COMMISSION DECISION

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

(notified under document number C(2006) 6923)

(Only the Swedish version is authentic)

(Text with EEA relevance)

(2007/258/EC)

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

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

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

Whereas:

1. PROCEDURE

(1) By letter dated 9 August 2001, the satellite operator Nordic Satellite AB ('NSAB') ([2]) submitted a complaint to the European Commission ('the Commission') regarding alleged State aid granted by the Swedish State to the Swedish terrestrial network operator, Teracom AB ('Teracom') and certain of its subsidiaries in connection with the establishment of digital terrestrial television in Sweden ([3]). By letter dated 28 November 2001, the television distributor Viasat AB ('Viasat') — an integrated free-television and pay-television operator — submitted a very similar complaint to that of NSAB.

(2) After a preliminary investigation, the Commission informed Sweden, by letter dated 14 July 2004, that it had decided to initiate the formal investigation procedure (hereafter referred to as the 'opening Decision') as set out in Article 88(2) of the EC Treaty in respect of the alleged aid measures. The opening Decision was published in the *Official Journal of the European Union* on 25 September 2004. It called upon Sweden and other interested parties to submit their comments on the alleged aid measures.

(3) On 29 October 2004, the Commission received the Swedish Government's response (the '29 October response') to its opening Decision. It received comments also from the following interested parties: B2 Bredband AB ('B2') ([4]), the European Cable Communications Association ('ECCA') ([5]), the European Satellite Operators Association ('ESOA') ([6]), NSAB ([7]), Telenor Broadcast Holding AS ('Telenor Broadcast') ([8]), TeliaSonera AB ('TeliaSonera') ([9]), UGC Europe, Inc. ('UGC') ([10]) and Viasat ([11]).

(4) By letters dated 17 November 2004 and 17 January 2006, the Commission forwarded interested parties' observations to the Swedish Government. The latter submitted its comments on the observations by letters dated 20 December 2004 and 20 March 2006.

(5) On 22 November 2004, the Commission departments met with ECCA. Meetings were also held with representatives of NSAB and ESOA on 1 March 2005 and on 21 and 30 November 2005.

(6) By letters dated 8 February 2006, 7 April 2006, 31 May 2006 and 30 August 2006, the Commission sent additional requests for information to Sweden. The Swedish Government responded by letters dated 20 March 2006 (the '20 March response') (registered as received on 22 March 2006), 25 April 2006 (the '25 April response') (registered as received on 24 October 2006), 5 May 2006 (the '5 May response') (registered as received on 11 May 2006), 15 June 2006 (registered as received on 16 June 2006) and 1 September 2006 (registered as received on 4 September 2006).

([1]) See Case C 24/04 (ex NN 35/04) *Introduction of digital terrestrial television in Sweden*, OJ C 238, 25.9.2004, p. 5.

([2]) On 1 December 2005, NSAB changed its name to SES Sirius AB. Notwithstanding this, the complainant will throughout this Decision be referred to as 'NSAB.'

([3]) On 12 April 2002 and on 2 October 2002, NSAB supplemented its complaint with additional information concerning the alleged state aid measures.

([4]) See B2's submission dated 22 October 2004.

([5]) See ECCA's submission dated 25 October 2004 (registered as received on 2 December 2004).

([6]) See ESOA's submission dated 18 October 2004 (registered as received on 25 October 2004).

([7]) See NSAB's submissions dated 22 October 2004, 11 February 2005 (registered as received on 14 February 2005), 9 March 2005 (registered as received on 10 March 2005) and 1 December 2005 (registered as received on 6 December 2005).

([8]) See Telenor Broadcast's submission dated 17 November 2004 (registered as received on 18 November 2004).

([9]) See TeliaSonera's submission dated 25 October 2004 (registered as received on 26 October 2004).

([10]) See UGC's submission dated 25 October 2004 (registered as received on 26 October 2004).

([11]) See Viasat's submission dated 25 October 2004 (registered as received on 26 October 2004).

2. BACKGROUND

(7) This Decision concerns the alleged State aid provided to Teracom and its subsidiary Boxer TV-Access ('Boxer') (unless otherwise stated, Teracom and its subsidiaries will hereafter be collectively referred to as 'Teracom') in connection with the development of the digital terrestrial television platform in Sweden ([12]). According to the complainants, Teracom has received direct and indirect (through the public-service broadcasters SVT and UR) financial support from the Swedish State. This support has allegedly been used to give digital terrestrial transmission in Sweden an unfair competitive advantage over other types of digital transmission platforms such as cable and satellite.

(8) This Decision will not address Sweden's failure to adopt the laws, regulations and administrative provisions necessary to comply with the Directive on the transparency of financial relations between Member States and public undertakings because this has been the subject of a separate ruling by the European Court of Justice ([13]).

3. RELEVANT COMPANIES

3.1. Companies involved in the development of the digital terrestrial platform in Sweden

3.1.1. *Teracom*

(9) Teracom is a company charged with the building and operation of the terrestrial television transmission platform in Sweden. It is a public company, wholly owned by the State. It was created in 1992 to take over the television and radio transmission operations previously carried out by the Swedish Telecommunications Administration ('Televerket') ([14]).

(10) According to its articles of association, Teracom is to transmit and distribute radio and television programmes, and develop, market and perform other services related to or compatible with its transmission and distribution activities. These other services consist mainly of telecom and information services.

(11) Since its creation, Teracom has been the exclusive owner and operator of the only existing terrestrial broadcasting network in Sweden ([15]). To broadcast via the terrestrial platform, private and commercial television channels enter into transmission agreements with Teracom and pay Teracom for services provided.

(12) On 15 December 2005, the Swedish Post and Telecommunications Regulator ('Post- och telestyrelsen') adopted two Decisions stating that Teracom, in its role as a network operator, has significant market power in the Swedish wholesale markets for terrestrial broadcasting services. It therefore imposed special obligations on Teracom with regard to the distribution of television content to end-users through both the analogue and the digital terrestrial network. Teracom is now obliged, under certain conditions, to provide access to the terrestrial platform to companies wishing to distribute television content to end-users, to apply cost-oriented pricing, to apply non-discriminatory conditions for access to the terrestrial platform and to keep separate and open accounts for its own activities and activities connected with the provision of access ([16]).

3.1.2. *Boxer*

(13) Boxer offers consumers access to television programme packages and other services via the digital terrestrial television platform. The company was established in October 1999 and is owned 70 % by Teracom and 30 % by the British private equity and venture capital company 3i ([17]).

(14) Boxer is the only distributor of television programmes (including pay television) in the digital terrestrial network in Sweden. When a television channel receives a broadcasting licence for the Swedish terrestrial network, the channel can either sign a distribution agreement with Boxer to have its programmes distributed or choose to broadcast free-to-air, i.e., unencrypted. Most television channels broadcasting in the digital terrestrial network have signed a distribution

([12]) According to the complainants, unlawful state aid has also been provided to a company called Senda i Sverige AB ('Senda'). Senda used to be a subsidiary of Teracom dealing with the coordination, marketing and packaging of television programmes and services for terrestrial digital television. Since 1 October 2002, Senda has been merged with Boxer and the two companies are now operating under the name 'Boxer.'

([13]) See Commission Directive 2000/52/EC of 26 July 2000 amending Directive 80/723/EEC on the transparency of financial relations between Member States and public undertakings, OJ L 193, 29.7.2000, p. 75. Judgment of the Court of Justice of 15 July 2004 in Case C-141/03 *Commission* v *Sweden*, not yet reported.

([14]) See Prop. 1991/92:140, bet. 1991/92:KrU28, rskr. 1991/92:329. Televerket has since been privatised and is now known as Telia AB.

([15]) In December 2004, the Commission opened infringement proceedings against Sweden for violations of the Directive on competition in the markets for electronic communications networks and services (SG infringement No 2004/2197; Case COMP/C-1/39.157). The case concerned the maintenance of exclusive rights in the relevant sector. As a result of these proceedings, the Government undertook to abolish the exclusive rights awarded to Teracom with regard to the provision of analogue terrestrial broadcasting services by 1 January 2006. The case concerning digital terrestrial broadcasting services is still ongoing although the Government no longer disputes the Commission's assessment that the regulatory framework currently in force infringes the said Directive. However, because the Government has failed to provide the Commission with a draft piece of legislation which would allow it to ascertain whether the infringement will come to an end and when the new legislation would enter into force, the Commission has decided to refer Sweden to the Court of Justice; see Commission press release IP/06/1411 of 17 October 2006.

([16]) See Decision 05-8675/23 of 15 December 2005 relating to the digital terrestrial network and Decision 05-8674/23 of 15 December 2005 relating to the analogue terrestrial network.

([17]) See www.boxer.se. Between April 2000 and April 2005, 3i's 30 % shareholding in Boxer was held by Skandia Liv ('Skandia').

agreement with Boxer ([18]). According to Boxer, it grew by 42 % in 2005 and had over half a million subscribers at the end of December 2005 ([19]).

