other provisions of the Treaty, the Commission cannot declare the aid scheme of which the charge forms part to be compatible with the internal market. Consequently, the method by which an aid measure is financed may render the entire aid scheme incompatible with the internal market.
- (21) The Commission therefore expressed doubts as to whether the new taxes formed an integral part of the measure. If so, their compatibility with the Treaty would have to be assessed by the Commission and would impact on the general legality of the aid scheme. This concern seemed justified, in particular in view of the fact that the Commission has doubts as to the compatibility of the new taxes imposed on undertakings providing fixed telephony, mobile telephony and Internet access services with Directive 2002/20/EC⁽⁹⁾.
- (22) Another issue about which the Commission had doubts was whether, following the reform of the financing system, Spain had established sufficient safeguards against a possible overcompensation. The abolition of advertising may impact on the costs of the broadcaster by making its programming less dependent on commercial considerations.
- (23) Moreover, the system of financing RTVE should provide for an adequate procedure for assessing beforehand whether the new services of the public broadcaster RTVE comply with the material conditions of the Amsterdam Protocol⁽¹⁰⁾. The information submitted by

Spain did not allow the Commission to examine whether Spain already had such a mechanism.

III. COMMENTS FROM INTERESTED PARTIES

- (24) Comments from 15 interested parties were received. They came from commercial broadcasters (TF1 and ACT – Association of Commercial TV in Europe), pay TV operators (DTS, Canal Satélite), telephone and Internet service providers (redtel, ONO, AETIC) cable operators (Cable Europe) and advertisers. Some of them asked for their identity to be kept confidential.
- (25) Most complainants were arguing against the lawfulness of the new taxes, which in their view would distort competition between public and private TV, between free TV and pay TV, or between operators who only offer telecommunications services and other operators of telecommunications services who also offer audio-visual services. They also raised doubts concerning the compatibility of the tax on electronic communications with Article 12 of the Authorisation Directive 2002/20/EC⁽¹¹⁾.
- (26) Broadcasters and Internet service providers also questioned the compatibility of the definition of the public service remit of RTVE. It would not be precise enough and would be too generous regarding the acquisition of broadcasting rights for special sport events or films produced by major international producers. TF1 in particular argued that no ex ante test was in place for the introduction of significant new public services of RTVE.
- (27) Regarding the possible hypothecation of the tax to the aid, TV broadcasters and Internet service providers argued that the revenue from the new taxes would have a direct impact on the aid. They were in particular concerned that raising tax revenues could lead to a compensation of RTVE beyond the level of the net costs of providing the public service.
- (28) Regarding the proportionality of aid, various TV and Internet operators saw a risk of overcompensation. The budgetary planning for RTVE of EUR 1 200 million, as determined by Law 8/2009, would not be based on a proper calculation of the net costs of the public service. The current annual budgeted costs of RTVE would be an arbitrary basis. It would not differentiate between commercial and public service activities. In particular, the planning would not take into account the cost savings that would be achieved by abolishing advertising, since the programmes would no longer need to attract

⁽⁸⁾ Joined Cases C-261/01 and C-262/01, *Belgische Staat v Eugene van Calster, Felix Cleeren and Openbaar Slachthuis*, paragraphs 48 and 49; Case C-174/02 *Streekgewest Westelijk Noord-Brabant*, paragraph 26; Case C-333/07, *Régie Networks*, paragraphs 93 to 112.

⁽⁹⁾ See paragraph 5 above.

⁽¹⁰⁾ See Commission Decisions E 3/2005 of 24 April 2007, paragraphs 370 and 372; E 8/2006 of 27 February 2008, paragraph 230, and E 4/2005 of 27 February 2008, paragraph 121. This case practice was adopted on the basis of the Communication from the Commission on the application of State aid rules to public service broadcasting (OJ C 320, 15.11.2001) (the 2001 Broadcasting Communication), and further clarified and consolidated in paragraph 88 of the Communication from the Commission on the application of State aid rules to public service broadcasting (OJ C 257, 27.10.2009, p. 1).

⁽¹¹⁾ See paragraph 6 above.

large audiences. Production, as in the case of arts programmes, for example, would thus be less costly. Others, however, expressed the fear that RTVE would spend more on high-value programmes.

