

Commission Decision of 9 November 2005 on the State Aid which the Federal Republic of Germany has implemented for the introduction of digital terrestrial television (DVB-T) in Berlin-Brandenburg (notified under document number C(2005) 3903) (Only the German version is authentic) (Text with EEA relevance) (2006/513/EC)

COMMISSION DECISION

of 9 November 2005

on the State Aid which the Federal Republic of Germany has implemented for the introduction of digital terrestrial television (DVB-T) in Berlin-Brandenburg

(notified under document number C(2005) 3903)

(Only the German version is authentic)

(Text with EEA relevance)

(2006/513/EC)

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

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

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

Having called on interested parties to submit their comments pursuant to those provisions<sup>(1)</sup>,

Having regard to those comments,

Whereas:

I. PROCEDURE

- (1) By fax of 16 December 2002, the Association of Private Cable Network Operators (*Verband Privater Kabelnetzbetreiber e.V.*, hereinafter 'ANGA') filed a complaint concerning the financing of digital terrestrial television (DVB-T) in Berlin-Brandenburg<sup>(2)</sup>. By letter of 26 March 2003, it urged the Commission to initiate the procedure and to suspend the granting of the aid.
- (2) By letter of 2 May 2003, the Commission submitted a request for information from Germany. The information was provided on 30 June 2003 following an extension of the deadline. On 1 October 2003 a meeting took place between the Commission departments and the alleged provider of the aid, the Media Authority for Berlin-Brandenburg (*Medienanstalt Berlin-Brandenburg*, 'Mabb'). Mabb supplied further information on 23 October 2003 and 4 February 2004.

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- (3) By letter of 23 December 2003, Kabel Baden-Württemberg GmbH & Co. KG ('Kabel BW') announced that it too would be submitting a complaint regarding the financing of DVB-T in Berlin-Brandenburg. The complaint was submitted on 8 March 2004. However, the Commission decided that this complaint would not be examined as part of the present formal investigation procedure. Since the complaint deals with the prices set by public service broadcasters (PSBs) for rental of their terrestrial broadcasting capacities to commercial service broadcasters (CSBs), it was included in the general investigation into the financing of PSBs in Germany<sup>(3)</sup>.
- (4) By letter of 14 July 2004, the Commission informed Germany that it had decided to initiate the formal investigation procedure laid down in Article 88(2) of the EC Treaty in respect of the measure at issue ('decision to initiate the procedure'). The Commission decision to initiate the procedure was published in the *Official Journal of the European Union* on 28 August 2004<sup>(4)</sup>. The Commission called on interested parties to submit their comments on the measure.
- (5) Following the extension of the deadline, Germany responded by letter of 4 October 2004 to the request for comments in the decision to initiate the procedure. The Commission also received comments from the following interested parties: Nordic Satellite AB ('NSAB')<sup>(5)</sup>, ProSiebenSat.1 Media AG ('ProSiebenSat.1') and the European Cable Communications Association ('ECCA') and Deutsche Telekom AG ('DTAG')<sup>(6)</sup>, and the European Satellite Operators Association ('ESOA')<sup>(7)</sup>. By letter of 17 November 2004, the Commission forwarded those observations to Germany, which commented on them by letter of 16 December 2004.
- (6) The Commission received further information from Mabb<sup>(8)</sup>, from Deutscher Kabelverband<sup>(9)</sup>, from ANGA<sup>(10)</sup>, from DTAG<sup>(11)</sup> and from European Economic & Marketing Consultants GmbH ('EE&MC'), acting on behalf of Kabel BW<sup>(12)</sup>. In addition, the Commission Departments met with ECCA, Mabb, EE&MC and DTAG<sup>(13)</sup>. The Commission notified Germany of this information by letters of 14 June and 14 July 2005, to which it replied by letter of 15 August 2005.