3.1.3. *SVT*

(15) SVT is the main public service broadcaster in Sweden. Since 1997, SVT, like all the other radio and television public service companies in Sweden, is owned by a Foundation ([20]). Its obligations as a public service broadcaster are regulated in both its analogue and its digital broadcasting licences, which are issued by the Government. SVT's public service channels must reach 99,8 % of the Swedish population and it must broadcast via the terrestrial network to its fullest extent ([21]). The requirement to cover 99,8 % of the population means that, until the digital terrestrial platform is fully built out, SVT must broadcast in parallel over the analogue terrestrial network. SVT currently purchases all its services for terrestrial transmission from Teracom ([22]).

(16) All of SVT's channels are broadcast as 'free-to-air television'. SVT's broadcasting licence also states that SVT can use satellite and, in fact, to reach the entire Swedish population, SVT broadcasts its public service channels via satellite. Between March 1999 and April 2004, NSAB — one of the complainants — had the exclusive right to broadcast SVT's public service channels in the Nordic region via its satellites ([23]). SVT's public service channels are also available via the cable network by virtue of must-carry legislation.

3.1.4. *Utbildningsradion ('UR')*

(17) UR — the 'educational radio' — is the second public service broadcaster in Sweden. It broadcasts both radio and television. Like SVT, UR is also owned by the Foundation (see 3.1.3. above) ([24]).

(18) Similarly to SVT, UR's obligations as a public service broadcaster are regulated in its broadcasting licence and UR is required, after having consulted Swedish Radio ('Sveriges Radio') and SVT, to purchase services for transmitting via the analogue terrestrial network from Teracom ([25]). UR broadcasts via one of SVT's channels and its programmes must reach 99,8 % of the Swedish population. Also, UR's programmes must be broadcast over the terrestrial network, and are broadcast free-to-air on the terrestrial networks and as must-carry on the cable networks.

(19) In the remaining part of this Decision, SVT and UR will be collectively referred to as 'SVT' and figures (e.g., appropriations and payments) relating to each of the two companies will be referred to in aggregate ([26]).

3.2. **Complainants**

3.2.1. *NSAB*

(20) NSAB is a company with its head office registered in Sweden. NSAB owns and operates two Sirius satellites that provide the Nordic and Baltic regions, as well as Eastern and Central Europe, with television and other media and telecommunications services. NSAB distributes radio and television signals of both public and private broadcasters.

(21) NSAB is 75 % owned by one of the leading direct-to-home satellite services operators in Europe — the Luxembourg-registered SES ASTRA — and 25 % owned by the Swedish Space Corporation ('Svenska Rymdaktiebolaget'). Swedish Space Corporation is a State-owned limited liability company with operations in Sweden ([27]). Until March 2000, NSAB was partly owned by Teracom ([28]).

3.2.2. *Viasat*

(22) Viasat is an integrated free- and pay-television operator which distributes programmes via the Sirius satellite platform. It operates out of the United Kingdom, where it is also registered. Viasat is a wholly owned subsidiary of the Swedish media group MTG AB ('MTG'). MTG operates worldwide and claims to be, among other things, the largest free- and pay-television operator in Scandinavia and the Baltic countries.

4. **TELEVISION BROADCASTING**

4.1. **Television broadcasting platforms in Sweden**

(23) In Sweden, television is currently distributed through the terrestrial networks, through cable networks and satellite-delivered master antenna television systems ('SMATV'), via

([18]) This Decision is without prejudice to the application of the EU internal market rules.

([19]) See Boxer's press release of 18 January 2006, *Boxer grew by 42 % in 2005*. See also Boxer's press release of 12 July 2005, *Boxer fortsätter att öka antalet digitala TV-kunder*; and its press release of 20 October 2005, *Fortsatt ökning för Boxer*.

([20]) See www.svt.se and Prop. 1995/96:161, pp. 70-72.

([21]) See, e.g., Government Decision of 10 February 2005 (No I:11), Government Decision of 22 June 2005 (No I:22), Government Decision of 15 December 2005 (No I:102) and Government Decision of 23 February 2006 (No I:15).

([22]) Until 31 December 2005, it was obliged to do so with regard to analogue broadcasting.

([23]) The agreement between NSAB and SVT was notified to the Commission in 1999 (Case No IV/C-2/37.517) and the parties received a comfort letter in November 1999.

([24]) See www.ur.se/ur/start.php? s1=omur&s2=historik.

([25]) See Government Decision 29 addressed to UR, *Tillstånd att sända television*, KU2001/1543/Me (partly) of 20 December 2001; and Annex 1 to Government Decision I:12, *Tillstånd att sända ljudradio och television*, U2005/1824/Me of 2 October 2005. This broadcasting licence has been prolonged and covers the whole of 2006 as well.

([26]) The reason for this is that the appropriations allocated to UR are not significant and the rules governing UR's activities and transmissions are virtually the same as those governing SVT. Moreover, UR broadcasts via one of SVT's channels. The appropriations allocated to each of the two companies, and payments made by each of them, will therefore be treated as one.

([27]) See http://www.ses-sirius.com.

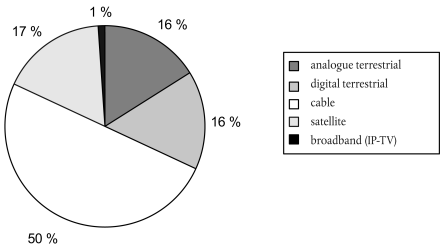
([28]) See Teracom's Annual Report 2000.

satellite and via broadband. According to the Government, television broadcasting will soon be available also through third-generation mobile telephone networks ([29]).

(24) Figure 1 below illustrates the comparative significance of the different television platforms in Sweden in 2006. The figure indicates the actual use of the different platforms as a percentage of all Swedish households ([30]). In the case of the terrestrial platform, the figure distinguishes further between analogue and digital reception.

Figure 1:

Actual household TV reception in Sweden in 2006



(25) All the currently commonly available transmission platforms, i.e. cable, satellite and terrestrial, have been or are affected by the transition from analogue to digital television broadcasting. The digitisation of broadcasting has great advantages in terms of more efficient spectrum usage and increased transmission possibilities. This will lead to new and better high-quality services and to wider consumer choice.

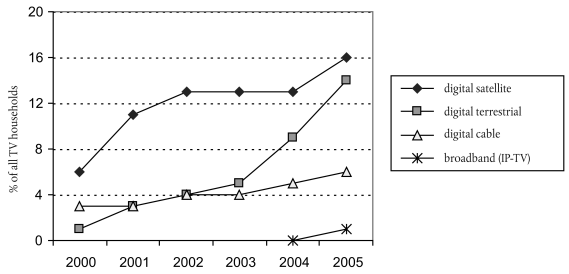
(26) Irrespective of the transmission mode, digital transmission has either an open architecture or contains a conditional access system where the channels are encrypted. This means that, in order to receive open digital transmissions, viewers need a digital receiver which is either built into the television set or comes in the form of a separate 'set-top box' which operates as a decoder. In order to watch encrypted channels, viewers must have a set-top box which is capable of reading a so-called 'access card'.

4.2. The development of digital terrestrial television in Sweden

(27) Digital television in Sweden has developed strongly during the last five years. While all the digital platforms — satellite, cable and terrestrial — experienced growth during the period from 2000 to 2005, satellite was at the forefront of digitisation (see Figure 2) ([31]).

Figure 2:

Development of digital platforms in Sweden (2000-05)



(28) On the basis of a proposal from the Government, Parliament decided in 1997 that the development of a digital terrestrial network should start in several parts of the country and that the State should gradually decide whether, and if so how, the build-out of the network should continue ([32]). It was decided that the development of the digital terrestrial network should be financed entirely by the participating companies, i.e., the broadcasters and the network owner, and not by the State ([33]).

(29) In 2003, Parliament decided that the analogue terrestrial network should be switched off by 1 February 2008 ([34]), and in May 2004 it decided that the multiplex reserved for SVT's digital transmissions should be built out to cover 99,8 % by the time the analogue terrestrial network was entirely shut down. By then, at least one more multiplex should cover 98 % of the population. No requirements as to the coverage of the other multiplexes were decided on ([35]).

(30) According to Teracom, the first stage of the shut-down of the analogue terrestrial network started on 19 September 2005 and covered approximately 150 000 households in Sweden ([36]). See Table 1 below for the planned stages and the estimated percentage population affected by the shut-down in each stage.

Table 1:

Planned shut-down of the analogue terrestrial network and estimated percentage of the population affected

	% of population in affected area	% of population covered by digital terrestrial television (accumulated figures)
Stage 1 ended in November 2005	4	4

([29]) See the 29 October response, p. 11.
([30]) See Statens Offentliga Utredningar: *Sveriges övergång till digital-TV*, Digital-TV-Kommissionen.
([31]) Source: Mediavision, MMS, see the 20 March response, question 15. See also Radio och TV-verket's *Mediautveckling 2005 och 2006*.
([32]) See Bet. 1996/97:KU17; Rskr. 1996/97:178.
([33]) See Bet. 1996/97:KU17.
([34]) See Bet. 2002/03:KU33, Rskr. 2002/03:196.
([35]) See Bet. 2003/04:KU24; Rsks. 2003/04:231.
([36]) See https://www.teracom.se.