- (29) A possible overcompensation was also seen in the fact that RTVE's losses of advertising income would be fully covered by State funds. This compensation would be calculated on the basis of previous years while the economic crisis would have led to lower commercial revenues in 2010 and thus to lower overall revenues for RTVE. It would not be fair if, with the abolition of dual financing, RTVE were to obtain a guaranteed income, independent from the varying commercial income.
- (30) Broadcasters also questioned the existence of an effective system of budgetary control to ensure that only the net costs of the public service provision are covered by public funds.

IV. COMMENTS FROM SPAIN

- (31) As a preliminary point, Spain contests the fact that in the current procedure the Commission assesses the issues of proportionality and of the ex ante test for significant new services. They would be part of the existing scheme of financing RTVE as approved by the Commission in 2005 and 2007. The opening decision in the present procedure, however, is based on the definition of the reform of the financing system as new aid in the sense of Article 1(c) of Council Regulation (EC) No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article 93 of the EC Treaty⁽¹²⁾. The 'new aid' element would be limited to the financing reform by introducing new taxes and would not alter or affect the other elements of the existing scheme. These other elements would therefore still be existing aid and should not be assessed by the Commission in this procedure.
- (32) Regarding the issue of hypothecation of the tax, Spain argues that the new taxes would not form an integral part of the aid and would not have a direct impact on the amount of the aid. Spain emphasised that according to Article 2(2) of Law 8/2009, read in conjunction with Article 33 of Law 17/2006, the only factor for determining the amount of public financing of RTVE is the net costs of the public service, no matter how much revenue is generated by the taxes. The planned costs of the public service do not take into account the revenue generated by the taxes, but are based on the costs of this service in the previous years.
- (33) Spain confirmed that the contribution from the taxes on TV broadcasters and telecommunication operators is not just channelled to RTVE. Instead, the revenues from the taxes will be transferred to the general State budget (State Treasury), from where all the payments to RTVE will be made. Spain has established maximum amounts for the contribution from taxes. Any surplus revenue will be attributed to the general state budget and may thus be earmarked for other purposes. Furthermore, below these maximum amounts, Spain may decide what percentage of the tax it actually intends to allocate for RTVE. The budgetary planning for 2010 provides for example for less than half the maximum possible contribution to be allocated to RTVE.
- (34) Spain maintains that higher- or lower-than expected revenues from the new taxes would not lead to changes in the planned amounts for the public service compensation. Should the revenue from the new tax sources not be sufficient to cover the financing gap left by abolishing advertising, the missing funds would be contributed from the general state budget, in accordance with Article 33 of Law 17/2006. Any surplus revenue will be attributed to the general budget. Finally, any excess in income beyond the EUR 1 200 million ceiling set by Article 3(2) of Law 8/2009 would be transferred to the Public Treasury. Therefore the planned overall funding of RTVE's public service mission would not depend on the amount of the specific tax revenues but would in any case be assured by the general state budget.
- (35) Regarding the proportionality of the aid, Spain argued that the principle of net cost coverage would be assured. According to Article 33(1) of Law 17/2006, as amended by Law 8/2009, net costs are the only parameter determining the effective amount of the aid. According to Articles 2(2) and 8(2) of Law 8/2009, the general state budget compensates any insufficient tax revenues and any excess revenue is allocated to it, except for the possible overcompensation of 10 % of the annual budgeted costs provided for in Article 8(1) and (2).
- (36) With regard to the appropriateness of an annual budgetary planning of EUR 1 200 million for the coming years, Spain does not consider that it has acted arbitrarily. This amount is based on the annual budgeted costs incurred by RTVE in fulfilling its public service obligation. These obligations were not altered in a way that would lead us to expect lower expenses; on the contrary, complainants overlook the fact that RTVE has to invest EUR 104 million in additional productions to fill the air time freed by the disappearance of commercials.

⁽¹²⁾ OJ L 83, 27.3.1999, p. 1.

