

Public Funding of Digital Broadcasting under EC State Aid Law

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I. Introduction

On 19 August 2004, the European Commission published the content of two letters it had sent to the authorities in Germany¹ and Sweden², with which the Commission notified the authorities of its decision to initiate the procedure of Article 88(2) EC concerning respectively the financing of the digital terrestrial television network (DVB-T)³ in the region of Berlin-Brandenburg and the establishment of the digital terrestrial network (DVB-T) for television transmission in Sweden. Through these two preliminary decisions, the Commission reiterated that the financing of DVB-T infrastructures and/or measures put in place by the State with the aim of promoting their viability are not measures of general nature but fall under the provision of Article 87(1) EC, thereby constituting State aid within the meaning of the latter Article, and need thus be assessed accordingly.

The DVB-T case in Germany

In 2000, the German Committee "Initiative Digitaler Rundfunk" – comprised of the representatives of the Länder, the public and private broadcasters, consumer organisations as well as transmission operators – announced a strategy for introducing the digital terrestrial television and thus terminating the analogue terrestrial transmission by 2010. The initiative finds its legal basis in the amended German Frequency Allocation Regulation (Frequenzzuteilungsverordnung). Article 52 a of Rundfunkstaatsvertrag (Interstate Broadcasting Treaty) allows the public

broadcasters to gradually shut down the analogue broadcasting and thus switch to the new digital technology. Article 40 paragraph 1(1) of the Interstate Broadcasting Treaty stipulates that 2% of the licence fees can be used by the Media Authorities of the German Länder as financing means for promoting new technologies in the field of broadcasting. The Medienanstalt Berlin-Brandenburg (Media Authority Berlin-Brandenburg; hereinafter MABB) decided in November 2002 to implement the strategy adopted by the Committee "Initiative Digitaler Rundfunk" and opted for the promotion of a terrestrial network, thereby not giving an equal chance to the other means of digital TV signal transmission, cable and satellite. To this end, the MABB signed an agreement with two major private broadcasters, RTL and ProSieben/Sat1. The broadcasters were granted one multiplex (i.e. block frequencies for 4–6 channels) and direct subsidies – paid by the MABB – up to 30% of their digital transmission fees for seven years for committing themselves to broadcast digitally for 5 years, regardless of how the market develops. Both the broadcasters have given up their analogue frequencies. This move was perceived to make the digital terrestrial mode of transmission attractive to the viewers and the rest of the broadcasters, thereby securing its viability. In the mean time, two frequencies for Berlin-Brandenburg had been allocated to T-Systems (a subsidiary of Deutsche Telekom AG) and SFB⁴ through a special tendering procedure organised by the Regulierungsbehörde für Telekommunikation und Post (German Regulatory Authority for Telecommunications and Post, hereinafter RegTP) for the new digital terrestrial. The two undertakings were obliged to build the terrestrial network and operate it afterwards. T-Systems provides the transmission services on a commercial basis and charges the broadcasters a fee with the aim to fully recover the costs of the investment⁵.

After a complaint filed by the Association of Private Cable Network Operators in Germany claiming that the subsidies given for the development of the DVB-T constitute illegal State aid within the meaning of Article 87(1) EC, the Commission started a preliminary investigation which has led to the decision to initiate the formal procedure of Article 88(2) EC. In addition, a complaint was filed by the company Kabel Baden-Württemberg GmbH&Co. KG claiming that

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1 C (2004) 2672 final; State aid Case No. NN 36/04, Germany, DVB-T in Berlin-Brandenburg, (from now on the German DVB-T Decision). The decision is available at: http://www.europa.eu.int/comm/competition/state_aid/decisions/36_2004/en.pdf

2 Decision on the State aid Case No. NN 35/04, Sweden, Introduction of digital terrestrial television (from now on the Swedish DVB-T Decision). The decision is available at: http://www.europa.eu.int/comm/competition/state_aid/decisions/35_2004/en.pdf

3 DVB-T stands for digital video broadcasting over a terrestrial network. Other forms of digital video broadcasting are DVB-S (Satellite) or DVB-C (Cable).

4 Now known as Rundfunk Berlin-Brandenburg (RBB). The role of RBB is marginal and is not discussed any further here.

5 See: German DVB-T Decision, paragraphs 6 to 17.

public broadcasters received compensation through the German licence fee system for the establishment of DVB-T network. The Commission is intending to evaluate this claim during the course of another investigation, which will deal with the question of compatibility of the German licence fee system with EC State aid law⁶.