	% of population in affected area	% of population covered by digital terrestrial television (accumulated figures)
Stage 2 ended in May 2006	20	24
Stage 3 is scheduled to end in November 2006	16	39
Stage 4 is scheduled to end in May 2007	28	67
Stage 5 is scheduled to end in October 2007	33	100

Source: Teracom. Note that figures are estimates.

(31) Teracom's own funds and the revenues from the sale of network services (e.g., user fees) have not been sufficient to cover the entire investment costs related to the roll-out of the countrywide digital terrestrial network and Teracom, therefore, has had to raise additional capital. It has done this through loans on the capital market and through the sale of assets, and in this way it has managed to finance the development of the digital terrestrial network ([37]).

4.2.1. *Transmission via the digital terrestrial network in Sweden*

(32) Digital terrestrial television operates through multiplexes, which are systems that combine and digitalise multiple signals for transmission over a single line or a common channel. This results in more capacity and in a larger number of channels which can be broadcast simultaneously. Teracom currently operates five multiplexes, each multiplex having the capacity to transmit around eight individual television channels. During the spring of 2006, four of the multiplexes covered approximately 98 % of the Swedish population and the fifth multiplex approximately 50 % of the population ([38]).

(33) The Government bases its decision to grant a licence on recommendations from the Radio and Television Agency ('Radio och TV-verket'), which reviews the applications. In October 2006, approximately 40 television channels were granted a licence to broadcast in the digital terrestrial network. One of the five multiplexes is reserved for SVT, a second one is currently mainly devoted to TV4 and the remaining multiplexes are shared among the other licence holders ([39]).

4.2.2. *The marketing of the digital terrestrial network to consumers*

(34) Boxer is responsible for the subscriber base — that is, for marketing the pay television offer on the digital terrestrial platform to end customers. According to the Government, Teracom and Boxer face fierce competition from other transmission platforms such as satellite operators. This made it difficult for Boxer, while trying to establish itself and build up a customer base, to charge customers the full cost of a set-top box. After the launch of the digital terrestrial platform, Boxer therefore offered set-top boxes to customers at a low price and recovered the costs over the entire subscription contract period. This explains why Boxer suffered substantial losses in the initial phase of its operations. When Boxer was making losses, it received a capital injection on equal terms from both its parent companies: 70 % from Teracom and 30 % from Skandia ([40]).

4.3. Swedish public service television and its funding

(35) According to Swedish law, each household that owns a television set must pay a television licence fee. The money from the television licence fee finances the public service companies (television and radio) in Sweden ([41]).

(36) The television licence fee is collected by an entity jointly owned by all the Swedish radio and television public service companies: Radiotjänst i Kiruna AB ('Rikab') ([42]). Rikab transfers the money it collects to a specific account with the Swedish National Debt Office ('Riksgäldskontoret'), the so-called 'rundradiokontot'.

(37) On the basis of SVT's activities and any changes or additions that the Government wishes to add to the public service obligations, Parliament decides each year on the amount the company will have at its disposal for the performance of its public service duties ([43]). SVT uses the money allocated to it to perform its public service activities, as detailed in the broadcasting licence and the conditions of funding ([44]). Out of the allocated money, SVT decides itself how much should be used for, e.g., programme activities and how much should be spent on distribution of programmes (e.g., transmission fee payments to Teracom) ([45]).

(38) During the digital terrestrial switchover, analogue and digital terrestrial transmissions will be broadcast in parallel

([37]) See the 29 October response, sections 3.4.2. and 3.5.

([38]) See http://www.teracom.se and Statens Offentliga Utredningar: *Sveriges övergång till digital-TV*, Digital-TV-Kommissionen.

([39]) See http://www.rtvv.se/se/Om_media/tv/digitaltv/but also the Report made by the Post and Telecommunications Regulator in November 2005, *Förstudie: Frigjort frekvensutrymme vid övergången till digitalt marksänd TV*, pp. 5-7.

([40]) See the 29 October response, p. 22, and the Government's response of 20 December 2004, p. 2. It should be noted that, as of April 2005, 3i is the owner of the 30 % previously held by Skandia.

([41]) See the Law on the Television Licence Fee (1989:41).

([42]) *Ibid*.

([43]) See *Radio och TV i allmänhetens tjänst — Riktlinjer för en ny tillståndsperiod*, Betänkande av Kommittén om radio och TV i allmänhetens tjänst, Stockholm 2005.

([44]) See *Anslagsvillkor för Sveriges Television AB för år 2005*, Prop. 2004/05:1, bet. 2004/05:KrU1, rskr. 2004/05:97.

([45]) See the 29 October response, pp. 27-30 and 42-43.

to give viewers time to switch to the new reception mode. To prevent the higher costs incurred by SVT because of these parallel transmissions leading to a significant increase in the television licence fee collected from television set owners ([46]), the State decided to implement an alternative financing mechanism to cover the costs. To this end, a separate account was opened with the National Debt Office in 2002, the so-called 'distribution account' ('distributionskontot'). The distribution account is financed by money from the rundradiokontot and through a credit facility granted by the National Debt Office. From the distribution account money is then transferred to SVT to pay for terrestrial transmission ([47]).

(39) For the first few years, the distribution account is running a deficit because the amount of money which is transferred to it from the rundradiokontot is less than the amount which is transferred from it to SVT for transmission payments. The difference between what the distribution account receives from the rundradiokontot and the money which SVT needs for transmission payments is covered by the credit granted by the National Debt Office. Once the analogue terrestrial network is switched off and SVT no longer needs to pay for the parallel transmission of analogue and digital terrestrial signals, the transfers from the distribution account to SVT will be reduced and the deficit on the distribution account will be paid off gradually. It is estimated that all costs for parallel transmission will be fully recovered by 2013, when the distribution account will be in balance again ([48]).

(40) According to the conditions of funding, SVT appears in no way to be restricted in how it uses and allocates the amount given to it from the rundradiokontot and the distribution account — on condition that the money is used solely for its public service activities as detailed in the broadcasting licence and the conditions of funding ([49]).

4.4. Public service broadcasting in the terrestrial network: SVT's payments to Teracom for transmission services

(41) Part of the funding SVT receives is used to purchase terrestrial transmission services from Teracom. The price of those services is negotiated between SVT and Teracom without the involvement of the Government. According to the Government and the Annual Reports of Teracom, Teracom applies a principle of 'equal treatment' ('likabehandlingsprincipen') towards all broadcasters with regard to its fees for analogue and digital transmission ([50]).

([46]) Also, the distribution costs will decrease as the analogue terrestrial network is shut down.

([47]) See the 29 October response, pp. 27-30.

([48]) See the 29 October response, pp. 27-29; Prop. 2001/02:1, p. 121; Prop. 2004/05:1, p. 108; and the 20 March response, question 4.

([49]) See, e.g., *Anslagsvillkor för Sveriges Television AB för år* 2005, Prop. 2004/05:1, bet. 2004/05:KrU1, rskr. 2004/05:97; but also the 20 March response, question 4.

([50]) See the 29 October response, section 3.6.2; the 20 March response, question 9; and Teracom's Annual Reports for, e.g., 2003 and 2004.

(42) With regard to analogue terrestrial transmission, Teracom was, from 1992 until December 2005, required to set its prices at cost level ('självkostnadskalkyl'). SVT's actual payments to Teracom are usually fixed for several years in advance in agreements negotiated between the two companies. According to the current agreement, SVT's payments to Teracom for the period from 2004 until 2013 are based, *inter alia*, on the planned timetable for the switch-off of the analogue terrestrial network. If Parliament decides to change this timetable, the payments may be adjusted ([51]).

(43) With regard to digital terrestrial transmission, Teracom's application of the principle of equal treatment is reflected in the fact that, since 1999, all broadcasters (including SVT) have been charged according to the same pricing model, the so-called penetration-based pricing model ('penetrationsbaserad prissättning') ([52]). This means that, apart from certain fixed fees per channel, i.e., a basic fee ('grundavgift') and a connection fee ('anslutningsförbindelser'), the broadcasters are charged a variable fee which is proportionate to their respective number of viewers (i.e., penetration). The amount per viewer of this variable fee is the same for all channels ([53]). The principle of equal treatment constrains Teracom's pricing behaviour towards SVT and guarantees that SVT does not pay more for digital terrestrial transmission than the other broadcasters — to the extent the services required are the same ([54]). The principle of equal treatment has recently been re-confirmed in the Government's budget bill 2005/06 ([55]).

(44) […] (*) ([56]).

5. DETAILED DESCRIPTION OF THE ALLEGED AID MEASURES

(45) The measures assessed in this Decision are the following:

— indirect financial support to Teracom through allegedly excessive transmission fees paid by SVT in return for Teracom's transmission services provided on both the analogue and the digital terrestrial network;

— direct financial support by means of a State credit guarantee granted to Teracom; and

([51]) See the 29 October response, section 3.6.2; and the framework agreement ('ramavtal') between Teracom and SVT signed on 4 March 2004, annexed to the 20 March response. The reason why Teracom is no longer obliged to price analogue transmission at cost level is the recent decision (with commitments) issued by the PTS. Since that decision, Teracom's prices are subject to *ex ante* control by the PTS. See Section 3.1.1. above.