- (37) It would furthermore not be right to assume that, following the disappearance of advertising, RTVE would no longer need to attract large audiences and could therefore reduce production costs and offer less attractive transmissions. According to its public service mission, RTVE would be obliged to maintain a distinguished and substantial presence and audience reach among the TV channels, in order to fulfil its mission effectively.
- (38) Finally, under Article 37 of Law 17/2006, effective ex post budgetary control would be assured by internal auditing, a review by the Government Audit Office and external auditing by a private auditing firm (KPMG). Furthermore, pursuant to Articles 39 and 40 of this law, the Parliament and the audiovisual authority supervise the fulfilment of the public service mission by RTVE and its annual accounts. Finally, RTVE is subject to review by the Court of Auditors.
- (39) Regarding the existence of ex ante control for the introduction of significant new services, Spain advised that Article 41(3) of General Law 7/2010 of 31 March 2010 on Audiovisual Communications⁽¹³⁾ established such a procedure. The independent Spanish supervisory and regulatory authority for public broadcasting, the Consejo Estatal de Medios Audiovisuales, has been entrusted with this ex ante control, consisting of a public consultation of stakeholders, publication of the results of the consultation, and the evaluation of the overall impact of each new service on the market. Spain furthermore indicated that it intends to sign a programme contract (contrato-programa) with RTVE by 1 November 2010 which will define what constitutes a significant new service. According to the draft of this programme contract, a significant new service will be taken to mean a new service offer clearly differentiated from the services already in place, which can be classified as the reference product market, with the ability to have an effect on the market, in particular in terms of the impact on demand.
- (42) Nevertheless, in its comments submitted before the opening of the procedure Spain claimed that the reform did not affect trade between Member States, since RTVE did not operate outside Spain. But when State financial aid strengthens the position of an undertaking compared with other undertakings competing in intra-Union trade, this trade must be regarded as affected by that aid, even if the beneficiary undertaking itself is not involved in exporting⁽¹⁴⁾. Similarly, where a Member State grants aid to undertakings operating in the service and distribution industries, it is not necessary for the recipient undertakings themselves to carry on their business outside the Member State for the aid to have an effect on trade in the Union⁽¹⁵⁾.
- (43) In the light of this principle, the Commission Communications on the application of State aid rules to public service broadcasting of 2001 and 2009 explain that 'State financing of public service broadcasters can also be generally considered to affect trade between Member States This is clearly the position as regards the acquisition and sale of programme rights, which often takes place at an international level Moreover, the ownership structure of commercial broadcasters may extend to more than one Member State'⁽¹⁶⁾.
- (44) RTVE is itself active on the international markets (sale of programmes and acquisition of broadcasting rights). Through the European Broadcasting Union it exchanges television programmes and participates in the Eurovision system⁽¹⁷⁾. Furthermore, in the acquisition and sale of broadcasting rights, RTVE is in direct competition with commercial broadcasters that are active in the national and international broadcasting market and that have an international ownership structure. Therefore even without the commercial activities RTVE carried out until August 2009, competition on the Spanish market risks being distorted by the aid granted to RTVE in a way which may affect trade between Member States. The Commission has already stated this in decisions E 8/2005 and NN 8/07.

V. ASSESSMENT OF THE AID MEASURE

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

- (40) According to Article 107(1) of the TFEU, concerning aid granted by Member States, 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.
- (41) The financial resources included in the Spanish system of financing RTVE flow to and are subsequently released from the general state budget. They constitute a direct transfer of State resources to a specific undertaking which are not available to its competitors. RTVE thereby enjoys a selective advantage.
- (45) The Commission also considered the possibility that the financing measures could be regarded merely as compensation for public service obligations which would not confer a financial advantage on RTVE, within the meaning of the *Altmark* decision of the Court of Justice⁽¹⁸⁾. RTVE is an undertaking entrusted with the

⁽¹⁴⁾ ECJ, judgment of 17 June 1999, Case C-75/97 *Maribel bis/ter* [1999] ECR I-3671, paragraph 47.

⁽¹⁵⁾ ECJ, judgment of 7 March 2002, case C-310/99 *Italy v Commission* [2002] ECR I-2289.

⁽¹⁶⁾ OJ C 320, 15.11.2001, p. 5, paragraph 18; OJ C 257, 27.10.2009, p. 1, paragraph 22.

⁽¹⁷⁾ ECJ, judgment of 8 October 2002 in joint cases T-185/00, T-216/00, T-299/00 and T-300/00 *M6 and others v Commission* [2002] ECR II-3805.