## II. DETAILED DESCRIPTION OF THE AID

### A. BACKGROUND

- (7) The present procedure 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.
- (8) The aid in question is for terrestrial transmission, which, in analogue mode, can normally accommodate fewer than 10 television channels. In Berlin, however, the special circumstances that existed before the Wall came down

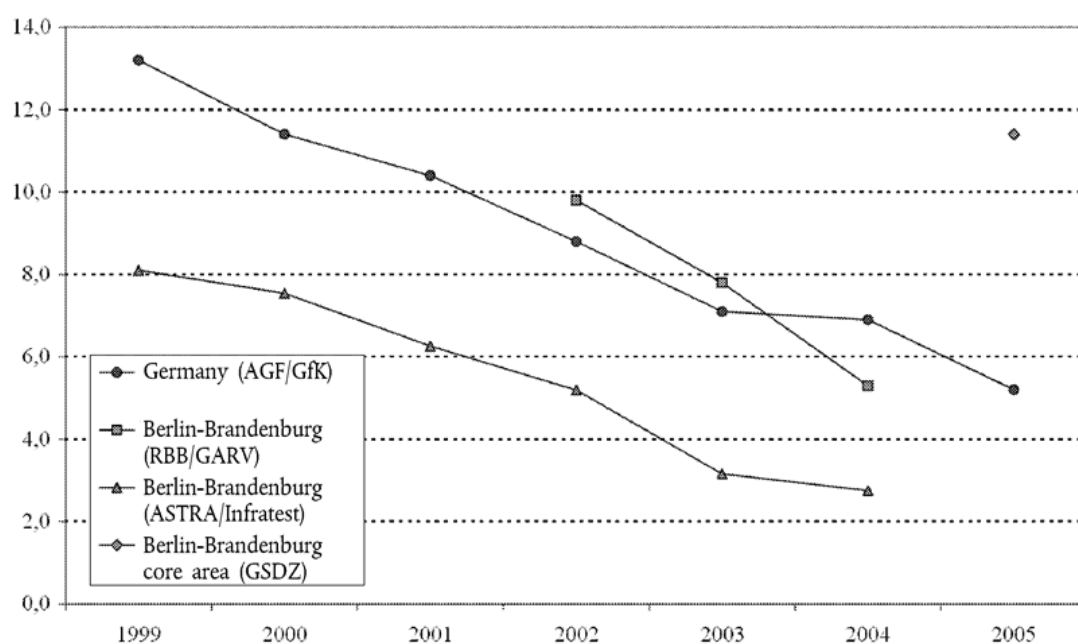
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meant that up to 13 channels could be broadcast terrestrially in analogue mode. After digitisation, some 30 channels will be able to be broadcast terrestrially.

- (9) Since the emergence of cable and satellite in the 1980s, the use of terrestrial broadcasting has fallen sharply in Germany. According to data collected by AGF/GfK, 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<sup>(14)</sup>. According to data by ASTRA/Infratest, the share of terrestrial households in Germany was even lower, that is 3,8 % (end of 2004)<sup>(15)</sup>. For Berlin-Brandenburg, ASTRA/Infratest gives the following breakdown of household TV reception (end of 2004): 2,8 % terrestrial, 67,5 % cable and 29,7 % satellite. Data collected by institutions related to Mabb indicate for Berlin-Brandenburg a share of households with terrestrial reception for their primary television set of 5,3 % in 2004<sup>(16)</sup>. By 2005, the share of households in the urban areas (50 % of all households in the DVB-T area, ‘DVB-T core area’) was however at 11,4 % which demonstrates the importance of DVB-T reception in the areas with the best reception.

Figure 1

Market share of terrestrial platform country-wide and in Berlin-Brandenburg



- (10) In order to promote the digitisation of broadcasting transmission, the Digital Broadcasting Initiative (*Initiative Digitaler Rundfunk*, ‘IDR’) was launched at the end of 1997 by decision of Germany, following a decision by the Minister-Presidents of the *Länder*. Under this initiative, Germany, the *Länder* and various market participants drew up recommendations on digitisation. An initial IDR report was approved by Germany in August 1998 and then

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worked on as part of the IDR to produce a plan, the *Startszenario 2000*<sup>(17)</sup>. Among other things, the plan stated that the digitisation of cable, satellite and terrestrial broadcasting would be completed by 2010 at the latest.