([52]) See the 29 October response, section 3.6.1, p. 29.

([53]) It is only in the case of the fourth multiplex that since 2002 the variable part of the transmission fee has been based on another, cost-based pricing model; see the Government's reply of 21 March 2003.

([54]) See the 29 October response, section 3.6.2., and the 20 March response, question 9.

([55]) See Prop. 2005/06:1, Utgiftsområde 24, pp. 71-74.

(*) The text in paragraph 44 and related footnote has been deleted for confidentiality reasons. The text contains certain information about an agreement between SVT and Teracom.

([56]) […]

— direct financial support in the form of a conditional shareholder contribution ('villkorat aktieägartillskott'), to be repaid by Teracom.

5.1. **SVT's transmission fee payments to Teracom**

(46) On the basis of the information available to it at the time of the opening Decision, the Commission had reason to believe that the Government used SVT as a vehicle to channel State money to Teracom during the switch-over from analogue to digital terrestrial television. According to the available information, SVT had been allocated funding for transmission which, cumulated over the period from 2002 to 2013, would exceed Teracom's expected costs of transmitting SVT's channels. The excess funding appeared to amount to approximately SEK 509,61 million by 2013 (see below).

(47) As set out in the opening Decision, the Commission was also concerned that the funding allocated to SVT to cover its transmission payments was automatically transferred to Teracom. Should Teracom's terms and conditions for the provision of transmission services to SVT not be comparable to those of a normal market transaction, any payments in excess of the market price could raise concerns of possible disguised aid in favour of Teracom.

(48) The information at the Commission's disposal at the time of the opening Decision suggested that, up to 2007, SVT's transmission fee payments to Teracom would be lower than Teracom's costs of transmitting SVT (visible from column 5 in Table 2). As of 2008, however, when the analogue terrestrial network will be switched off and SVT will no longer be obliged to make parallel transmissions in analogue and digital mode, the information suggested that SVT's annual payments would exceed Teracom's costs of transmitting SVT: from 2008 until 2013, SVT would, every year, pay Teracom considerably in excess of its transmission costs. In 2013, SVT's payments were estimated at 2,3 times the size of its transmission costs. Such payments would more than offset Teracom's initial losses and would allow Teracom a cumulated profit of SEK 509,61 million by 2013. The Commission had doubts that this profit would be the result of normal market conditions and was concerned that the profit might constitute State aid in favour of Teracom (see the opening Decision, paragraph 32).

Table 2:

SVT's transmission fee payments to Teracom from 2002 to 2013 as presented in the opening Decision

Year	Payments from SVT to Teracom (1)	Teracom's costs of transmitting SVT in analogue (2)	Teracom's costs of transmitting SVT in digital (3)	Teracom's total costs of transmitting SVT (4 = 2+3)	Teracom's predicted annual profits (5 = 4 — 1)	Teracom's predicted cumulated profits/losses (6)
2002	485	480	160	640	- 155,00	- 155,00
2003	523	480	160	640	- 117,00	- 272,00
2004	556,46	480	160	640	- 83,54	- 355,54
2005	591,79	480	160	640	- 48,21	- 403,75
2006	256,19	240	160	400	- 143,81	- 547,56
2007	273,79	120	160	280	- 6,21	- 553,77
2008	291,58		160	160	131,58	- 422,19
2009	309,57		160	160	149,57	- 272,61
2010	327,77		160	160	167,77	- 104,85
2011	346,16		160	160	186,16	81,31
2012	364,75		160	160	204,75	286,06
2013	383,55		160	160	223,55	509,61

5.2. The State guarantee issued in favour of Teracom

(49) On the basis of the information available at the time of the opening Decision, the Commission had reason to suspect that a credit guarantee was issued in favour of, or at least was available to, Teracom.

(50) During 2001, for reasons mainly related to Teracom's investments in digital terrestrial television, the predictions concerning Teracom's solvency were not very optimistic and it was expected that its solvency would continue to fall ([57]). As a consequence, there was a serious risk that Teracom would not only fail to respect its contracts for the transmission of SVT and TV4's programmes but also have no means for developing and operating the digital terrestrial network as a whole. In addition, there was a risk that Teracom would not be able to honour its creditors.

(51) A Government proposal of November 2001 recommended that a credit guarantee amounting to a maximum of SEK 2 000 million (approximately €210 million) be given to Teracom. Teracom would be charged a fee to cover the risks and administrative costs involved in granting the guarantee and the guarantee was limited in time ([58]). This proposal was approved by Parliament in February 2002 ([59]). According to the information available to the Commission at the time of the opening Decision, subsequent to the approval, the Government took a decision to issue a credit guarantee in favour of Teracom.

(52) The Commission explains the application of Article 87(1) of the EC Treaty to credit guarantees granted by a Member State in its Notice on State aid in the form of guarantees (the 'Notice on Guarantees') ([60]). According to section 4 of the Notice on Guarantees, only the fulfilment of all of a number of conditions ensures that an individual State guarantee does not constitute State aid under Article 87 (1) ([61]).

(53) On the basis of the background to the credit guarantee and the reasons for the decision to issue a guarantee — as explained in the opening Decision (Teracom's poor financial situation and falling solvency), the Commission had reason to believe that the conditions set out in section 4 of the Notice on Guarantees might not have been fulfilled and that the credit guarantee constituted State aid to Teracom.

5.3. The capital injection

(54) On the basis of information concerning Teracom's financial position available at the time of the opening Decision, the Commission could not exclude that the conditional shareholder contribution in the form of a capital injection constituted State aid to Teracom.

(55) Although Teracom had started a reorganisation of the entire Group's activities in 2002 to improve its financial situation ([62]) and sales forecasts were improving, Teracom still made losses and its solvency kept falling ([63]). According to the information available to the Commission at the time of the opening Decision, Teracom's solvency ratio was at 20 % at the end of 2002 while its lenders required that the solvency ratio be at a level of 25 % (the level for the Group was, according to the Commission's information, apparently 30 %) ([64]). Both Teracom and its lenders therefore requested that a capital injection be granted to Teracom ([65]).

(56) According to the Commission's information, the Government concluded that Teracom's dire financial situation was of a temporary nature, triggered by high investment and operating costs, and that in the long term Teracom would be a viable company with a strong position in the marketplace and a serious business model. In March 2003, the Government proposed that Parliament should authorise it to grant Teracom a conditional shareholder contribution in the form of a capital injection amounting to approximately SEK 500 million (approximately €52,5 million) ([66]). After approval by Parliament in May 2003 and the signing of an agreement with Teracom in June 2003, the State granted Teracom the conditional shareholder contribution.

([57]) See Teracom's Interim Report for the second quarter of 2002.

([58]) See Government bill 2001/02:76.

([59]) See Parliament's Decision 2001/02:KrU07; Rskr. 2001/02:149.

([60]) See the Commission's Notice on the application of Articles 87 and 88 of the EC Treaty to State aid in the form of guarantees, OJ C 71, 11.3.2000, p. 7.

([61]) These conditions are: (i) the borrower may not be in financial difficulty; (ii) the borrower must, in principle, be able to obtain a loan on market conditions from the financial markets without any intervention by the State; (iii) the guarantee should be linked to a specific financial transaction, be for a maximum amount, not cover more than 80 % of the outstanding loan or other financial obligation (except for bonds and similar instruments) and not be open-ended; and (iv) the market price for the guarantee should be paid (which reflects, among other things, the amount and the duration of the guarantee, the security given by the borrower, the borrower's financial position, the sector of activity and the prospects, the rates of default, and other economic conditions).

([62]) See, e.g., Teracom's Interim Report for the second quarter of 2002.

([63]) *Ibid.*

([64]) This is defined as the consolidated equity/assets ratio.

([65]) See the 29 October response, p. 39.

([66]) See Prop. 2002/03:64. A conditional shareholder contribution is not a loan. A conditional shareholder contribution means that the repayment takes place through payments of dividends once the company has enough own capital in the balance sheet. According to the agreement between the State (through the Government) and Teracom, there was a condition that repayment should start as soon as Teracom had sufficient financial means to do so. It is also specifically stated in the agreement that the contribution is done on 'market terms' and that the expected return is the same as that of a conditional shareholder contribution made in respect of a 'competitive business operation.'

(57) In March 2003, prior to the adoption of the proposal, the Government informed the Commission about its intention to put forward a proposal to Parliament about the capital injection. According to the Government, however, this did not constitute a formal notification to the Commission ([67]).

(58) The information available to the Commission indicated, therefore, that prior to the capital injection Teracom's solvency was lower than the requested 25 %. This led the Commission to conclude that the transaction may not have taken place on conditions similar to those on the private credit market (i.e., that a private creditor would have taken the same decision to inject capital into Teracom). The Commission could, therefore, not exclude that the capital injection constituted State aid.

5.4. Reasons for initiating the formal investigation procedure

(59) The information available to the Commission at the time the procedure was initiated suggested that it could not be excluded that all three alleged State aid measures met the requirements of Article 87(1) and, therefore, constituted State aid.

