Commission rules subsidy for digital terrestrial television (DVB-T) in Berlin-Brandenburg illegal

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I. Introduction

On 9 November 2005, the Commission took a final decision regarding subsidies for the introduction of digital terrestrial television (DVB-T) in the German Länder of Berlin and Brandenburg. It decided that the subsidies worth some € 4 million granted to commercial broadcasters for the use of the DVB-T network violated European state aid rules because they were liable to distort competition. The subsidies, which had not been notified to the Commission, must be paid back insofar as already paid over to broadcasters. This concerns about half the total amount of the subsidies. This is the first time the Commission has in the area of DVB-T come to decision after having conducted a formal investigation.

II. Background: The digital switchover in Berlin-Brandenburg

The Commission's investigation into the matter was prompted by complaints lodged by cable operators. These were concerned that the subsidies targeted only the terrestrial platform and thus risked to distort competition among the different TV transmission platforms. On 14 July 2004, the Commission opened a formal investigation procedure and received subsequently comments from several market operators.

The present decision is to be viewed against the background of the digitisation of broadcasting, which is affecting all the currently commonly available transmission platforms, i.e. cable, satellite and terrestrial. The subsidies in question were for terrestrial transmission, which, in analogue mode, can normally accommodate fewer than 10 television channels. In Berlin, however, due to special circumstances up to 13 channels could be broadcast terrestrially in analogue mode. After digitisation, some 30 channels are broadcast terrestrially.

Since the emergence of cable and satellite in the 1980s, the use of terrestrial broadcasting has fallen sharply in Germany. The household reception figures for primary television sets in Germany were on 1 January 2005: 5.2% terrestrial, 55.9% cable and 38.9% satellite. For Berlin-Brandenburg, the share of terrestrial reception was estimated at a similar level.

The Länder of Berlin and Brandenburg were the first region in Germany to make joint preparations for the switchover from analogue to digital terrestrial television (‘switchover’). In a switchover agreement concluded on 13 February 2002, the media authority of Berlin-Brandenburg (‘Mabb’), the public service broadcasters (‘PSBs’) ARD, ZDF and RBB and the commercial broadcasters RTL Group and ProSiebenSat.1 (1) decided on the basic features of the switchover, including a schedule for the individual phases of the switchover and the allocation of a multiplex to each of the five operators (1). The agreement did not, however, specify to what extent the digital switchover would be subsidised.

The first phase of the switchover was launched on 1 November 2002, involving two multiplexes. On 28 February 2003, analogue broadcasting of the national commercial channels came to an end and DVB-T transmission was significantly expanded (second phase). On 4 August 2003 analogue terrestrial broadcasts by all other broadcasters were halted (analogue switch-off).

The rollout of DVB-T concerns in particular two types of operators which may or may not be integrated: network operators, which take care of the transmission of broadcasting signals, and broadcasters, which package content. Both types of operators need to obtain licences for the transmission via certain frequencies.

The network licences were awarded by the national telecommunications regulator at the request of Mabb. As a result, T-Systems, a subsidiary of Deutsche Telekom, was allocated six multiplexes and RBB two multiplexes (2). In practice, T-Systems also operates the two multiplexes allocated to RBB due to an agreement between the two operators. Following a second frequency allocation procedure, one national multiplex was also allocated to T-Systems.

The broadcasting licences were awarded by Mabb. Priority had to be given to the programme channels which were already broadcast in analogue form.

(1) A multiplex is a block of digital frequencies used for broadcasting and, in the case of Berlin-Brandenburg, has four channels.
(2) On account of coordination problems with Poland, the regulator did not in the end allocate one of the multiplexes foreseen for T-Systems.
The total transmission capacity for broadcasting consisted in seven multiplexes. It was finally allocated as follows: three entire multiplexes and one programme channel on a fourth multiplex to the PSBs. Two programme channels on the fourth multiplex were allocated to FAB and BBC World, which were already present on the analogue network. An entire multiplex was allocated to each RTL Group and ProSiebenSat.1. All this capacity was allocated by decision of Mabb without an open procedure. The capacity of one additional multiplex was opened up to tender individually and finally awarded to Eurosport, Viva Plus, DSF and SWR. The remaining transmission capacity was earmarked for providers of other forms of broadcasting, in particular mobile television transmission (DVB-H).