- (11) In the case of terrestrial broadcasting, the *Länder* of Berlin and Brandenburg were the first region in Germany to make joint preparations for the switch-over from analogue to digital terrestrial television ('switch-over'). The relevant *Land* legislation was first made possible following the amendment to the State Treaty on cooperation between the two *Länder* in the field of broadcasting ('State Media Treaty') in November 1998<sup>(18)</sup>. On 17 December 2001 the Media Council of Mabb decided to provide financial assistance for the switch-over. In an agreement concluded on 13 February 2002 ('Switch-over Agreement'), Mabb, the public service broadcasters ARD, ZDF and RBB ('Rundfunk Berlin-Brandenburg')<sup>(19)</sup> and the commercial broadcasters RTL Television ('RTL Group') and ProSiebenSat.1 decided on the basic features of the switch-over, including in particular a schedule for the individual phases of the switch-over and the allocation of a multiplex to each of the five operators<sup>(20)</sup>.
- (12) In general, digital terrestrial broadcasting concerns 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. The development of digital TV requires updating of transmission equipment by the network operator and allocation of frequencies to be used for transmission. The following paragraphs describe the procedures that the German authorities have followed in awarding licences to network operators and to broadcasters.

#### Award of network licences

- (13) On 7 May 2002 Mabb notified the Telecommunications and Postal Regulatory Authority ('RegTP') of the need for frequencies that arose from the Switch-over Agreement<sup>(21)</sup>. The overall need was broken down into eight service areas (Berlin 1-5 and Brandenburg 1-3). RegTP launched an open frequency allocation procedure on 10 July 2002<sup>(22)</sup>. The relevant legislative act noted that there was an additional, country-wide service requirement<sup>(23)</sup>. DTAG's subsidiary T-Systems applied for the frequencies for the service areas Berlin 1-5 and Brandenburg 3, and RBB for the frequencies for the service areas Brandenburg 1 and 2. Since there was only one application for each of the eight service areas, RegTP allocated the frequencies on 14 October 2002 as part of the so-called application procedure and did not need to launch the second stage of the frequency allocation procedure, i.e. the tender procedure<sup>(24)</sup>. Since T-Systems and RBB were already operators of the analogue terrestrial network and thus possessed a telecommunications licence, this requirement for allocating the frequencies through the application procedure was also met. The two network operators subsequently paid the necessary frequency allocation fees as specified in the procedural regulation. The licences for the DVB-T network are limited until the end of 2025<sup>(25)</sup>.

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- (14) In practice, T-Systems operates the two multiplexes allocated to RBB. The two companies have concluded an agreement whereby T-Systems takes over the provision, letting and operation of the technical infrastructure for the transmission of DVB-T on behalf of RBB. The agreement entered into force on 28 February 2003 (start of the second phase of the switch-over) and will run for ten years. Moreover, T-Systems and all broadcasters of the ARD group have concluded a 'Framework Agreement for the provision of DVB-T in Germany' which charges T-Systems with the technical operation of the DVB-T networks.
- (15) Apart from the regional frequency allocation procedure for eight multiplexes for Berlin-Brandenburg, all the *Länder* agreed on a national service area for one multiplex to be allocated to the broadcaster ZDF. RegTP launched the frequency allocation procedure for this multiplex on 27 November 2002<sup>(26)</sup>. The relevant legislative act noted that the procedure would be launched even though sufficient frequency capacity for the territory of the Federal Republic was not yet available and that the details of the areas to be allocated frequencies were not yet known<sup>(27)</sup>. It also pointed out that the national need had to be met by one and the same network operator. In other words, it was not possible for a bidder to apply to operate this multiplex only in certain regions. The only company to submit a bid for the operation of this multiplex was T-Systems.

#### Award of broadcasting licences

- (16) The allocation of the multiplexes to network operators under telecommunications legislation, which is described above, is to be distinguished from the allocation of programme channels to broadcasters under media legislation. Mabb is responsible for allocating programme channels. The relevant procedure was laid down in the DVB-T statutes (*DVB-T Satzung*) adopted on 9 July 2001<sup>(28)</sup>. In accordance with Section 52a(1) of the State Broadcasting Treaty (*Rundfunkstaatsvertrag*)<sup>(29)</sup> and with Section 6a(1) of the State Media Treaty (*Medienstaatsvertrag*), the statutes state in particular that, for the first allocation of digital terrestrial broadcasting capacity in Berlin and Brandenburg, consideration must be given, as a matter of priority, to the programme channels which are already broadcast in analogue form. The technical transmission capacities for these programmes have to be equivalent relative to the other transmission capacities. In the case of commercial broadcasting groups that transmit more than one analogue terrestrial channel, the statutes envisage the allocation not of individual programme channels but of entire multiplexes.