(60) In addition, at the time of the opening Decision, the Commission had no information suggesting that the aid would be compatible with the EC Treaty. None of the derogations provided for in Articles 87(2), 87(3) or 86(2) seemed to be applicable and it was problematic that Sweden appeared to have disregarded the principle of technological neutrality during the digitalisation process.

(61) The Commission therefore initiated the formal investigation procedure to provide Sweden and interested parties the opportunity to submit their comments on the Commission's preliminary assessment as set out in the opening Decision.

6. COMMENTS FROM INTERESTED PARTIES

6.1. B2 Bredband AB ('B2')

(62) B2 agrees with all the allegations set out in the opening Decision. According to B2, the advantages granted to Teracom are capable of distorting competition not only for digital satellite but also for digital cable. For broadband distribution, multicast television will become a major product in the next few years ([68]).

6.2. ECCA

(63) ECCA has no specific comments on the information presented in the opening Decision, but welcomes the Commission's examination of digital terrestrial services in Sweden. This is particularly because several Member States are intervening to finance new infrastructure and, especially, digital terrestrial networks and services. According to ECCA, these policies already influence customers' behaviour vis-à-vis cable services.

(64) In addition, according to ECCA, the procedures and conditions set for these platforms by national and regional authorities are discriminatory in nature and have the effect of putting other platform operators at a competitive disadvantage. According to ECCA, capital investors are reluctant to invest in infrastructure if it is likely that public authorities will promote the establishment of a competing infrastructure capable of offering the same types of services at subsidised prices. This could have very negative effects on the availability of financing needed to consolidate this branch of the cable industry, upgrade networks and introduce new services ([69]).

6.3. ESOA

(65) According to ESOA, the Swedish authorities grant unlawful State aid to Teracom. The effect of the aid is to favour the terrestrial technological solution over others such as cable and satellite solutions, which distorts competition because State aid enables Teracom to reduce costs and undercut prices set by normal market conditions.

(66) According to ESOA, the operation of satellites for digital television transmission requires significant investment. Nevertheless, in an undistorted market, satellites are strong competitors to terrestrial (including cable) digital solutions. Given that the transition from analogue to digital transmission is ongoing throughout the European Union, ESOA is concerned that interventions similar to those seen in Sweden may be occurring in other Member States as well ([70]).

6.4. NSAB

(67) NSAB stands by the arguments advanced in its complaint and supplementary submissions and agrees with the allegations as set out in the opening Decision. It doubts, however, whether the figures communicated by the Swedish authorities in response to the opening Decision correspond to all payments made by SVT to Teracom and whether they give a fair and accurate picture of the amounts actually being paid. It therefore urges the Commission to demand further information and explanations from the Government.

(68) With regard to the Government's arguments in favour of digital terrestrial broadcasting as against digital satellite broadcasting, NSAB notes that in some neighbouring countries there are only relatively few households that cannot receive satellite broadcasts. In addition, it points out that in countries such as, for example, Finland 10 % of households within adequate digital terrestrial network

([67]) See the 29 October response, p. 50.
([68]) See footnote 4 above.
([69]) See footnote 5 above.
([70]) See footnote 6 above.

coverage experience reception problems. It states further that, according to the BBC, 25 % of households in the United Kingdom cannot watch digital terrestrial television owing to poor aerial installations.

(69) Finally, NSAB questions the neutrality of the report by Öhrlings PriceWaterhouseCoopers ('PWC') concerning the capital injection to the Teracom Group. It also claims that the report based its business forecast for Teracom on some over-optimistic assumptions, for example with respect to the expected number of subscribers ([71]).

6.5. **Telenor Broadcast**

(70) Telenor Broadcast does not take a position on whether the alleged measures in the present case constitute State aid. However, it stresses that aid provided to the digital terrestrial platform will put other platform operators at a competitive disadvantage; both in the distribution markets, where television services are offered to consumers, and in the transmission markets, where infrastructure transmission capacity is offered to broadcasters.

(71) Teracom (including Boxer) is active as a provider of both transmission services to broadcasters and television services to consumers, and will be able to use the State aid to subsidise both activities. In the downstream television distribution market this can be done either by offering the television services at lower prices or offering more set-top-boxes than would otherwise be economically feasible without the State aid. According to Telenor Broadcast, this is of critical importance at this stage of the development towards a single market for all platforms.

(72) Telenor Broadcast also raises the question whether the obligation for SVT to cover 99,8 % of the Swedish population via the terrestrial network in itself constitutes State aid, and questions whether terrestrial transmission is the most cost-efficient means of distributing television ([72]).

6.6. **TeliaSonera**

(73) TeliaSonera does not take a position on whether the alleged measures in the present case are compatible with the EC Treaty. However, it emphasises the importance of competitive neutrality among various technical infrastructures in the television distribution marketplace ([73]).

([71]) See footnote 7 above.
([72]) See footnote 8 above.
([73]) See footnote 9 above.

6.7. **UGC**

(74) UGC does not take a position on whether the alleged measures in the present case are compatible with the EC Treaty. At the same time, however, it strongly supports the Commission's investigation. It further maintains that State-sponsored competition can only serve to distort the market. In its view, there can be no justification for State involvement in the development of digital terrestrial television based on a public interest argument. Should it be in the public interest to provide digital television, there are many alternative infrastructures that can do so ([74]).

6.8. **Viasat**

(75) Viasat welcomes the Commission's investigation and takes the view that it is clear from the opening Decision that Teracom (including Boxer) has received considerable funding from State resources which constitute unlawful State aid. It fully agrees with the conclusions in the opening Decision. According to Viasat, satellite transmission is a much more cost-efficient distribution platform and the choice by the Government to favour the terrestrial network will lead to a reduction of consumer choice and lower quality of available products.

(76) Viasat adds that Boxer has also benefited from additional State aid not only through Teracom but also directly from SVT. Unlike satellite broadcast distributors (including Viasat), Boxer does not have to pay a fee for the distribution rights to SVT's programmes ([75]).

7. **COMMENTS FROM SWEDEN**

(77) In its 29 October response, the Government takes the view that there has been no aid to Teracom in contravention of Sweden's obligations under the EC Treaty. It maintains in particular that the opening Decision relied on incomplete and often inaccurate information.

7.1. **SVT's allegedly excessive transmission fee payments to Teracom**

(78) According to the Government, SVT has not made and will not make any excessive payments to Teracom in return for transmission services on the analogue and the digital terrestrial network. In addition, the Government claims that the Commission's assessment in the opening Decision was based on inaccurate figures.

([74]) See footnote 10 above.
([75]) See footnote 11 above.

(79) First, in the opening Decision, the Commission looks at Teracom's costs in the digital terrestrial network (column 3 of Table 2) excluding VAT although all other figures in the same table included VAT. According to the Government, all figures should exclude VAT to make them comparable ([76]). Table 3 below presents the relevant table from the opening Decision corrected for VAT. According to these corrected figures, Teracom's accumulated profits will, by 2013, be significantly lower (SEK 23,7 million) than the amount indicated in the opening Decision (SEK 509,61 million).

Table 3:

SVT's transmission fee payments from SVT 2002 to 2013

(excluding VAT)

Year	Payments from SVT to Teracom excl. VAT (1)	Teracom's costs of transmitting SVT in analogue excl. VAT (2)	Teracom's costs of transmitting SVT in digital (3)	Teracom's total costs of transmitting SVT excl. VAT (4 = 2+3)	Teracom's predicted annual profits/losses (5 = 4 — 1)	Teracom's predicted accumulated profits/losses (6)
2002	388,0	384	160	544	- 156,0	- 156,0
2003	418,4	384	160	544	- 125,6	- 281,6
2004	445,2	384	160	544	- 98,8	- 380,4
2005	473,4	384	160	544	- 70,6	- 451,0
2006	205,0	192	160	352	- 147,1	- 598,1
2007	219,0	96	160	256	- 37,0	- 635,0
2008	233,3		160	160	73,3	- 561,8
2009	247,7		160	160	87,7	- 474,1
2010	262,2		160	160	102,2	- 371,9
2011	276,9		160	160	116,9	- 255,0
2012	291,8		160	160	131,8	- 123,2
2013	306,8		160	160	146,8	23,7

Source: The 29 October response, p. 25. Note, however, that the table still includes a number of errors which are explained and corrected in below.

(80) Second, the Government maintains that the Commission's opening Decision is based on estimates of Teracom's costs of transmitting SVT made as early as 2001 (see columns 3 and 4 in Table 4 and Table 3 respectively). According to the Government, Teracom's actual costs have been significantly different from these estimates (see Table 4 below) and to support its statement, the Government submitted accurate figures. The difference is most notable for Teracom's costs in the digital terrestrial network where the costs were originally estimated at SEK 160 million per year. This estimate was based on a coverage rate of the digital network of 98 % and on a complete functionality of the network as of 2002 including, for example, a regional breakdown ('regional nedbrytbarhet') of transmission signals and security enhancing measures ('säkerhetsåtgärder') ([77]). It was, however, only during the course of 2005 that the digital terrestrial network was rolled out to this degree and that Teracom's costs of transmitting SVT via the digital platform started to correspond to the original estimates (see Table 4 below). The submitted figures which reflect Teracom's actual costs also address the concern the Commission expressed in the opening Decision that the costs of transmitting SVT were, in the initial phase of the roll-out, lower than SEK 160 million ([78]).