⁽¹⁸⁾ Judgment of 24 July 2003, Case C-280/00 *Altmark Trans* [2003] ECR I-7747.

⁽¹³⁾ Official State Gazette 79, 1.4.2010, p. 30157.

provision of a service of general economic interest (SGEI), public service broadcasting. State measures compensating the net additional costs of a SGEI do not qualify as State aid if all the conditions set out by that judgement are fulfilled. First, the recipient undertaking must effectively discharge public service obligations and those obligations must be clearly defined; second, the parameters on the basis of which the compensation is calculated must have been established beforehand in an objective and transparent manner; third, the compensation must not exceed what is necessary to cover all or part of the costs incurred in discharging the public service obligations, taking into account the relevant revenue and a reasonable profit for discharging those obligations; fourth, where the undertaking which is to discharge public service obligations is not chosen in a public procurement procedure allowing for the selection of the offer capable of providing those services at the least cost to the community, the level of the compensation must be determined on the basis of an analysis of the costs which a typical undertaking, well run and adequately provided with the necessary means to be able to meet the public service requirements, would have incurred in discharging those obligations.

(46) Where public subsidies granted to undertakings expressly required to discharge public service obligations in order to compensate for the costs incurred in discharging those obligations do not comply with all these conditions, such subsidies fall within Article 107(1) of the TFEU and must be regarded as State aid within the meaning of that provision⁽¹⁹⁾.

(47) The public entity RTVE was entrusted with the provision of the public service broadcasting as defined by Laws 17/2006 and 8/2009. However, it was appointed as the public service broadcaster by law and not by means of a public tender. Moreover, the Spanish authorities did not determine the level of compensation needed on the basis of an analysis of the costs which a typical undertaking, well run and equipped, would have incurred in discharging those obligations. The level is determined annually on the basis of the current net costs, without using the benchmark of a well-run undertaking. The parameters on the basis of which the compensation would be calculated were not established in advance in an objective and transparent manner. Therefore, not all the conditions set out by the Court are met and the measures under assessment qualify as State aid within the meaning of Article 107(1) of the TFEU⁽²⁰⁾.

⁽¹⁹⁾ See footnote 18, paragraph 94.

⁽²⁰⁾ See the same conclusion in Case E 8/2005, footnote 7, paragraph 46.

Assessment of the existing aid nature of the measures

(48) Spain has not notified the new aid measure. It contends that the measure would not constitute a substantive alteration of the existing aid scheme as amended pursuant to the Commission decision in case E 8/2005 within the meaning of Article 108(3) of the TFEU and would therefore not constitute new aid requiring notification.

(49) According to Article 1(c) of Regulation (EC) No 659/1999, 'new aid' is taken to mean all aid which is not existing aid, including alterations to existing aid. According to Article 4 of the Implementing Regulation (EC) No 794/2004, neither modifications of existing aid of a purely formal or administrative nature which cannot affect the evaluation of the compatibility of the aid measure with the internal market nor an increase in the original budget of an existing aid scheme by up to 20 % shall be considered an alteration to existing aid.

(50) In order for an alteration to an existing scheme to qualify as 'new aid', the alteration to the system must be substantial, i.e. the basic features of the system must be altered as would be the case if, for example, there had been changes in the aim pursued, the basis on which the levy was made, the persons and bodies affected or, generally, the source of its finances⁽²¹⁾. In the present case the sources of RTVE's finances have been substantially changed. The new sources of financing also mean that the financing linked to advertising (which was not aid) is now given by the State (and is aid). This sharp increase in the amount of aid and the switch from a dual funding to single funding system give a clear indication that there is new aid.

(51) Furthermore, if Article 1(c) of the procedural regulation states that alterations to existing aid are to be regarded as new aid, this provision means that 'it is not altered existing aid that must be regarded as new aid, but only the alteration as such that is liable to be classified as new aid', as the Court of First Instance emphasised in the *Gibraltar* case⁽²²⁾. It continued that 'it is only where the alteration affects the actual substance of the original scheme that the latter is transformed into a new aid scheme. There can be no question of such a substantive alteration where the new element is clearly severable from the initial scheme'⁽²³⁾.