The DVB-T case in Sweden

The Swedish parliament decided in autumn 2000 that digital terrestrial broadcasting should cover the whole country. The establishment and operation of the DVB-T network is entrusted to Teracom, a telecommunications company fully owned by the State that operates also the analogue network. Teracom distributes TV programmes of the public broadcaster Sveriges Television (SVT) as well as those of private broadcasters, and operates – according to the Swedish authorities – on a commercial basis⁷. Teracom charges a fee to the broadcasters who use its services; whereas the distribution services Teracom offers to SVT are regulated by law. The activities of SVT are regulated by legislation and its licence. According to their provisions, SVT has the right to transmit digitally until December 2005; however, the licence can be extended for 4 more years. SVT's transmissions are offered free of charge to the Swedish public on the condition that a licence fee is paid. SVT is obliged to transmit digitally and through the analogue network of Teracom and must cover 99.8% of the population. Every television set owner is obliged to pay a licence fee set by the parliament to a special account of the Rundradiotjänst i Kiruna Ab (Rikab), which then forwards to SVT an amount perceived to cover the latter's general operating costs. In 2002, the Government created a separate account for transmission costs called Distribution Account (DA) and set up a scheme for transferring the money accumulated from the collection of the licence fees by Rikab to the DA. The scheme foresees that the amount of the funds transferred will increase gradually until it reaches the level of analogue distribution costs. However, due to the doubled costs that SVT is going to incur as a result of the obligation to transmit on both modes, the amount DA will transfer to SVT will be higher than the amount transferred by Rikab to DA; therefore, there will be a period where deficit is accumulated in the DA. This deficit will be covered by loans from the Swedish National Debt Office (hereinafter SNDO). After the analogue network is shut down, the deficit will start decreasing and it has been assumed to be fully repaid by 2013.

Two complaints were launched with the European Commission by two satellite operators alleging that the financing of the establishment of DVB-T in Sweden involves the granting of State aid in contravention of Article 87(1) EC and/or a measure by the State in contravention of Article 86(1) EC. The com-

plainants name the following measures as constituting State aid within the meaning of Article 87(1) EC: i) the use of public funds for establishing DVB-T in Sweden, ii) the use of Teracom's resources, which derive mainly from payments by SVT for analogue transmissions, for establishing DVB-T in Sweden, and iii) the credit guarantee issued by the State to Teracom for the amount of 2.000 million SEK⁸.

II. Assessment under Article 87(1) EC

1. Aid granted by the State or through State resources

Article 87(1) EC requires that the aid must originate either directly from the State pocket or indirectly from State resources. The Court held in *Stardust Marine* that "for advantages to be capable of being categorised as aid within the meaning of Article 87(1) EC, they must, first, be granted directly or indirectly through State resources... and, second, be imputable to the State...". In *PreussenElektra* the Court held that only "... advantages which are granted directly by the State and those granted by a public or private body designated or established by the State" are considered to meet this requirement. It must be noticed at the outset that as regards the financing of the DVB-T, the issue is not whether or not the licence fees, which compensate the broadcasters for providing free-to-air programmes over DVB-T, are to be seen as State resources. It has been mentioned above that the Commission is intending to investigate this issue with reference to the German licence fee system at some later point in the near future¹⁰. The question in the DVB-T financing cases rather seems to be whether the re-

6 See: German DVB-T Decision, page 2; The compatibility of the German licence fee system with EC State aid law has also caused a vivid debate in the scholarly work, with authors taking diametrically opposed positions. For an illustration of the views expressed see: Koenig/Haratsch, "The Licence-Fee-Based Financing of Public Service Broadcasting in Germany after the *Altmark Trans Judgment*", ESTAL 2003, pages 569-578; Selmayr/Kamann, "Public Broadcasting and EC State Aid Law: No "Carte Blanche" after *Altmark Trans*", K&R 2/2004, pages 49-58.