([76]) In particular, the Government has pointed out that the transmission fees which Teracom charges SVT include VAT and that the amounts which SVT receives from the distribution account allow for this. Teracom does not benefit from the part of the payment earmarked for VAT because it has to pay this money to the tax authority; see the 20 March response, question 2.

([77]) See the 29 October response, p. 34.

([78]) See the opening Decision, paragraph 36.

(81) Third, the Government pointed out that SVT's transmission fee payments to Teracom as presented in the opening Decision (column 1 of Table 2 and Table 3 above) do not correspond to SVT's actual payments but refer to the funding that was intended to be transferred from the distribution account to SVT. These funds were at SVT's disposal to pay for terrestrial transmission, but there was no obligation for SVT to use these funds solely for that purpose ([79]). The Government also pointed out to the Commission that, contrary to the original assumption, SVT is scheduled to receive SEK 384 million (excluding VAT) in 2006 from the distribution account instead of SEK 205 million (excluding VAT) as estimated in the opening Decision ([80]).

(82) Table 4 below presents SVT's actual payments to Teracom (columns 1a to 1c) and Teracom's actual costs of transmitting SVT (columns 2 to 4) for the period from 1999 to 2006 ([81]). In addition to the timeframe covered in the opening Decision, the table includes the years 1999, 2000 and 2001. According to the Government, these figures allow the Commission to verify that for the entire period since the launch of the digital terrestrial network in April 1999 SVT has not made any excessive payments to Teracom. The information relating to these additional years also addresses the concern raised by the Commission in the opening Decision ([82]), namely that SVT received extra funds during the initial phase of the roll-out of the digital terrestrial network (from 1997 until 2001) i.e., before the distribution account was created. The Government made clear that SVT received, during this period, in total SEK 300,3 million for technical renewal ('teknisk förnyelse'). Out of this amount, SEK [...] million was spent on digital terrestrial transmission services (SEK [...] million in 2000 and SEK [...] million in 2001). These figures are included in Table 4 (column 1b) and are considered in the calculation of Teracom's profits and losses in its dealings with SVT.

(83) Based on Teracom's actual costs and fees, Table 4 illustrates, for every year between 1999 and 2006, Teracom's profits or losses in its dealings with SVT (column 5). It appears that, in every year except 2005, SVT's total payments for analogue and digital transmission to Teracom (column 1c) have been lower than Teracom's total costs of transmitting SVT (column 4). Over the period as a whole, Teracom has in fact made losses on transmitting SVT in the order of SEK 149,5 million.

Table 4:

SVT's actual transmission fees and Teracom's actual transmission costs from 1999 until 2006 (excluding VAT)

Year	SVT's analogue fees (1a)	SVT's digital fees (1b)	SVT's total fees (1c)	Teracom's costs of transmitting SVT in analogue excl. VAT (2)	Teracom's costs of transmitting SVT in digital (3)	Teracom's total costs of transmitting SVT excl. VAT (4 = 2+3)	Teracom's annual profits/ losses (5 = 4–1c)	Teracom's accumulated profits/ losses (6)
1999	[...]	[...]	[...]	[...]	[...]	[...]	- 10,3	- 10,3
2000	[...]	[...]	[...]	[...]	[...]	[...]	- 31,8	- 42,1
2001	[...]	[...]	[...]	[...]	[...]	[...]	- 24,1	- 66,2
2002	[...]	[...]	[...]	[...]	[...]	[...]	- 18,9	- 85,1
2003	[...]	[...]	[...]	[...]	[...]	[...]	- 3,6	- 88,7
2004	[...]*	[...]*	[...]	[...]	[...]	[...]	- 58,2	- 146,9
2005	[...]*	[...]*	[...]	[...]	[...]	[...]	17,5	- 129,4
2006	[...]*	[...]*	[...]	[...]	[...]	[...]	- 20,1	- 149,5

Source: Annex 6 to the 20 March response. For figures with an asterisk, see explanation in footnote 81.

([79]) See the 29 October response, section 3.6.2., p. 32.
([80]) See and the 20 March response, Annex 7.
([81]) […]
([82]) See the opening Decision, paragraph 36.

(84) The Government has provided the Commission with explanations regarding the losses Teracom made on SVT transmissions during the period 1999 to 2006. First, according to the Government, Teracom's pricing in the digital terrestrial network was based on the actual number of viewers (the so-called penetration rate), which, during the initial phase of the roll-out, was below expectations. Second, to give broadcasters an incentive to start digital terrestrial transmissions, Teracom was initially not able to charge transmission fees which would fully cover its costs. Finally, Teracom's costs as presented in include imputed costs such as the owner's required rate of return. Such imputed costs are not considered losses under accountancy rules ([83]).

(85) The Government has also submitted Teracom's actual prices and costs of transmitting broadcasters other than SVT in the analogue and the digital terrestrial network ([84]), in particular the costs and prices of Sweden's main commercial broadcaster, TV4, which is also the only other broadcaster present in the analogue terrestrial network. To the extent that the data indicate that SVT has paid higher transmission fees than TV4, these price differences can, according to the Government, be explained by the special requirements for SVT's transmissions, for example, SVT's higher coverage rate and greater capacity utilisation, the regional breakdown of SVT's transmission signals and security enhancing measures ([85]).

7.2. The alleged credit guarantee issued in favour of Teracom

(86) According to the Government, a credit guarantee was never issued. The Government concedes, however, that in February 2002 Parliament adopted a Decision authorizing the Government to issue a credit guarantee ([86]).

(87) As indicated by the Government, it is important to note that, according to the Swedish Constitution, only the Government, but not Parliament, can make financial commitments towards third parties (such as Teracom) with respect to funds belonging to the State budget. However, the Government cannot make such commitments without Parliament's prior approval. Also, in the case at hand, the Government had requested that the National Debt Office be charged with the task of issuing the guarantee ([87]).

(88) According to the Government, once parliamentary approval was given, the Government, in June 2002, by decision, asked the National Debt Office to issue a credit guarantee in favour of Teracom and decide upon a fee to charge Teracom for the risks involved and the administrative costs. The Government emphasises, however, that this decision specified that the National Debt Office had to consider the EC rules on State aid to see whether a credit guarantee would be compatible with those rules, and, if it was not, to gather the information necessary for a notification under Article 88(3) of the Treaty ([88]). In addition, the National Debt Office had to make a risk assessment of any State guarantee. Importantly, prior to a decision by the National Debt Office concerning the amount of the credit guarantee, the time period and the amount of the fee and prior to establishing that the credit guarantee would not conflict with EC State aid rules, the credit guarantee could not be issued ([89]).

(89) The National Debt Office, which based itself partly on a preliminary credit assessment carried out between July and September 2002 by Standard & Poor's ([90]), concluded that the financial risks involved in issuing a credit guarantee were too significant. If any credit guarantee were to be issued, a very high fee would have to be charged to cover the risks involved. In addition, the National Debt Office found that it could not be excluded that a State guarantee would constitute State aid ([91]). According to the Government, after the National Debt Office had reported its view on 1 October 2002, no actions were taken by the Government, the National Debt Office or by Teracom.

7.3. Capital injection

(90) According to the Government, the conditional shareholder contribution in the form of a capital injection does not constitute State aid within the meaning of Article 87(1) of the EC Treaty.

(91) The Government notes first that the opening Decision is based on partly inaccurate information, which makes Teracom's economic and financial situation look worse than in reality. Teracom's solvency was not as low as indicated in the opening Decision and Teracom had made losses only in 2001 and 2002 and not in 2003 ([92]).

(92) According to the Government, the Commission, in the opening Decision, made a wrong assessment of Teracom's economic and financial situation at the time of the capital injection. The Government emphasises that at the end of June 2003, when it injected capital into Teracom, the company's financial and economic situation had changed considerably compared with the time period which provided the basis for the National Debt Office's negative opinion on the proposal to grant a State guarantee to Teracom ([93]).

([83]) See the 25 April response, question 4.

([84]) See the 20 March response, Annex 6.

([85]) See the 20 March response, questions 7 and 8. For each of the special requirements, the Government also quantified the effect on Teracom's prices.

([86]) See Parliament's Decision 2001/02:KrU07; Rskr. 2001/02:149.

([87]) See Regeringsformen (1974:152), chapter 9 § 10; the Guarantee Decree (1997:1006) and the Law regarding the State's budget (1996:1059). See also Government Decision Ku2002/483/Me dated 27 June 2002.

([88]) See Government Decision Ku2002/483/Me dated 27 June 2002.

([89]) See Government Decision Ku2002/483/Me dated 27 June 2002, read in conjunction with § § 8, 9, 11 and 12 of the Guarantee Decree (1997:1006).

([90]) Standard & Poor's is a global company providing independent credit ratings, indices, risk evaluations, investment research, data, and valuations. The preliminary credit assessment was based mainly on the financial indicators of the company and not on a detailed market analysis.

([91]) See the National Debt Office's report DNR 2002/000170 dated 1 October 2002.