⁽²¹⁾ Opinion of Advocate General Trabucchi delivered on 23 January 1975, in Case C51/74 *HULST* [1975] ECR p. 79. Special Spanish edition, p. 27.

⁽²²⁾ Judgment of 30 April 2002 in joined Cases T-195/01 and T-207/01, *Government of Gibraltar v Commission* [2002] ECR II-2309, paragraph 109.

⁽²³⁾ See footnote 22, paragraph 111.

- (52) It follows from this case law and legislation that adjustments which do not affect the evaluation of the compatibility of the aid measure cannot affect the substance of the aid either, and therefore do not change the classification of the measure as existing aid. On the other hand, if an alteration affects the substance of a scheme, but not to an extent which requires a new assessment of its other elements, this alteration can be assessed on a stand-alone basis, without reference to the other elements of the scheme. In this case it is only the alteration which is subject to the obligation for notification and review by the Commission.
- (53) The three fiscal measures which are introduced or amended by Articles 4, 5 and 6 of Law 8/2009 are severable from the existing scheme for funding RTVE. Although the new sources of financing may affect the legality of the scheme as such, they do not affect the evaluation of the other elements of the aid to RTVE or the effect the aid may have on the market.
- (54) The new elements of the aid, namely the new taxes, may create new aid in that they do not fall within any of the situations contemplated by Article 1(b) of Regulation (EC) No 659/1999. They are in fact set up by laws approved after the entry into force of the Treaty, they are not an individual aid measure granted in the context of an authorised aid scheme, they were not authorised on the basis of Article 4(6) of Regulation (EC) No 659/1999, they were not granted 10 years before the Commission's first action and, finally, they apply to sectors that were open to competition when they came into force. Second, even if we admit, as a hypothesis, Spain's argument that they must be regarded as a modification to the existing funding scheme, it appears that the way the additional funding of RTVE is financed constitutes a substantial alteration of the existing funding scheme with regard to the source of its finances. The existing scheme did not contain the specific levies to be collected for the benefit of RTVE, the legality of which may impact on the compatibility of the entire aid.
- (55) As was set out in the opening decision, the changes in the financing of RTVE raised doubts on the part of the Commission as to their effect on the overall compatibility of the financing of RTVE with the Treaty and required an additional assessment by the Commission. Therefore these changes needed to be formally notified to the Commission. As set out above, the classification as new aid applies only to the alteration as such. Therefore, the procedure has been opened by the Commission only in order to assess the quality of these changes and their consequences for the compatibility of the aid.
- service mandate under Article 106(2) of the TFEU, on the basis of the criteria set out in the 2001 Communication on the application of State aid rules to public service broadcasting (the 2001 Broadcasting Communication) ⁽²⁴⁾. In accordance with the Commission notice on the determination of the applicable rules for the assessment of unlawful State aid and with paragraph 100 of the 2009 Broadcasting Communication, the latter applies in the case of non-notified new aid only if the new aid was granted *after* its publication on 27 October 2009. In the present case, however, the new aid system was introduced with the entry into force of the law on 1 September 2009. Hence, the new financing scheme will be assessed on the basis of the 2001 Communication and of the Commission's subsequent case practice ⁽²⁵⁾.
- (57) In order for a measure to benefit from the derogation in Article 106(2), it is necessary that all the following conditions be fulfilled:
- (a) the service in question must be a service of general economic interest and clearly defined as such by the Member State (definition);
 - (b) the undertaking in question must be explicitly entrusted by the Member State with the provision of that service (entrustment);
 - (c) the application of the competition rules of the Treaty (in this case, the ban on State aid) must prevent the performance of the particular tasks entrusted to the undertaking and the exemption from these rules must not affect the development of trade to an extent that would be contrary to the interests of the Union (proportionality) ⁽²⁶⁾.
- (58) In the specific case of public broadcasting, the above approach has to be adapted in the light of the interpretative provisions of the Amsterdam Protocol, which refers to the 'public service remit as conferred, defined and organised by each Member State' (definition and entrustment) and provides for a derogation from the Treaty rules in the case of the funding of public service broadcasting 'in so far as such funding is granted to broadcasting organisations for the fulfilment of the public service remit ... and ... does not affect trading

Compatibility of the aid

Definition of RTVE's public service remit and entrustment

- (56) The Commission assesses aid to public broadcasters in the form of compensation for the fulfilment of a public

⁽²⁴⁾ OJ C 320, 15.11.2001, p. 5.