**III. Mabb’s financial support for the switchover**

Mabb provided financial assistance for the digital switchover. It concluded with the commercial broadcasting groups ProSiebenSat.1 and RTL Group contracts containing the following key points as regards the assistance to be granted:

a) Mabb allocated to each of the two broadcasting groups for a period of seven years a multiplex with four programme channels.

b) The broadcasting groups undertook to broadcast their main television channels via DVB-T for five years as of 1 March 2003, irrespective of the actual coverage.

c) Mabb made available to the two broadcasting groups grants towards the costs of the digital terrestrial transmission. In the case of RTL Group, the grant amounted to €265,000 a year, or €66,250 per programme channel. In the case of ProSiebenSat.1, it amounted to €330,000 a year, or €82,500 per programme channel. The grants were payable as of 1 March 2003 for a period of five years.

Mabb concluded similar agreements with FAB and BBC World. For these broadcasters too, Mabb provided a grant towards transmission costs for a period of five years. As for the broadcasters that were not broadcast terrestrially before the switchover, Mabb concluded a third type of agreement with four programme channels.

Mabb financed the grants towards commercial broadcasters’ transmission costs from its own budget, which essentially receives 2% of the licence fee income accruing to Berlin and Brandenburg. Mabb granted the funding described above only to the commercial broadcasters. The PSBs financed the costs of DVB-T transmission out of the licence fee income accruing directly to them.

**IV. Assessment**

### IV.1. Did Mabb’s financial support constitute state aid?

**State resources:** In the Commission’s view, the financial support granted by Mabb constituted state resources. It was funded from Mabb’s budgetary resources. Mabb is a public authority established by the State Media Treaty of the Länder of Berlin and Brandenburg. More specifically, the State Media Treaty assigns to Mabb the task of supervising the digital switchover and adopting the necessary measures.

**Economic advantage:** At the level of commercial broadcasters, the subsidy granted by Mabb covered some of their transmission costs via the DVB-T network for a period of five years. The support thus relieved them of expenses which were part of their normal operating costs. Germany argued that the subsidy compensated the commercial broadcasters for giving up their analogue terrestrial transmission (ATT) licences and did not therefore confer an economic advantage upon them. There are, however, a number of reasons which contradict this argument: The commercial broadcasters present in ATT had already been compensated by the award of DVB-T licences, the subsidy was not conceived or calculated as a compensation payment and Mabb could have limited the ATT licences to the switchover date and could thus have avoided any potential compensation claims.

At the network level, it appeared that the network operator T-Systems received an indirect advantage stemming from Mabb’s subsidy (7). Under agreements between Mabb and the commercial broadcasters — of which the financial support was an integral part — T-Systems had the guarantee that the two major commercial broadcasters in particular, which together account for about 90% of total German TV advertising revenue and for close on half of German TV viewing, would use its network for five years. In addition, compared

(7) Even though RBB rolls out part of the DVB-T network (two multiplexes), it cannot be considered a beneficiary because these multiplexes are used only by PSBs which do not receive any subsidy from Mabb.
with a situation in which no subsidy is granted, T-Systems might have been able to charge commercial broadcasters higher transmission prices than under normal market conditions because the subsidy provided the broadcasters with more funds for this particular purpose. It is however not possible to establish to what extent the transmission fees charged by T-Systems and not being subject to price regulation exceed market prices.

**Distortion of competition:** The Commission found that the allocation procedures neither for the network licences nor for the broadcasting licences were such as to ensure that the selective economic advantage deriving from Mabb’s subsidy would be eliminated or minimised so as to prevent a distortion of competition. Indeed, at the level of broadcasters, the majority of licences were not subject to any open procedure. At network level, the tender procedures were characterised by a high degree of uncertainty and intransparency coupled with a strong position of the incumbent terrestrial network operator T-Systems.

The measure also distorted competition in that the share of the transmission costs covered by the subsidy was not the same for all commercial broadcasters. The share varied between 28% and 50% per DVB-T channel (4). Moreover, RTL Group and ProSiebenSat.1 were allocated more channels in DVB-T than previously in ATT. In contrast, FAB and BBC World continued to have only one terrestrial channel each and, accordingly, received funding only for this one channel.

The Commission also considered that the measure was selective in so far as the subsidy was granted to broadcasters who used the DVB-T platform rolled out by T-Systems and did not, for example, support broadcasters who used other transmission platforms. The measure can therefore be regarded as ‘sectoral aid’. On the retail market, the selective support and ‘artificial’ development of DVB-T affected the viewers’ decision between the different broadcasting platforms. In the case of Berlin-Brandenburg, there was also empirical evidence of the substitutability between the different transmission platforms and, more particularly, of the competitive effect of the DVB-T launch on cable.

**Effect on trade:** Finally, the Commission considered that the measure affected trade between Member States in view of the international activities of the companies directly and indirectly concerned, for example, the RTL Group, ProSiebenSat.1, Deutsche Telekom.