7 See: Swedish DVB-T Decision, paragraph 63.

8 See: Swedish DVB-T Decision, paragraph 30 et seq.

9 See: ECJ, Judgment in Case C-482/99, [2002] ECR I-04397, paragraph 24.

10 For more on this see: Koenig/Kühling, ZUM 2001, page 537 et seq.; Oppermann, *Deutsche Rundfunkgebühren und europäisches Beihilferecht*, 1997; Selmer/Gersdorf, *Die Finanzierung des Rundfunks in der Bundesrepublik Deutschland auf dem Prüfstand des EG-Beihilferegimes*, 1994; Koenig/Kühling, "EG-beihilfenrechtlicher "Switch-Off" für das digitale terrestrische Fernsehen (DVB-T)?" K&R 2004, page 201 et seq.; Communication from the Commission on the application of State aid rules to public service broadcasting of 15.11.2001, OJ 2001 C 320/4. Commission Decision of 24.02.1999, Case NN 70/98 Kinderkanal/Phoenix; Commission Decision of 14.12.1999, Case NN 88/98 BBC News 24, SG(99) D/10201; Commission Decision of 01.10.2003, Case N 37/2003, BBC Digital Curriculum, C (2003) 3528 final.; Commission Decision of 13.10.2003, C 62/1999, RAI, C (2003) 3371 final; Commission Decision of 15.10.2003, Case NN 166/95 a, RTVE; Commission Decision of 23.01.2004, Case NN 170/2003, C (2004)/166. See also footnote 6 above.

sources deployed by the Media Authorities, such as Landesmedienanstalten in Germany, in this case MABB, and by the public broadcasters in the Swedish case, to the terrestrial operators are to be seen as transfer of State resources and imputable to the State, thereby falling within the meaning of the first paragraph of Article 87 EC¹¹. The Commission concluded in its preliminary investigation that in both the cases of Sweden and Berlin-Brandenburg the payments designated for funding of and/or supporting the digital terrestrial infrastructure meet these criteria. Thus, in the case of Germany, the Commission found that due to the fact that the MABB has been established on the basis of a public law treaty between the Länder Berlin and Brandenburg (Medienstaatsvertrag 1992) and also that it has been assigned by law to carry out public tasks, the MABB qualifies as a "body designated or established by the State". This finding seems to be in accordance with the established case law of the ECJ¹². The fact that the MABB enjoys independence from the State according to the German principle of "Staatsferne" does not alter its status as a public body within the meaning of the Court's case-law¹³. Consequently, the Commission concluded that the payments made by the MABB are a transfer of resources imputable to the State, as this seemed to have been accepted by the German authorities as well¹⁴.

The same is valid in the case of Sweden. In this case the Commission indicated several transactions involving transfer of resources from State agencies or public bodies. First, the direct payments by SNDO to SVT during the first phase, covering the deficit created as a result of the doubled costs, are State resources, because SNDO is the treasury of the government. Second, the Commission found that the payments made by SVT to Teracom are State resources and must be as well considered imputable to the State since SVT

is an undertaking entrusted with a public service task; the State exercises significant influence on SVT through legislation; SVT is owned by a public foundation and some of its members are appointed by the government; and last but not least, SVT is compensated through state funding for its transmission over DVB-T¹⁵. Once again, the findings of the Commission here correspond to the line of reasoning of the ECJ in Stardust Marine¹⁶.

2. An advantage to certain undertakings

Furthermore, Article 87(1) EC requires that there has been a benefit, which the undertakings would not have received under normal business circumstances, and that this benefit is conferred selectively only to certain recipients. This condition is met when an economic advantage is granted directly or indirectly to particular undertakings, or although an economic advantage seems to be offered to all undertakings in the field, in practice, only a few of them are favoured exclusively, thereby making the measure selective.

Before the aid measures are examined against the backdrop of this condition of Article 87(1) EC, few remarks on the treatment of general infrastructures are considered necessary and appropriate at this point. Traditionally, financing of infrastructures has been considered not to constitute State aid if: i) there exists a degree of certainty that the market will never provide such an infrastructure or, at least, not on the same conditions, ii) the infrastructure is needed to supply a service regarded as falling within the responsibility of the State to the public and is limited to fulfilling the requirements of that service, and iii) it is not likely to favour a particular undertaking (non-selectivity condition). In order for the infrastructure not to favour certain undertakings, it must be available to different operators and – where possible – for different activities. If the public authorities operate the infrastructure, the latter must be available to all users on a non-discriminatory basis. If the infrastructure is given to undertakings, appropriate fees should be charged. In the case of limited use by a single undertaking, the Member State should act in accordance with the requirements of transparency and non-discrimination¹⁷. This, however, does not seem to be the case as regards the digital terrestrial schemes, at least, as this has been implemented in Sweden and Berlin-Brandenburg. Thus, with respect to the so-called market failure requirement, the fact that the market has not as yet embraced the digital terrestrial – to the extent the promotion schemes in Berlin-Brandenburg and Sweden have foreseen it – does not by necessity mean that the market has failed. As the Commission had shown in its Communication on the

11 See: Koenig/Kühling, K&R 2004, footnote 10 above, page 201 et seq.

12 See for instance: ECJ, Judgment in Case C-379/98 - Preussen Elektra, [2001] ECR I-02099, paragraph 58; CFI, Judgment in Case T-358/94 - Air France v Commission, [1996] ECR II-2109, paragraph 58 et seq.