⁽²⁵⁾ This case practice was consolidated in the 2009 Broadcasting Communication. In practice, by complying with the 2009 Broadcasting Communication, Spain will therefore also comply with the Commission's 2001 Broadcasting Communication and the case practice developed on the basis of this Communication.

⁽²⁶⁾ See paragraph 29 of the 2001 Broadcasting Communication.

conditions and competition in the Union to an extent which would be contrary to the common interest, while the realisation of the remit of that public service shall be taken into account' (proportionality) ⁽²⁷⁾.

- (59) The definition of the public service remit by Law 17/2006 has been deemed compatible with Article 106(2) of the TFEU by the Commission in its decision on the financing of RTVE in cases E 8/2005 and NN 8/07. Article 9 of Law 8/2009 affects this definition in so far as it adds further obligations and restrictions on the content of the broadcasting of RTVE. The criterion of an appropriate definition of the public service mandate is therefore still fulfilled. Furthermore, withdrawing RTVE from the TV advertising market may contribute to strengthening the public service mission by making programming less dependent on commercial considerations and the fluctuations of the commercial revenues.
- (60) For this reason, the Commission did not express doubts in the opening decision with regard to these aspects of the financing of RTVE.

The choice of funding RTVE

- (61) A central feature of the changes in the financing of RTVE is the almost complete discontinuation of its commercial activities, the change from a 'dual funding' system, combining support by public funds and revenues from commercial activities, to 'single funding', where broadcasting is financed exclusively, or almost exclusively, through public funds, in line with the distinction drawn in paragraph 45 of the 2001 Broadcasting Communication. Member States are free to choose whether and how to combine different sources of financing. However, the part of RTVE's income which hitherto originated from commercial activities will not simply be replaced by funding from Spain's general state budget, in line with Article 33 of Law 17/2006. This replacement will also be accompanied by the introduction or amendment of certain taxes for the very purpose of generating the necessary revenues.
- (62) The link established between the financing and the revenue from new taxes suggests that the revenue from the taxes appears to be allocated for the financing of the aid to RTVE and to have a direct impact on the amount of the aid. Where a charge specifically intended to finance aid proves to be contrary to other provisions of the Treaty, the Commission cannot declare the aid scheme of which the charge forms part to be compatible with the internal market. Consequently, the method by which an aid measure is financed may render the entire aid scheme incompatible with the internal market. Therefore, as set out in paragraphs 21, 22 and 23

above, it has to be assessed whether the new financing system is in fact hypothecating the aid to the taxes and whether the Commission should therefore include the effects of the new taxes in the State aid analysis.

- (63) However, for a tax to be regarded forming an integral part of an aid measure, it must be hypothecated for the financing of the aid, in the sense that the revenue from the tax is necessarily allocated for the financing of the aid and has a direct impact on the amount of the aid ⁽²⁸⁾.
- (64) These conditions are not fulfilled in the case at hand. As confirmed by Spain, the amount of aid for RTVE is set with regard only to the financing needs of RTVE and the estimated net costs of providing the public broadcasting service. The financing received by RTVE is, in fact and in law, independent from the revenue generated by the taxes, since such financing will depend only on the net costs of the public service obligation. On the one hand, the revenue generated by the taxes which will be allocated to the financing of RTVE cannot exceed the net costs of the public service obligation (any excess going beyond the net cost of public service will be paid back to the general state budget). On the other hand, when the net costs of the public service obligation exceed the revenue generated by the taxes in question, the gap will be filled by contributions from the general state budget. Higher- or lower-than expected revenues from the new taxes will not lead to changes in the projected amounts. Should the revenue from the new tax sources be insufficient to cover the financing gap left by abolishing advertising, the missing funds would be contributed from the general state budget, in accordance with Article 33 of Law 17/2006. Any surplus revenue will be attributed to the general state budget. Therefore the planned overall funding of RTVE's public service mission will not depend on the amount of the specific tax revenues but will in any case be assured by the general State budget.
- (65) The fact that the link between the taxes and the purpose for which they are introduced is mentioned in the explanatory memorandum and in the law itself does not alter this conclusion. The wording in the law ('for the purpose of contributing to the financing of RTVE') does not define the quality of the link between the taxes and the aid.
- (66) Accordingly, the Commission concludes that the three tax measures described in paragraph 14 are not an integral part of the aid. Their legality has no bearing

⁽²⁷⁾ See paragraph 31 of the 2001 Broadcasting Communication.