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Table 1

## Programme coverage and network operators during digital switch-over

Channel	Analogue TV	Service area	Coverage as of 11/2002	Coverage as of 3/2003	Coverage as of 8/2003
K 05	<i>(TV Berlin)</i>	Berlin 1	ARD/ZDF/ ORB/SFB	TV-Bouquet	BBC World/ FAB/WDR/ SWR
K 07	<i>Das Erste</i>	Brandenburg 1	<i>Das Erste</i>	ARD Bouquet	ARD Bouquet
K 22	<i>FAB</i>		<i>FAB</i>	<i>FAB</i>	X
K 25	<i>SAT.1</i>	Berlin 2	<i>SAT.1</i>	RTL Bouquet	RTL Bouquet
K 27	<i>ORB</i>	Brandenburg 2	<i>ORB</i>	RBB Bouquet	RBB Bouquet
K 29	<i>VOX</i>		<i>VOX</i>	<i>Erste — Simulcast</i>	X
K 33	<i>ZDF</i>	country- wide	<i>ZDF</i>	ZDF Bouquet	ZDF Bouquet
K 39	<i>SFB/B1</i>	Berlin 3	<i>SFB/B1</i>	<i>SFB/B1</i>	Other media services
K 41	<i>BBC World</i>		<i>BBC World</i>	<i>BBC World</i>	X
K 44	<i>Pro7</i>	Brandenburg 3	Pro7/Sat.1/ RTL/RTLII	Pro7Sat.1 Bouquet	Pro7Sat.1 Bouquet
K 47	<i>RTL II</i>	Berlin 4	<i>RTLII → Pro7 Simulcast</i>	<i>ZDF — Simulcast</i>	X (not allocated)
K 51			<i>RTLII — Simulcast</i>	<i>ORB — Simulcast</i>	X
K 56	<i>RTL</i>	Berlin 5	<i>RTL</i>	TV — Bouquet	Eurosport/ Viva/ DSF/9Live

Explanation: Channels K 05, K 25, K 33, K 39, K 44 and K 56 are provided by T-Systems, while Channels K 07 and K 27 were allocated to RBB but are also provided by T-Systems. On account of coordination problems with Poland, Channel K 47 has not yet been allocated by RegTP. Analogue transmissions are in italics.

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- (17) The total transmission capacity for broadcasting consisted in seven multiplexes. It was finally allocated as follows: three entire multiplexes (K 07, K 27 and K 33) and one programme channel on a fourth multiplex (K 05) to the PSBs (ARD and ZDF). Two programme channels on the fourth multiplex were allocated to FAB (*Fernsehen aus Berlin*) and BBC World, which were already present on the analogue network. An entire multiplex was allocated to each of the commercial broadcasting groups, RTL Group (K 25) and ProSiebenSat.1 (K 44). All these channels were allocated by decision of Mabb without an open procedure. The remaining capacity was opened up to tender individually by decision of 8 May 2002<sup>(30)</sup>. However, for want of suitable tenderers, these programme channels were initially allocated for a one-year period to the following broadcasters<sup>(31)</sup>: Eurosport, Viva Plus, Deutsches Sportfernsehen (DSF) and SWR. After the companies mentioned had taken part in a second tender procedure published on 16 April 2004<sup>(32)</sup>, the corresponding licences were extended to five years. The remaining transmission capacity (K 39) was earmarked for providers of other forms of broadcasting, with mobile television transmission (DVB-H) in particular to be tried out.

#### Phases of switch-over process

- (18) As regards the practical arrangements for the switch-over, mention should be made of the DVB-T pilot project which had been operational as of August 1997 and in which DTAG, together with Mabb and SFB, operated a DVB-T network in Berlin-Brandenburg on a trial basis. On 1 November 2002, which saw the start of normal operations, the first phase of the switch-over was launched, involving two digital multiplexes (K 05 and K 44) operated by T-Systems. On 28 February 2003, analogue broadcasting of the national commercial channels came to an end and DVB-T transmission was significantly expanded (second phase of the switch-over). As a result, these channels were completely switched to digital terrestrial broadcasting after a simulcast period lasting only four months. On 4 August 2003 analogue terrestrial broadcasts by all other broadcasters were halted.