13 See: CFI, Judgment in Case T-358/94 - Air France v Commission, [1996] ECR II-2109, paragraph 62; see also: ECJ, Judgment in Case C-482/99 - French Republic v Commission of the European Communities (Stardust Marine), [2002] ECR I-04397, paragraph 58 et seq. For more on this see: Koenig/Kühling, K&R 2004, footnote 10 above, page 201 et seq., also Koenig/Kühling/Theobald (eds.), *Recht der Infrastrukturförderung*, 2004, page 17 et seq.

14 See: German DVB-T Decision, paragraph 20 et seq.

15 See: Swedish DVB-T Decision, paragraph 29 et seq.

16 See: ECJ, Judgment in Case C-482/99, [2002] ECR I-04397.

17 For a fuller account on the application of EC State aid law in the case of infrastructures see: Koenig/Kühling/Theobald (eds.), *Recht der Infrastrukturförderung*, 2004; see also: Santamato/Westerhof, *EuZW* 2003, pages 645-648; See also recently Commission Decision of 09.09.2004, Case N 213/2003 Project ATLAS, C(2004) 3408final, paragraph 31 et seq.; and Services of general economic interest and state aid (Commission Non-paper of 12 November 2002).

Switchover¹⁸ (see in particular the Annex thereof), market-led digitisation processes have been taking place in the field of satellite and cable TV. The Commission noticed that a necessary condition for assuming public intervention not to constitute State aid is that such an intervention is based on technological neutrality. In both the cases at issue, public authorities opted for the promotion of digital terrestrial, thereby disproportionately benefiting only particular operators. The preliminary investigation of the Commission showed – as will be analysed in the following – that the financing by the State of the digital terrestrial networks in Sweden and Berlin-Brandenburg entail selective aid, for the aid confers an advantage only on the broadcasters using the terrestrial, as compared to ones using cable and satellite for transmitting their programmes (especially obvious in the case of Berlin-Brandenburg). Moreover, both schemes under investigation involve unlawful direct or at least indirect aid granted selectively to the telecommunications undertakings operating the terrestrial networks. Last but not least, the measures do not fulfil the requirements of proportionality and necessity. That is to say, first, the aid need be justified by a public objective of general interest, second, it must be substantiated that without the aid this interest would have not been served and last, it must be demonstrated that only the terrestrial is the option to do that. The national authorities – as the Commission has noticed in the decisions – have not brought convincing evidence that the requirements of proportionality and necessity are fulfilled.

Since the above requirements are not fulfilled, the Commission rightly decided that the measures do not aim at general infrastructures of the type falling outside the scope of the State aid law and must therefore be evaluated under the provision of Article 87(1) EC.

Economic advantages granted in the DVB-T case in Germany

In the German case, the Commission identified two groups of beneficiaries, the private broadcasters as direct beneficiaries and T-Systems as indirect beneficiary. As regards the first group, the Commission rejected the claim of the German authorities that the

measure is of a general nature. It pointed out that even if the subsidy offered to RTL and ProSieben/Sat1 applies to all broadcasters that will transmit through the new digital terrestrial network, the measure is nevertheless selective, for it discriminates between them and the broadcasters that will not use the terrestrial but will continue to transmit through cable and satellite networks. The latter broadcasters are not getting any subsidy. Concerning the claim of the authorities that the measure is a mere compensation for the losses the broadcasters will incur as a result of the switchover costs, rise of competition, and fall of advertising revenue due to the uncertainties associated with the viability of the DVB-T, the Commission answered that it is going to investigate these elements after it receives further information. It warned nonetheless that the fact that a flat rate is applied for calculating the subsidy – which shows that there is no direct relation between the subsidy and the net additional costs¹⁹ – and other problems linked to the calculation of these costs are strong indications for the non-compensatory nature of the measure²⁰.