⁽²⁸⁾ Judgment of 22 December 2008 in Case C-333/07 *Regie Networks*, paragraph 99.

on the compatibility of the aid to RTVE. Nor are the observations made by interested parties on their legality of relevance for the State aid assessment. Therefore the infringement proceeding currently open in relation to the tax on electronic communications for an alleged breach of Article 12 of the Authorisation Directive 2002/20/EC does not affect this decision.

Proportionality of the measure

- (67) As concerns the proportionality of the compensation so that it covers no more than the net costs of discharging RTVE's public service obligations, the new law provides that any revenue of RTVE in excess of the net costs of the public service plus an additional 10 % reserve would flow back into the general state budget. A 10 % surplus may be kept in a reserve fund, in order to cover a possible undercompensation in previous years or exceptional costs, for up to 4 years. This mechanism to avoid undue overcompensation is in line with the Commission's case practice ⁽²⁹⁾.
- (68) To ensure that the aid is proportionate, Member States must also install an appropriate mechanism to ensure a regular and effective control of the use of public funding for the public service remit ⁽³⁰⁾ and a guarantee that the annual State financing is limited to the net cost of the public service obligation ⁽³¹⁾. Spain retains in place its system of external control introduced by Law 17/2006, as described above and as approved by the Commission in decision E 8/2005, which allows the net costs of public service broadcasting to be determined.
- (69) However, given that the abolition of advertising may impact on the costs of the broadcaster by making its programming less dependent on commercial considerations, in order to rule out the possibility of overcompensation the Commission, in the opening decision, invited Spain and other interested parties to comment on the financing mechanism.

(70) Interested parties expressed concerns that an overcompensation of RTVE would be likely. The budgetary planning for RTVE of EUR 1 200 million per year would not be based on a proper calculation of the net costs of the public service. It would not differentiate between commercial and public service activities and would not consider cost savings through abolishing advertising because programmes no longer need to attract a large audience and may be produced more cheaply. Furthermore, the full compensation for the loss of advertising income would be calculated on the basis of previous years while the economic crisis would have led to lower commercial revenues in 2010 and consequently to lower overall revenues for RTVE. It would not be fair if, with the abolition of dual financing, RTVE were to obtain a guaranteed income, independent from the varying commercial income. They also expressed a concern regarding budgetary control.

(71) However, Spain demonstrated that the budgetary planning remains in line with RTVE's annual budgeted costs in previous years and that there is no reason to assume that any considerable cost savings could be made now or in the near future merely through the abolition of advertising. RTVE will continue to be required to attract a large audience, and the abolition of commercials will create a need for additional productions which will have to be financed. Compared to the figures of previous years (EUR 1 177 million in 2007, EUR 1 222 million in 2008 and EUR 1 146 million in 2009) and taking into account the additional cost of the productions (EUR 104 million) needed to replace the advertising air time the remaining commercial income (estimated as only EUR 25 million), a ceiling of EUR 1 200 million for the budgetary cost planning seems a cautious and reasonable amount for the annual budgeted costs of the public service compensation. Furthermore, the principle of compensating the effective net costs of a public broadcaster necessarily entails protecting it from the variations in the revenues in the advertising market.

(72) Regarding budgetary control, Spain pointed to the existing control mechanisms already established by Law 17/2006, as described in paragraph 38 above. To assure that the State aid does not exceed the net costs of the public service mission, an effective budgetary ex post control is assured, according to Article 37 of Law 17/2006, by internal auditing, a public review by the Government Audit Office and external auditing by a private auditing firm. Furthermore, pursuant to Articles 39 and 40 of this Law, the Parliament and the audio-visual authority supervise the fulfilment of the public service mission by RTVE and its annual accounts. Finally, RTVE is subject to review by the Court of Auditors. The comments received from interested parties do not give any reason to suppose that this system is not being properly applied.