([92]) In fact, since its creation in 1992, Teracom has only made losses in these two years — 2001 and 2002. See Teracom's Annual Reports but also the 29 October response, page 40.

([93]) See the 29 October response, pp. 38-40.

(93) As indicated by the Government, over the course of 2002 Teracom had taken various steps to remedy its financial and economic problems. It sold off three of its subsidiaries, reduced costs by laying off a significant part of its workforce (20 %), merged subsidiaries, shut down parts of its operations and concentrated its business on fewer locations and reduced investments compared with 2000 and 2001. In addition, the market for digital terrestrial television was developing favourably, with growing demand for digital television subscriptions, in particular during the autumn of 2002. For Teracom, this led to a significant increase in annual subscription sales from approximately 100 000 at the end of 2001 to approximately 140 000 at the end of 2002. These cost-cutting measures and the sales increase during the second half of 2002 significantly improved Teracom's financial and economic situation and, in fact, the company was already making profits in the first three months of 2003 — before the Government made its proposal to Parliament ([94]).

(94) The Government explains that, when the National Debt Office communicated its negative opinion to it, the Government decided to conduct a more in-depth analysis of Teracom's economic and financial position ([95]) — instead of the snapshot type of analysis which the National Debt Office had carried out.

(95) Similarly to what a private shareholder would have done, the Government assessed Teracom's short- and long-term economic and financial position based on Teracom's business plans for the years 2003 to 2005, on its financial forecasts for the period 2003 to 2010 and on comparisons with other companies and other shareholders in the same and similar industries. It concluded that a conditional shareholder contribution in the form of a capital injection amounting to SEK 500 million would improve Teracom's solvency and allow Teracom to subsequently generate enough profits to pay back the injection within a reasonable time. The Government maintains that, in this situation, the shareholder capital injection did not constitute State aid. According to the Government, a private investor would, in the same situation, have been prepared to contribute capital because Teracom's long-term financial forecasts were positive ([96]).

(96) The Government adds that, in this context and contrary to what it should have done, the Commission did not take into account all relevant factors in examining whether the capital injection could be expected to generate a reasonable return. The Commission limited its analysis to Teracom's past losses and its solvency ratio. In the Government's view, the Commission was also wrong to compare the State with an outside creditor but should instead have compared it with a private shareholder, which can be presumed to take a long-term approach to its investment. The State owns 100 % of Teracom, which also implies a longer term interest than in the case of a minority holding ([97]).

(97) To further support its arguments, the Government submitted a report by PWC, an independent auditing consultancy, which was requested by the Government to review the Government's decision concerning the capital injection. The report assesses Teracom's economic and financial situation at the time of the capital injection and based on information available at the time of the Government's decision. The report concludes that the Government had sufficient information to decide on the injection and that Teracom's long-term profitability was at a level which would have satisfied a private investor ([98]).

(98) Finally, the Government is of the opinion that the Commission did not sufficiently take into account the broader context of the capital injection. It should, for example, have taken into account that the injection was necessary to secure the investments already made which, in the long term, were expected to be profitable ([99]).

8. ASSESSMENT OF THE ALLEGED AID MEASURES

(99) For a measure to be characterised as State aid within the meaning of Article 87(1), four conditions must be fulfilled: (1) there must be a transfer of State resources; (2) the measure in question must involve an economic advantage to the recipient; (3) the measure must distort, or threaten to distort, competition; and (4) the measure must affect trade between Member States.

8.1 SVT's transmission fee payments to Teracom

8.1.1. *Economic advantage*

(100) To determine whether the transmission fees which SVT pays to Teracom for terrestrial transmission confer an economic advantage on Teracom, it needs to be examined whether SVT has paid or is, in the future, due to pay amounts which exceed what Teracom could reasonably expect to obtain from customers under normal market conditions.

(101) First, the Commission has investigated whether, since the launch of digital terrestrial television in Sweden in 1999 up to the year 2006, SVT has paid Teracom more than Teracom's costs of transmitting SVT. While the calculations in the opening Decision were to a large extent based only on estimates of SVT's payments and Teracom's costs, the Commission has in the present Decision based its calculations on actual figures (see Table 4 above). These figures demonstrate that, during the period from 1999 to 2006, SVT has not made excessive payments to Teracom.

([94]) See the 29 October response, pp. 38 and 39, and Teracom's Annual Reports 2002 and 2003.
([95]) See the 29 October response, p. 39.
([96]) See the 29 October response, pp. 39, 40 and 51-56.
([97]) See the 29 October response, pp. 51 and 53.
([98]) See the 29 October response, Annex 33.
([99]) See the 29 October response, pp. 55 and 56.

In fact, seen over the entire period, SVT's payments have been lower than Teracom's costs of transmitting SVT, resulting in losses on transmission amounting to approximately SEK 149,5 million. Because this figure (SEK 149,5 million) includes payments for both analogue and digital transmissions, this also indicates that there has been no cross-subsidisation in the sense that Teracom has charged excessive fees for analogue transmissions in order to use the money for its digital operations.

(102) Second, the Commission has verified whether Teracom has charged higher transmission fees to SVT than to commercial broadcasters and, in this way, extracted an economic advantage from SVT. In this respect, the Commission notes that Teracom's pricing is subject to the principle of equal treatment, i.e., Teracom applies the same terms and conditions to all its customers ([100]). More particularly, the Commission notes that Teracom's pricing for analogue transmissions has been cost-based ever since 1992 and that its prices for digital transmissions are determined by the so-called penetration-based pricing model in which the parameters are the same for all of Teracom's customers ([101]). The Commission has also compared the actual prices which Teracom has charged to SVT and to other broadcasters in the digital terrestrial network. While Teracom has charged a higher price to SVT than to, for example, the commercial broadcaster TV4, this price difference is due to additional services which SVT requires from Teracom ([102]). The Commission, therefore, has not found any indications that SVT is subject to less favourable (or more favourable) terms and conditions than other broadcasters or that it is charged disproportionately high transmission fees.

(103) Third, and for the sake of completeness, the Commission has investigated whether, in the future, SVT will have to pay Teracom more than a normal market price for transmission. One of the concerns raised in the opening Decision was whether, between 2008 and 2013, SVT would make excessive transmission payments to Teracom which, by 2013, would lead to accumulated profits in favour of Teracom of about SEK 510 million. However, the Commission notes that Teracom's pricing is currently and for the foreseeable future subject to the above-mentioned pricing principles which will prevent it from charging SVT excessive transmission fees ([103]). Moreover, since the decisions of the Swedish Post and Telecommunications Regulator in 2005, Teracom is subject to ex-ante regulation in the wholesale markets for analogue and for digital terrestrial transmissions ([104]). These decisions should, in principle, eliminate any risk that Teracom might charge SVT excessive transmission fees. Finally, as has been explained by the Government (see paragraph 40 above) and contrary to the concern raised by the Commission in the opening Decision, SVT is not obliged to use all the funds it receives from the distribution account to pay Teracom for transmission. SVT negotiates the transmission price independently with Teracom, and if it ends up spending less on transmission than forecast it is free to use these funds for its programme activities ([105]).

(104) On the basis of the above considerations, the Commission takes the position that, although SVT is obliged to transmit via the analogue and digital terrestrial network and currently has no other alternative than to use Teracom for its services, Teracom is restricted in its capacity to take advantage of SVT as a captive customer. In this context, the Commission also notes that, because commercial broadcasters find it worthwhile being present in the digital terrestrial network and paying Teracom's respective transmission fees, it is reasonable that SVT does so too.

(105) As regards the allegation that Boxer received aid because SVT does not pay for distribution ([106]), the Commission would point out that commercial agreements between broadcasters and distributors can take various forms. In view of the fact that the transaction between these two parties involves an exchange of transmission services versus availability of content which is valuable to both parties, the precise terms and conditions can vary considerably depending, for example, on the platforms and operators involved.

(106) On the basis of the foregoing, the Commission concludes that the transmission fees paid by SVT to Teracom do not confer an economic advantage on Teracom and thus do not constitute State aid within the meaning of Article 87(1).

8.2. **The State guarantee**

(107) According to the Notice on Guarantees, a guarantee generally falls within the scope of Article 87(1) if trade between Member States is affected and no market premium is paid. According to section 2 of the Notice on Guarantees, if a State guarantee has been issued, even if no payments are ever made by the State under a guarantee, there may nevertheless be State aid under Article 87(1). This is because aid is considered to have been granted at the

([100]) See paragraph 41 above.
([101]) See paragraphs 42 and 43 above.
([102]) See paragraph 85 above.
([103]) See paragraph 102 above.
([104]) See paragraph 12 above.
([105]) See paragraph 41 above.
([106]) See paragraph 76 above.

moment the guarantee is granted, not at the moment at which it is invoked or the moment at which payments are made under the terms of the guarantee.

(108) However, the Commission notes that, according to settled case law, e.g., *Austria* v *Commission*, there has to be an unconditional and legally binding promise to grant the aid in question before aid can be established to exist ([107]).