Even if the broadcasters are merely compensated for their net additional costs, the measure seems to grant an indirect benefit to the operator of the DVB-T network, T-Systems. The fact that the MABB will subsidise the costs related to transmission over DVB-T – which in their turn represent a part of the fees T-Systems will charge for distribution over DVB-T – encourages the broadcasters to switch to the DVB-T mode of transmission. Without the subsidy, T-Systems would have had to lower its prices in order to attract broadcasters, thereby carrying the costs of launching the new service on its own, or transfer the costs to the ultimate consumers. The subsidy facilitates the launch of the service and it must be considered as an economic advantage within the meaning of Article 87(1) EC²¹. In this context, it is of interest to note that the indirect advantage conferred on T-Systems does not qualify as a compensation for the services provided by it in order to discharge public service obligation within the meaning of the Altmark Trans Judgment of the ECJ²². According to the Altmark Trans Judgment, the recipient undertaking must actually have a public service obligation to discharge, clearly defined beforehand by legislation or its licence, and the parame-

18 See: Communication from the Commission to the Council, the EP, the EESC and the Committee of Regions on the transition from analogue to digital broadcasting (from digital 'switchover' to analogue 'switch-off') [Communication on the Switchover] COM (2003) 541 final.

19 The Commission has used the term "extra costs" in its decision. We interpret this term to mean the additional costs that undertakings incur in discharging public service obligations, so-called "net additional costs". The method for calculating net additional costs is provided for in the third requirement of Altmark Trans Judgment. According to this requirement, the net additional costs shall comprise "the costs incurred in the discharge of public service obligations, taking into account the relevant receipts and a reasonable profit

for discharging those obligations". See ECJ, Judgment in Case C-280/00 - Altmark Trans, [2003] ECR I-07747, paragraph 92.

20 See: German DVB-T Decision, paragraph 23 et seq.

21 See: German DVB-T Decision, paragraph 32 et seq.; See also: Koenig/ Kühling, in: Streinz, EUV/EGV Kommentar 2003, Article 87 EC, paragraph 30; Koenig/Kühling, K&R 2004, footnote 10 above, page 201 et seq.; as regards indirect advantages see: Koenig/Sander, EuR 2000, page 743.

22 See: ECJ, Judgment in Case C-280/00 - Altmark Trans, [2003] ECR I-07747, paragraph 87 et seq.

ters on which the compensation is calculated must be established in advance in an objective and transparent manner. Neither of these conditions is fulfilled in the case at issue, thereby making Altmark irrelevant in this case²³.

Economic advantages granted in the DVB-T case in Sweden

The Swedish scheme involves a more straightforward situation. It seems that the authorities utilized the opportunity of promoting digital broadcasting and set up certain payment schemes that involve unlawful State aid to the digital terrestrial network operator, Teracom, which, in its turn, is wholly owned by the State. The promotion schemes seem to contain a hidden aid from the public broadcaster Sveriges Television to the terrestrial operator Teracom, as part of the payment plan for the use of the digital transmission network²⁴. The Commission found that the payment plan is constructed in such way that the terrestrial operator Teracom is expected to receive for the period 2002-2013 approximately 510 million SEK more than what SVT ought to pay for transmission costs²⁵. In addition, the Swedish Parliament has approved a credit guarantee of 2,000 million SEK to be given to Teracom. The Commission found that this guarantee does not fulfil the conditions set out in the section 4 of the Commission Notice on the application of Articles 87 and 88 EC to State aid in the form of guarantees²⁶ and requested more information in order to deliver its final decision. Nonetheless, the evidence advocates strongly for the State aid nature of the guarantee²⁷. On a proposal from the Government, a capital injection from the State to Teracom in the amount of 500 million SEK is also authorised by the Swedish Parliament, despite the fact that the company had been going through financial difficulties and a process of restructuring and had also had a very low solvency ratio (20%). Consequently, the Commission fears that the Swedish authorities failed to abide to the prudent pri-

vate investor principle, and that the capital injection entails an aid element²⁸.

3. The aid distorts or threatens to distort competition

Distortion of competition – actual or potential – is the next criterion to be fulfilled in order to qualify a measure as State aid under Article 87(1) EC. There is a distortion of competition if the State intervenes with aid measures and alters the competitive conditions between the undertakings in the market²⁹. It is therefore essential for claiming a change in the competition conditions that an undertaking (or a line of production) receives an advantage that would have not been able to receive under normal market conditions, and that this advantage puts this particular undertaking in a favourable position in comparison with the position of other undertakings competing with the former in the market. In order to find out whether or not the position of an undertaking was improved in comparison with that of its competitors, one need discover who these competitors are. This can only be done by defining the relevant market where the beneficiary undertaking competes with other undertakings. Although a strict relevant market definition of the type required in competition cases – as this is described by the Commission in its Notice on Relevant Market³⁰ – has not as yet been employed in State aid cases³¹, at least, a broader relevant market, in which the beneficiary undertaking faces constraints from other participants, ought to be considered³².