#### B. DESCRIPTION OF THE AID

- (19) The subject-matter of the formal investigation procedure is the financial assistance provided by Mabb for the switch-over from analogue to digital terrestrial television. The legal bases for this assistance are Section 40(1)(2) of the State Broadcasting Treaty and Section 8(1)(8) of the State Media Treaty, pursuant to which the *Land* media authorities and, in the present case, Mabb are charged with promoting, among other things, development of the technical infrastructure for broadcasting and projects for new broadcasting techniques out of their share of the licence fee. On the basis of these legal provisions, Mabb, as mentioned above, adopted the DVB-T statutes and concluded the Switch-over Agreement with the PSBs and the commercial broadcasting groups ProSiebenSat.1 and RTL Group.

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- (20) According to Germany, the assistance is designed essentially to ensure pluralistic media diversity in an increasingly converging field, to safeguard infrastructure competition for digital modes of transmission, to use frequencies efficiently and to develop new services and uses.
- (21) Mabb concluded with the commercial broadcasting groups ProSiebenSat.1 and RTL Group contracts containing the following key points as regards the assistance to be granted<sup>(33)</sup>:
- (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 broadcasting costs of the digital terrestrial transmission. In the case of RTL Group, the grant amounts to EUR 265 000 a year, or EUR 66 250 per programme channel. In the case of ProSiebenSat.1, it amounts to EUR 330 000 a year, or EUR 82 500 per programme channel. The grants are payable as of 1 March 2003 for a period of five years. If the transmission costs calculated for the broadcasters by the network operator increase or decrease, Mabb will normally bear half of the difference, i.e. half of the increase or decrease in costs.
- (d) In the negotiations with ProSiebenSat.1, a coverage-related factor was also taken into consideration<sup>(34)</sup>. After the first two years, the annual assistance of EUR 330 000 will be reduced to EUR 250 000 for the remaining three years if the digital terrestrial coverage in the reception area exceeds 200 000 households.
- (22) According to Germany, the grant amounts to around one third of the fees payable by the broadcasting groups to the network operator. It is calculated in such a way that the two broadcasting groups have to pay the same fee to the network operator for a multiplex as they previously did for an analogue channel. Assistance equivalent to one third of the digital transmission costs thus reflects the fact that the transmission of a multiplex is some 50 % more expensive than that of an analogue channel. However, the Commission notes already at this stage that it must be borne in mind here that a multiplex has four times the transmission capacity of an analogue channel, i.e. four programme channels instead of only one.
- (23) Mabb concluded similar agreements with FAB and BBC World, which, before the switch-over, were also broadcast via analogue terrestrial transmission ('ATT') and thus had a claim to a programme channel on the DVB-T network<sup>(35)</sup>. For these broadcasters too, Mabb provides a grant towards transmission costs for a period of five years. The grant is equal to one third



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of the fees payable by the network operator. Calculation of the amount of assistance is based on the operator's invoice. However, the level of assistance amounts to at most EUR 68 167 per year.