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(4) The share varies not only as a result of differences in the absolute amount of the subsidy per DVB-T channel but also because of differences in the channel transmission prices as charged by T-Systems.

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**IV.2. Is the aid compatible?**

In the final decision, the Commission specified a number of principles to consider when assessing the compatibility of public support for the digital switchover. The present article is however focused on the specific case of Berlin-Brandenburg.

**Did the aid correct a market failure?**

The Commission confirmed that the digitisation of broadcasting in general is an objective of common interest. There is, however, no general justification why only the digitisation of the terrestrial platform should be aided and not that of other transmission platforms. In order to decide whether the aid was necessary and proportionate, the Commission tried to identify the presence of market failures specific to switchover on the terrestrial platform.

The Commission recognised that the digital switchover may indeed have been hampered by two types of market failures: a coordination problem between market players, which must agree on a timetable in order to ensure a short switchover period, and by positive externalities because the social benefit of more channels and services in the DVB-T network may exceed the private benefit of the incumbent broadcasters in switching since they risk, for example, being exposed to more competition for audience and advertising.

While these market failures may, in principle, justify a departure from the principle of technological neutrality, they could not serve as justification for the aid granted in the present case. The broadcasters did not own the frequency spectrum but operated on the basis of licences limited in time. Accordingly, the authorities could have resolved the coordination problem by setting a common expiry date for all analogue licences. This was the approach followed, for example, in Bavaria. Moreover, in the switchover agreement the commercial broadcasters RTL Group and ProSieben Sat.1 had committed to the digital switchover before it was clear that they would receive subsidies. The Commission also considered that the aid was not an appropriate instrument for encouraging a prompt analogue switch-off and the release of frequencies. Regulatory intervention in respect of the transmission licences was, once more, an example of a less distortive means of achieving the same goal and realising the positive externalities.

The Commission considered, moreover, that there were no indications for other types of market failures. In particular, it did not find any convincing evidence that the digitisation of broadcasting transmission in Berlin-Brandenburg was hampered by a structural competition problem or that DVB-T could help in resolving certain market...
rigidities. Instead, the market appeared capable of supporting various platforms so that the use of state aid to steer the market in a certain direction was not needed and might discourage the development of alternatives such as DSL. The Commission also rejected the view that the existence of uncertainty may have prevented innovations in this market. As suggested by the launch of other transmission platforms (satellite, ADSL), there was no particular reason to believe that the market could not cope with this type of risk. Moreover, there are Länder — Hessen is one example — in which DVB-T was launched without public support.

The Commission also investigated whether the aid could be justified by the promotion of innovation and specific advantages of the terrestrial platform. It was suggested that the DVB-T network would serve to promote innovation by offering interactivity and additional capacity for new media and telecom services. It would also have specific advantages such as portability and mobility. However, technical constraints limit the use of the DVB-T network for interactivity and mobile reception. Moreover, in Berlin-Brandenburg neither the capacity allocation nor the public support was focused on any innovative media or telecom services in particular.

Accordingly, the Commission was not convinced that the aid was an appropriate, necessary and proportionate instrument to correct a market failure and to promote the roll-out of DVB-T.

**Did the aid compensate a service of general economic interest?**

The Commission considered, firstly, that national authorities have to define a service of general economic interest (‘SGEI’) clearly and entrust it explicitly to a particular undertaking. In the present case, Germany seemed to have made the SGEI argument on an ad hoc basis. In fact, the alleged public service compensation was paid to the commercial broadcasters, which, in contrast to the PSBs, were not charged with any public service task. Instead, supporting the transmission costs of commercial broadcasters conferred an advantage on their normal commercial operation.

The arguments that the aid was needed to achieve digitisation of broadcasting transmission and to promote pluralism are not specific to the terrestrial platform. Cable and satellite can also contribute to the achievement of such objectives. Since these alternative platforms have greater transmission capacity, it appears that they are at least equally suitable for achieving a quick and smooth switch-over process and that they also have an important role to play in ensuring pluralism through a broad range of broadcasting channels.

Other SGEI arguments invoked by Germany, such as the promotion of innovation and the strengthening of competition among different TV platforms, were dismissed essentially on the same grounds as noted above. There were serious doubts as to the necessity and the proportionality of the aid in respect of these objectives.

**V. Conclusion**

The Commission concluded that the subsidy granted by Mabb to the commercial broadcasters constituted aid within the meaning of Article 87(1). The aid is not compatible with the common market. It was not notified by the Member State to the Commission and was illegally put into effect without Commission authorisation. It therefore had to be recovered from the commercial broadcasters involved.