In the case of the DVB-T in Germany, the relevant product market is primarily the market for distribution and transmission of television services (belonging into the broader group of electronic communications services markets within the meaning of the Electronic Communications Framework Directive³³). The Commission has pointed out in its previous decisional practice that all modes of distribution and

23 See on this: Koenig/Kühling, K&R 2004, footnote 10 above, page 201 et seq.

24 See: Swedish DVB-T Decision, paragraph 33 et seq.

25 Ibid., paragraph 36 et seq.

26 OJ 2000 C 71/14.

27 See: Swedish DVB-T Decision, paragraph 43.

28 Ibid., paragraph 49.

29 See: ECJ, Judgment in Case 730/79 - Philip Morris Holland BV v Commission, [1980] ECR 02671, paragraph 11. More about the criteria of Article 87(1) EC see: Koenig/Kühling, "Grundfragen des EG Beihilfenrechts", NJW 2000, page 1065; also Koenig/Kühling, in: Streinz, EUV/EGV Kommentar, 2003, Art. 87 EC, paragraph 55; Koenig/Kühling/Ritter, EG-Beihilfenrecht, 2002, page 83 et seq.

30 See: Commission Notice on the definition of the relevant market for the purposes of Community competition law, OJ 1997 C 372/5-13.

31 See: Koenig/Kühling, K&R 2004, footnote 10 above, pages 205-206; Koenig/Pfomm, "EG-Beihilfenrechtliche Entbündelung in der Infrastrukturförderung", SächsVBl 2003, page 281.

32 See on this: Koenig/Kühling, in: Streinz, EUV/EGV Kommentar, 2003, Art. 87 EC, paragraph 57; Koenig/Kühling/Ritter, EG-Beihilfenrecht, page 84 et seq. For more details, see also Koenig/Braun/Pfomm, Zeitschrift für Wettbewerbsrecht (ZWeR) 2003, page 171 et seq.; Capito, in: EMR/ZEI (eds.), Market Definitions in the Media Sector, 2003, paragraph 1.54 et seq. The study is available at: <http://europa.eu.int/comm/competition/publications/publications/#media>.

33 Directive 2002/21/EC of the European Parliament and of the Council of 7 March 2002 on a common regulatory framework for electronic communications networks and services (Framework Directive), OJ L 108/33. Article 2(c) states: "electronic communications service" means a service normally provided for remuneration which consists wholly or mainly in the conveyance of signals on electronic communications networks, including telecommunications services and transmission services in networks used for broadcasting..."; see also: Koenig/Kühling, K&R 2004, footnote 10 above, page 206.

transmission of television services belong to one relevant market³⁴. This line was maintained in the case of DVB-T in Berlin-Brandenburg³⁵. The DVB-T technology was rightly seen to be substitutable with other digital transmission modes, i.e. DVB-S (Satellite) or DVB-C (Cable), from the perspective of both the consumers and broadcasters³⁶. This is due to the fact that the price and contents of the services delivered are similar. The consumers' main preference is to have access to a broad range of services and a large number of channels at a good price. As long as the services package fulfils these conditions, it is of little importance to the consumers from whom they will receive these services or through which technical device they are distributed to the TV set. In the same manner, broadcasters prefer to be transmitted as broadly as possible so that an audience as large as possible views their programmes. They too, according to the Commission³⁷, see transmission systems as substitutable, for as long as they are offered the same coverage range at similar prices. The Commission has come to the conclusion that – as a result of the subsidy – the broadcasters have a great incentive to switch to the terrestrial network run by T-Systems. Consumers might also do the same since they pay no subscription fees for the terrestrial in comparison with cable and satellite. The Commission has provided empirical evidence that supports the assumption of the substitutability of the different transmission techniques. This evidence indicates that some sixty thousand end-users have already switched from cable and satellite to DVB-T, and that there is an increase in the demand for set-top-boxes³⁸ by buyers that had previously used cable or satellite reception³⁹. Therefore, a shift of the demand on both levels of the market towards the digital terrestrial distribution mode is to be expected, placing the other technical means of delivery (satellite or cable) in a disadvantageous position⁴⁰. Consequently, due to the subsidy, the position of the T-Systems in the market for distribution and transmission of television services appears to have improved in comparison with that of its competitors DVB-S and DVB-C operators. It is thus clear that the aid measure has an effect on the compe-