- (24) As for the broadcasters that were not broadcast terrestrially before the switch-over, i.e. Eurosport, Viva Plus and DSF, Mabb concluded a third type of agreement<sup>(36)</sup>. Programme channels were allocated to these broadcasters for a period of only one year beginning on 1 August 2003. During that period Mabb provided them with a grant of EUR 65 000 each. If the broadcasting costs of the network operator and thus the costs payable by the broadcasters to the operator fall, the amount of funding is reduced accordingly. There is no provision for the grant to be increased. Following a second invitation to tender by Mabb on 16 April 2004, the DVB-T broadcasting licences and the public funding have been extended to five years.
- (25) In its response to the decision to initiate the procedure, Germany stated that the programme channels of the abovementioned commercial broadcasters were currently receiving annual funding of some EUR 60 000 each. In the case of RTL Group and ProSiebenSat.1, this represents total public funding per year of some EUR 240 000 per group. In response to a subsequent request for information, Germany has corrected this information. The public funding corresponds in fact to the amounts specified in the Agreements with the individual broadcasters. In 2004, the first full year of funding, Mabb provided the following amounts: EUR 330 000 for ProSiebenSat.1, EUR 265 000 for RTL Group, EUR 68 167 each for FAB and BBC World, and EUR 65 000 each for DSF, Eurosport and Viva Plus. On the basis of this information, the total amount of Mabb's funding for commercial broadcasters comes to some EUR 4 million. To date, Mabb has already granted about half of this amount.
- (26) As can be seen from the Agreements between Mabb and the individual broadcasters, the latter pay a fee to the network operator for the broadcasting of their programme channels over the DVB-T network. According to the original invitations to tender (A.6) for the programme channels launched by Mabb, these fees were supposed to be regulated by RegTP<sup>(37)</sup>. In accordance with the Federal Telecommunications Law ('TKG') of 22 June 2004, the network operator must, however, be found to possess significant market power before measures regulating the fee payable can be imposed by RegTP (Sections 10 to 13 TKG). As far as the DVB-T network is concerned, RegTP has not yet, however, defined the relevant markets, with the result that the existence of significant market power, which is necessary for the fees to be regulated, has still not been established.
- (27) If the existence of significant market power on the part of a network operator is established in accordance with Sections 30 to 33 TKG, the fees would have to be regulated according to the principle of the costs of efficient service provision. T-Systems has maintained that it applies this principle to the fees it sets even though there is as yet no legal obligation to do so.

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- (28) Mabb finances 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 (in accordance with Section 40 of the State Broadcasting Treaty and Section 15 of the State Media Treaty).
- (29) Mabb grants the funding described above only to the commercial broadcasters. The PSBs finance the costs of DVB-T transmission out of the licence fee income accruing to them. According to KEF reports, ARD paid a total of EUR 43,9 million country-wide for DVB-T in the period 2001-04, the corresponding figure for ZDF being EUR 35,6 million<sup>(38)</sup>. The KEF reports do not provide any regional breakdown. It must, however, be assumed that a substantial amount of these resources have been available for DVB-T transmission in Berlin-Brandenburg since this was the first and the longest-running DVB-T project in Germany during the period concerned. The launch of DVB-T transmission in Berlin-Brandenburg on 1 November 2002 was followed by the launch in North Rhine-Westphalia (but not until 24 May 2004) and then in the Rhine-Maine area and in Northern Germany in the second half of 2004.

#### C. REASONS FOR INITIATING THE FORMAL INVESTIGATION PROCEDURE

- (30) In the decision to initiate the procedure, the Commission noted first that the measure described seemed to meet all the criteria of Article 87(1) and could, therefore, be regarded as State Aid. In particular, it differentiated between two types of potential beneficiary, namely the commercial broadcasters as direct beneficiaries and the network operator T-Systems as the indirect beneficiary.
- (31) The Commission also expressed doubts as to the compatibility of the aid with the EC Treaty. Neither the derogations from the general prohibition on Aid listed in Article 87(2) nor the derogation in Article 87(3)(c) seemed to be met. What was particularly problematic according to the Commission was the fact that the aid appeared to infringe the requirement of technological neutrality. In addition, the Commission wondered whether the aid could be regarded as compensation for a service of general economic interest.
- (32) Lastly, the Commission initiated the formal investigation procedure in order to give Germany and interested parties the opportunity to submit their comments on its provisional assessment of the measure described and to make available to the Commission any relevant information.

#### III. COMMENTS FROM INTERESTED PARTIES

- (33) NSAB submitted two sets of comments in which it generally supported the views expressed by the Commission in the decision to initiate the procedure. In practice, it took the view that the measure constituted State Aid for which, moreover, no exemption could be claimed. In particular, it stressed the non-technologically neutral nature of the measure and the adverse competitive

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effects of the indirect funding for T-Systems on operators of cable and satellite networks.