⁽²⁹⁾ See, for instance, paragraph 281 of Decision E 3/2005 ('a margin of 10 %') and paragraph 147 of Commission Decision C 2/04 of 22 June 2006 ('10 % of the total budget'). This case practice was consolidated and clarified in paragraphs 73 and 74 of the 2009 Broadcasting Communication.

⁽³⁰⁾ The 2001 Broadcasting Communication, paragraph 41.

⁽³¹⁾ See Decisions E 3/2005, paragraph 282, and E 4/2005, paragraph 112.

(73) The Commission considers that there is no indication that the estimated annual compensation for RTVE's public service obligation will exceed what can reasonably be expected to be the costs of this service or that the compensation would eventually go beyond the net costs of the public service.

Diversification of audiovisual services

(74) Moreover, in the opening decision the Commission asked Spain whether it had an adequate procedural framework for assessing ex ante whether the new audiovisual services of the public broadcaster RTVE comply with the material conditions of the Amsterdam Protocol (the so called ex ante control) ⁽³²⁾. The information submitted by Spain so far did not allow the Commission to examine whether Spain already has such a mechanism. The Commission agrees with Spain's contention that in principle this element of the financing of RTVE was the subject of the decisions of 2005 and 2007, which concerned the entire system of financing RTVE. The Commission furthermore agrees that the system has not been affected by the introduction of the new levies which gave rise to the present proceeding.

(75) Nevertheless, according to the information submitted by Spain, Article 41(3) of Law 7/2010 ⁽³³⁾ established such a procedure and entrusted the independent Spanish supervisory and regulatory authority for public broadcasting, the Consejo Estatal de Medios Audiovisuales, with the execution of this control, consisting of a public consultation of stakeholders, publication of the results of the consultation, and the evaluation of the overall impact of each new service on the market. However, this law does not contain a definition of what constitutes a significant new service. Member States should establish the relevant criteria ⁽³⁴⁾. But Spain indicated that it intends to sign a programme contract (contrato-programa) with RTVE by 1 November 2010 at the latest which will contain such a definition. According to the draft of this programme contract, a significant new service will be taken to mean a new service offer clearly differentiated from the services already in place, which can be classified as the relevant product market, with the ability to have an effect on the market, in particular in terms of the impact on demand.

(76) Spain has therefore fulfilled its obligation to introduce ex ante control, and the Commission takes note that by November 2010 it also intends to introduce a binding definition of what constitutes a significant new service. The Commission also notes that this mechanism had not been established before 2010.

VI. CONCLUSION

(77) The Commission finds that Spain has unlawfully implemented the reform of the financing of the public broadcaster RVTE in breach of Article 108(3) of the Treaty on the Functioning of the European Union. However, the Commission concludes that the taxes collected are not hypothecated for the financing of the aid for RTVE and do not have an impact on the compatibility of the aid with the Treaty. Furthermore, Spain has in place safeguards to avoid an overcompensation of RTVE. Finally, the Commission notes that Spain has introduced a procedure for an ex ante control for the introduction of significant new services within the public service remit. Therefore the aid to the public service broadcaster RTVE remains compatible with the Treaty,

HAS ADOPTED THIS DECISION:

Article 1

The financing of the public service broadcaster Corporación de Radio y Televisión Española (RVTE), modified by Spain by Law 8/2009 on the financing of RTVE, is compatible with the internal market within the meaning of Article 106(2) of the Treaty on the Functioning of the European Union.

Article 2

This Decision is addressed to the Kingdom of Spain.

Done at Brussels, 20 July 2010.

For the Commission
Joaquín ALMUNIA
Vice-President

⁽³²⁾ See Decisions E 3/2005, paragraphs 370 and 372; E 8/2006, paragraph 230 and E 4/2005, paragraph 121. This case practice was adopted based on the 2001 Broadcasting Communication and further clarified and consolidated in paragraphs 84-89 of the 2009 Broadcasting Communication.

⁽³³⁾ See footnote 13 above.

⁽³⁴⁾ Laid down in paragraph 85 of the 2009 Broadcasting Communication.