tion in the relevant market⁴¹. The fact that the DVB-T Berlin-Brandenburg is a local infrastructure with a coverage range limited only to one part of Germany, does not by itself exclude a distortion of competition having a "community dimension"⁴². As the Commission noticed in the paragraph 45 of its decision, the convergence that is taking place with regard to applications of digital television might enable T-Systems in cooperation with other undertakings members of the Deutsche Telekom Group, such as T-Mobile or T-Online, to bundle its service with the services offered by the latter undertakings. T-Systems has, at least in theory, the possibility to cross-subsidise the benefit derived as a result of guaranteed revenues from its network in Berlin-Brandenburg to other (international) markets where other companies of Deutsche Telekom Group are active⁴³.

As in the German case, the Commission established substitutability between different modes of distribution in both the downstream market for the provision of TV services to end-users and/or intermediaries, as well as the upstream market for the provision of distribution services to broadcasters in the case of Teracom in Sweden⁴⁴. Due to the fact that neither the cable nor the satellite providers receive funding from the State, and that the position of Teracom is by far better off as a consequence of the subsidy, here too, a distortion of competition has occurred⁴⁵.

In both cases, the national authorities opted for a particular technology, the terrestrial infrastructure, for introducing digital broadcasting in their countries. The Commission had explicitly stated in its Communication on the Switchover the necessity to maintain nondiscrimination and technological neutrality in case of an intervention in the market⁴⁶. The patterns chosen by the German and Swedish authorities for the promotion of digital broadcasting seem to have upgraded the position of their respective terrestrial operators T-Systems and Teracom in their respective markets, as compared to the position of their competitors, cable and satellite providers. As a consequence, the very idea of technologically neutral regulation is jeopardised, and the distortion of competition is obvious⁴⁷.

34 See: Koenig/Kühling, K&R 2004, footnote 10 above, page 206. Reference has been made to: Commission Decision of 03.03.1999, 1999/242/EC, TPS 1, OJ 1999 L 090/6, No. 30; Commission Decision of 15.09.1999, 1999/781/EC, British Interactive Broadcasting/Open, OJ 1999 L 312, No. 26; Commission Decision of 30.10.1999, 2001/98/EC, Telia/Telenor, OJ 2001 L 40, No.269 et seq.; EMR/ZEL, Market Definitions in the Media Sector, 2003, No. 1.81 et seq. Capito, in: EMR/ZEL (eds.), Market Definitions in the Media Sector, 2003, paragraph 1.81 et seq. The study is available at: <http://europa.eu.int/comm/competition/publications/publications/#media>

35 See: German DVB-T Decision, paragraph 39 et seq.

36 See: Koenig/Kühling, K&R 2004, footnote 10 above, page 206.

37 See: German DVB-T Decision, paragraph 42 et seq.

38 A set-top-box is a device that enables a television set to receive and decode digital television broadcasts.

39 See: German DVB-T Decision, paragraph 44.

40 See: Koenig/Kühling, K&R 2004, footnote 10 above, page 206.

41 See: German DVB-T Decision, paragraph 43.

42 See: Koenig/Kühling, K&R 2004, footnote 10 above, page 206.

43 See: German DVB-T Decision, paragraph 45.

44 See: Swedish DVB-T Decision, paragraphs 52-53.

45 See: Swedish DVB-T Decision, paragraph 53.

46 Communication from the Commission to the Council, the European Parliament, the European economic and social committee and the committee of the regions on the transition from analogue to digital broadcasting (from digital 'switchover' to analogue 'switch-off'), COM (2003) 541 final.