- (34) ProSiebenSat.1 stressed the importance of the funding, from a commercial viewpoint, for the success of the digital switch-over. Without any assistance, it would have considered switching off terrestrial transmission in Berlin-Brandenburg without any replacement. There was also the risk with the switch-over that terrestrial coverage would suddenly cease, with the financing of commercial broadcasters out of advertising revenue being adversely affected. ProSiebenSat.1 also made the point that the participation of the large commercial broadcasting groups in the switch-over alongside the PSBs was necessary in order to secure a sufficient degree of consumer acceptance. Furthermore, it claimed that the benefit conferred by the assistance was passed on through payment of the transmission fees to the network operator T-Systems. Lastly, it stated that the assistance provided by Mabb reduced the competitive advantage enjoyed by the PSBs, which had access to a substantial level of fee income for the introduction of DVB-T.
- (35) The comments by ECCA generally supported the views expressed by the Commission in its decision to initiate the procedure. ECCA points out in particular that the measure described placed at a disadvantage the operators of other transmission platforms, which relied exclusively on capital markets to obtain finance.
- (36) Similarly, the comments by ESOA supported the view expressed by the Commission in the decision to initiate the procedure to the effect that the measure described constituted state aid that was incompatible with the EC Treaty. ESOA also pointed out that, in many respects, satellites were a cheaper and more market-oriented form of transmission than digital terrestrial transmission.
- (37) In its comments, DTAG doubted that the assistance granted by Mabb constituted State resources and thus Aid. It went on to say that T-Systems could not be regarded as an indirect beneficiary. T-Systems received appropriate market remuneration for the DVB-T transmission and had also been allocated the frequencies in an open and transparent tender procedure. In addition, the assistance had to be seen as compensation for the provision of public-interest services by the commercial broadcasters, which had decided to dispense with analogue terrestrial transmission and had switched to DVB-T transmission. This also ruled out the existence of indirect assistance for T-Systems. Lastly, DTAG disputed that there had been any distortion of competition between terrestrial, cable and satellite transmission since the three modes of transmission were not substitutable from the point of view of the consumer.
- (38) The Commission notes that the other comments were received after the planned one month deadline and that the interested parties had not asked for

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any extension. Since these comments have helped, however, to provide a full picture of the form and effect of the measure, they are reproduced below with a view to ensuring a maximum degree of transparency. In addition, all comments and information have been passed on to Germany so that it has had the opportunity to comment on them in turn.

- (39) In its comments, the German Cable Association stated that the measure constituted unilateral assistance for DVB-T from public monies that seriously distorted competition among the competing network infrastructures. The DVB-T network was developed without any financial risk for the network operator since the participation of the commercial broadcasters was guaranteed by providing them with financial assistance. Furthermore, the German Cable Association noted that neither the tender procedure for DVB-T launched by RegTP nor the tender procedure for broadcasting licences launched by Mabb could be described as open and transparent. It also doubted that the assistance was necessary since the market participants had a vested interest in the switch-over and since alternatives to the assistance provided had existed. The assistance was not appropriate since it had not been calculated on the basis of the costs actually incurred by the broadcasters.
- (40) A similar line was taken by ANGA, which also pointed to the lack of transparency in respect of the result of the tender procedures at the level of the network operation and the broadcasting licences. It also referred to the vested interest of the network operator and of the broadcasters in the digital terrestrial switch-over. Furthermore, it stressed that DVB-T was specifically designed to compete with cable and refuted arguments to the effect that DVB-T would have to be justified as a means of securing plurality of opinion and for socio-political reasons. Lastly, ANGA argued that the collection of customer fees would have been an alternative to public funding.
- (41) Kabel BW observed that the assistance granted by Mabb for DVB-T had led to distortion of competition detrimental to satellite and cable services. Applying an analytical model, it also endeavoured to show that assistance for the DVB-T network in Berlin-Brandenburg would not be necessary since the fees accruing to the network operator would be sufficient to cover the costs of digital terrestrial transmission. It concluded from this that compensation in the form of assistance from Mabb was not necessary even if development of the DVB-T network were regarded as a service of general economic interest.

#### IV. COMMENTS FROM THE FEDERAL REPUBLIC OF GERMANY

- (42) In its response to the decision to initiate the procedure, Germany takes the view that the assistance granted by Mabb does not constitute aid within the meaning of Article 87(1) of the EC Treaty. Firstly, the assistance did not come from State resources since the funds were not under State control, and Mabb was free to decide how they were to be used. Secondly, the assistance was not granted to specific beneficiaries. This was the case not

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only with the commercial broadcasters as direct beneficiaries but also with the network operator as indirect beneficiary, since the assistance granted to the undertakings concerned was the result of open and transparent tender procedures. As a result, no specific undertaking benefited. Thirdly, Germany states that the assistance did not distort competition. In the case of the broadcasters, the digital switch-over increased competition since capacities for additional programme channels became available. In the case of the network operator, the various modes of transmission were not sufficiently substitutable, this being a necessary condition for a distortion of competition.