(109) In the present case, the Commission takes the view that the Government's decision to request the National Debt Office to issue a credit guarantee was a conditional decision and did not confer on Teracom an unconditional right to request that a credit guarantee be issued to it. The Commission notes that, under Swedish law, when authorities subject to governmental oversight issue a credit guarantee, its issuance is always conditional upon the findings of the National Debt Office regarding, among other things, solvency and honesty. This feature of the Swedish system and laws is a matter of public knowledge. Also, it is clear that the Government was aware of its obligations under Community law because it stated that the National Debt Office had to consider the credit guarantee under the State aid rules and, if necessary, gather the relevant information for a notification to the Commission. Importantly, the Commission notes that no action was taken subsequent to the National Debt Office's report. To sum up, on the basis of the above the Commission therefore finds that it is not possible to conclude that a credit guarantee was ever issued and that an unconditional and legally binding promise to grant the aid was made to Teracom. Consequently, no economic advantage was granted to Teracom.

8.3. **The capital injection**

(110) Where a State provides finance to a company in circumstances that would not be acceptable to an investor operating under normal market economy conditions, it confers an economic advantage on the beneficiary ([108]). To determine whether the conditional shareholder contribution in the form of a capital injection granted to Teracom at the end of June 2003 conferred an economic advantage on Teracom, it needs to be examined whether this capital injection complied with the market economy investor principle.

(111) The Commission concedes that the information concerning Teracom's financial situation as set out in the opening Decision was not entirely accurate. As demonstrated by the Government, Teracom's solvency was not as low as indicated in the opening Decision and Teracom had made losses for two years and not for three consecutive years. The opening Decision, therefore, pictured Teracom's financial situation as slightly worse than in reality.

(112) Having analysed the information submitted by the Government in its 29 October response as well as in subsequent responses, including Teracom's short- and long-term business plans, the Commission considers that the Government's assessment, in 2003, of Teracom's then current and future economic and financial situation was realistic, and that the prospects of a satisfactory return on the capital injection were credible.

(113) As described in detail in Section 7.3 above, the Government made an assessment of Teracom's economic and financial position based on the company's business plans for the years 2003 to 2005, its financial forecasts for the period 2003 to 2010 and comparisons with other companies and other shareholders in the same and similar industries. It concluded that a conditional shareholder contribution amounting to SEK 500 million would improve Teracom's solvency and allow the company to subsequently generate enough profits to pay back the shareholder contribution within a reasonable time ([109]). The forecast for 2003 indicated that Teracom's loss and profit accounts would be positive. In this context, the Commission notes that Teracom was already making profits in the first three months of 2003 — before the Government made its proposal to Parliament.

(114) Finally, the Commission has reviewed the report made by PWC on behalf of the Government, which explains the data which formed the basis for the Government's decision. In the Commission's view, these data provided a credible basis for an investment decision. In particular, the report indicates that, after losses in 2001 and 2002, Teracom was close to break-even at the time the capital injection was made. Especially, Teracom's economic and financial situation had improved considerably compared with the time when the National Debt Office gave a negative opinion on issuing a State credit guarantee ([110]).

(115) The report demonstrates that the Government's choice is compatible with the type of analysis that a private investor would have carried out, which consists in assessing the expected additional profits from the investment and whether these profits are sufficient to compensate for the risks of the investment. The report calculates the expected internal rate of return of the investment by determining the incremental cash flow it generates. This is done by taking the difference between two alternative scenarios — with or without the shareholder contribution. The internal rate of return of the investment was expected to reach approximately 24 %, a level that would exceed the demands of

([107]) Case C-99/98 *Austria* v *Commission* [2001] ECR I-1101.

([108]) See the Commission communication to the Member States: Application of Articles 92 and 93 of the EEC Treaty and of Article 5 of Commission Directive 80/723/EEC to public undertakings in the manufacturing sector, OJ C 307, 13.11.1993, p. 3.

([109]) A conditional shareholder contribution has to be paid back once the company is demonstrating free own capital in the balance sheet.

([110]) See paragraphs 93 and 94.

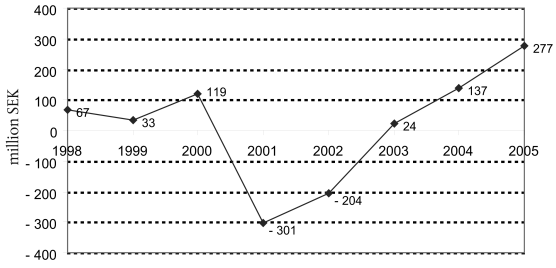
private market investors in this sector (the comparable industry rate of return on equity is 8,6 %) and compensate also for the financial risk of the company ([111]).

(116) Although it is impossible to establish with certainty *ex post* what would have been the evolution of revenues in the absence of the shareholder contribution, the Commission notes that Teracom's return on equity grew from 3 % in 2003 to 11 % in 2004 and 19 % in 2005 ([112]).

(117) Figure 3 below illustrates Teracom's return to profitability in 2003, 2004 and 2005. The company made its first repayment of the conditional shareholder contribution in 2006 ([113]).

Figure 3:

Development of Teracom's actual profits from 1998 to 2005



Source: Teracom's Annual Reports 1998 to 2005

(118) The Commission concludes, therefore, that the conditional shareholder contribution by way of a capital injection was made in circumstances that would be acceptable to a private investor operating under normal market economy conditions.

(119) However, in this particular case the question arises whether the fact that Teracom maintained its position as exclusive terrestrial network operator notwithstanding the entry into force in October 2002 of the Directive on competition in the markets for electronic communications networks and services (the 'Competition Directive') ([114]), which prohibits the maintenance of exclusive rights in the relevant sector, has an impact on the present State aid assessment ([115]).

(120) When, in examining a potential aid measure, the Commission finds that another provision of the EC Treaty has been breached, it must be assessed whether aspects of that aid contravene specific provisions of the EC Treaty other than Articles 87 and 88 and are so indissolubly linked to the object of the aid that it is impossible to evaluate them separately ([116]). In such a case, it is only if the breach of that other EC Treaty provision has a distortive effect which is demonstrable and additional to that inherent in the potential aid measure that it can determine the Commission's assessment of the measure ([117]).

(121) In the case at hand, the Commission notes that the infringement of the Competition Directive does not form part of the measure under assessment, but results from a course of action of the Government that is separate and distinct from the decision to grant the shareholder contribution.

(122) Moreover, although it cannot be excluded that the exclusive right may have influenced the profitability of Teracom and, therefore, of the shareholder contribution to a certain extent, this cannot be established with certainty since Teracom is subject to price regulation — as explained above in paragraphs 42, 43 and 102 — and cannot freely exercise its market power. In the present case, it can, therefore, not be demonstrated that it is primarily because of the exclusive right that the shareholder contribution was a profitable investment. It can therefore also not be determined that, without the exclusive right, the expected return on the shareholder contribution would not have been acceptable to a private investor.

(123) Therefore, in the absence of a clearly established causal link between Sweden's breach of the Competition Directive and the expected profitability of the shareholder contribution, the Commission is not in a position to invalidate Sweden's claim that the MEIP test has been met in the present case. This, however, does not prejudge the position which the Commission may take in future cases in the light of their facts.

(124) To conclude, in the present case the shareholder contribution and the breach of the Competition Directive can and should be assessed separately in accordance with the rules and procedures applicable to the two measures. It should

([111]) See PWC's report *Bedömning av kapitaltillskott till Teracom AB enligt den marknadsekonomiska investerarprincipen*, Annex 33 to the 29 October response.

([112]) See Teracom's Annual Reports 2003 to 2005.

([113]) See Teracom's Interim Report for the second quarter of 2006. The repayment amounted to SEK 150 million, i.e., approximately one third of the conditional shareholder contribution.

([114]) See reference in footnote 15.

([115]) According to the Directive, Sweden had to abolish all monopoly rights for broadcasting transmission services by 24 July 2003.

([116]) See, e.g., Case 74/76 *Iannelli & Volpi SpA* v *Ditta Paolo Meroni* [1977] ECR 557; Case C-225/91 *Matra SA* v *Commission* [1993] ECR I-3203.

([117]) See, e.g., Case 47/69 *France* v *Commission* [1970] ECR 487 and Case C-204/97 *Portugal* v *Commission* [2001] ECR I-3175.

be noted that, with regard to the Competition Directive, the Commission has referred Sweden to the European Court of Justice under Article 226 of the EC Treaty.

(125) As regards the shareholder contribution, however, the Commission concludes that the existence of State aid within the meaning of Article 87(1) has not been established.

9. **CONCLUSION**

(126) On the basis of the foregoing, the Commission finds that there are no indications that the investigated measures conferred an economic advantage upon Teracom or any of its subsidiaries. The Commission therefore concludes that the measures which Sweden has implemented do not constitute aid within the meaning of Article 87(1) of the Treaty,

HAS ADOPTED THIS DECISION:

Article 1

The measures investigated by the Commission and described in this Decision relating to the introduction of digital terrestrial television in Sweden do not constitute State aid within the meaning of Article 87(1) of the EC Treaty.

Article 2

This Decision is addressed to the Kingdom of Sweden.

Done at Brussels, 20 December 2006.

For the Commission

Neelie KROES

Member of the Commission