47 See: Koenig/Kühling, K&R 2004, footnote 10 above, page 208.

The aid affects trade between the Member States

As for the last condition of Article 87(1) EC, there is clearly an impact on trade between the Member States. The ECJ has held in the Philip Morris Judgment that if a Member State takes measures that will result in strengthening the position of an undertaking vis-à-vis that of other undertakings competing in the common market, the trade between Member States is affected⁴⁸. In both the cases at issue and other similar cases, the main actors involved are broadcasting and telecommunications companies. All of them are, as a rule, conducting business internationally. The broadcasters compete in the international markets for acquisition and sale of programme rights, as well as in the international market for advertising. The broadcaster RTL Group owns other broadcasting companies in other Member States and is also registered in Luxembourg. The same is valid for telecommunications operators. The Commission found that in both Germany and Sweden international satellite and cable operators – such as UPC (Liberty Media and Eutelsat or Viasat, NSAB or Canal Digital) were active and competing with T-Systems and Teracom in their respective markets. Both the schemes implemented in Berlin-Brandenburg and Sweden seem to strengthen the position of the terrestrial operators, respectively T-Systems and Teracom, and at least in the case of Berlin-Brandenburg, also the position of certain broadcasters seem to have been improved as a result of the subsidy granted by the MABB. Ultimately, intra-Community trade must be regarded as being affected by the aid.

III. Compatibility of the aid measures

Since the promotion measures constitute State aid within the meaning of Article 87(1) EC, the Commission must examine whether the aid granted to broadcasters and T-Systems, in Germany, and the aid granted to Teracom, in Sweden, are compatible with the common market. To this end, the Commission has stated in both the preliminary decisions that derogations provided for in Article 87(2) and 87(3) EC do not come into play in either of the cases. Even a potential justification under Article 87(3)(c) EC does not come into play either. Article 87(3)(c) EC states that aid

could be considered compatible if granted in order to "facilitate the development of certain economic activities or of certain economic areas, where such aid does not adversely affect trading conditions to an extent contrary to the common interest". In order to justify the aid under this exemption clause, the authorities must invoke convincing arguments on why digital terrestrial is the only valid option worth supporting by State funds, and whether it is of such a necessity that derogation from the line of the Communication on the Switchover could be justified. In addition, the measures must fulfil the requirements of transparency and proportionality. With respect to Article 86(2) EC, the Commission noticed that the latter is not relevant in the Swedish case, and cannot therefore provide for derogation, since the authorities have declared that Teracom is not entrusted with a service of general economic interest⁴⁹. In the case of T-Systems the Commission has declared that it will look into whether T-Systems has a public service obligation to discharge, however, chances of an exemption under Article 86(2) EC seem low⁵⁰. In any event, since the measures fulfil the conditions of Article 87(1) EC, thereby constituting State aid, national authorities had the legal obligation to notify them to the Commission, which is the only competent authority to decide for an exemption.

IV. Conclusion

Taking into account that both aid schemes have been already put into place prior to Commission authorisation, the aid should therefore be regarded as unlawful within the meaning of Article 1(f) of Regulation (EC) No 659/1999. Knowing the fact that Article 88(3) EC has suspensory effect, and that Article 14 of Council Regulation (EC) No 659/1999 provides that all unlawful aid may be recovered from the recipient, all aid provided by the authorities bears the danger of being recovered.

It is expected – as the above analysis has shown – that the Commission will deliver a negative decision as regards the compatibility of the aid measures with the common market and order that all unlawful aid be recovered in accordance with the procedures of the respective national laws of Germany and Sweden⁵¹. This could have undesired repercussions with respect to the very viability of the DVB-T infrastructures. Under these circumstances, it is not understandable why national authorities had not notified the Commission of the promotion schemes. Without prejudice to the element of violation of the EC Treaty that such a non-notification entails, had the Member States concerned notified the Commission about the measures at hand, such a notification would have at least provided all the actors with the necessary legal certainty and also avoided undesired consequences as

48 See: ECJ, Judgment in Case 730/79, [1980] ECR 2671, paragraph 11.

49 See: Swedish DVB-T Decision, paragraph 63.

50 See: German DVB-T Decision, paragraph 52.

51 See: ECJ, Judgment in Case C-5/89 - BUC-Alutechnik, [1990] ECR I-3437, paragraph 12; ECJ, Judgment in Case 94/87 - Alcan [1989] ECR 175, paragraph 12.

sociated with the recovery of illegal aid. It is reasonable to maintain that the provisions of EC State aid law shall not stand in the way of new emerging technologies. Nevertheless, decisions regarding when these new technologies will be implemented – including to which extent and in which form – must be left up to the market, in particular, when the markets at issue seem to be competitive. If there is to be an intervention on behalf of the State, such an intervention

may take the form of securing universal access to broadcasting services for all commercial operators and end-users, without discriminating between the different technical means⁵². Above and beyond all other considerations, all intervention by national authorities must be compatible with EC law.

52 See also: Koenig/Kühling, K&R 2004, footnote 10 above, page 208.