- (43) If the Commission were to classify the measure under investigation as state aid, Germany would argue that the measure was compatible with the EC Treaty under Article 87(3)(c), Article 87(3)(d) or Article 86(2).
- (44) Under Article 87(3)(c), the measure contributed to the development of the broadcasting sector since DVB-T allowed more television broadcasters to transmit and promoted the development of new services such as interactive television services or mobile and portable reception. In addition, it fostered media plurality, competition between the various modes of digital transmission and an efficient use of frequencies. Germany also argues that the assistance in its present form is necessary and appropriate since market forces alone would not have been sufficient to bring about the switch-over and since the measure constituted a relatively small incentive.
- (45) On the basis of Article 87(3)(d), Germany argues that the measure can be justified as aid to promote culture and that the assistance served to develop a pluralistic broadcasting system and thus fell within the cultural remit of the Member States.
- (46) Lastly, Germany argues that the broadcasting of television programmes over DVB-T is a service of general economic interest and that the Aid could be approved under Article 86(2). Under the agreements with Mabb on the capacity allocation and the granting of assistance, the commercial broadcasters were charged with providing a service, namely ‘participation in the digital switch-over and broadcasting of programmes over the digital terrestrial mode of transmission’. Without the assistance, they would not have been willing to broadcast over the DVB-T network, and this would have jeopardised the survival of this mode of transmission, the preservation of which was in the public interest.
- (47) In its response to the comments from the interested parties, Germany makes the point that, as a rule, the regulation of infrastructure in accordance with Directive 2002/21/EC on the Common Regulatory Framework for Electronic Communications Networks and Services (Framework Directive)<sup>(39)</sup> is based on different markets for cable, satellite and terrestrial broadcasting. In addition, the operators of these networks have failed as yet to provide evidence that cable and satellite have been disadvantaged in practice by the

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digital switch-over in Berlin-Brandenburg. No broadcaster had yet abandoned satellite broadcasting because Mabb was promoting the switch-over to DVB-T. However, Germany states that, through the measure, it intended to secure 'viable infrastructure-based competition' that, as in the case of the broadband sector, could be expected to have a positive effect.

- (48) In its response to additional comments from interested parties, Germany disputes in particular the arguments which cast doubt on the open, transparent and non-discriminatory nature of the procedure to allocate the network licences. Moreover, Germany disputes that the customer data submitted by cable operators show a negative competitive effect of the launch of DVB-T on cable operators. Instead, Germany highlights the strong competitive position of cable operators.

## V. LEGAL ASSESSMENT

### V.1. State Aid within the meaning of Article 87(1) of the EC Treaty

- (49) The Commission has examined whether the measure can be classified as State Aid within the meaning of Article 87(1) of the EC Treaty, according to which '*any aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods shall, in so far as it affects trade between Member States, be incompatible with the common market.*'

#### State resources

- (50) In the decision to initiate the procedure, the Commission stated that advantages granted by a public or private body designated or established by the State fall within the scope of Article 87(1)<sup>(40)</sup>. It maintained that Mabb should be considered a public body established or appointed by the State which performs a public task and that the advantages granted by this body should be considered State resources within the meaning of Article 87(1)<sup>(41)</sup>.
- (51) Germany replied that, for a measure to rank as State resources, it must constitute a burden for the State budget. Since, in the present case, the funding does not represent a financial burden for the budgets of the *Länder* of Berlin and Brandenburg but is financed from the licence fee (*Rundfunkgebühr*) collected from TV viewers, the funding does not constitute State resources. Secondly, Germany stated that Mabb decided independently and according to its status as an institution independent of the State which concrete measures were necessary to promote the digital switch-over. Accordingly, there was no direct influence by the State.
- (52) In the Commission's view, the advantage granted by Mabb is granted indirectly through State resources and is imputable to the State. It is funded from Mabb's budgetary resources. Irrespective of whether the German licence fee, which provides Mabb's budgetary resources, is to be regarded as forming

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part of State resources, these monies are to be considered State resources as of the moment they become part of Mabb's budget. The fact that these monies are collected from private individuals, as argued by Germany, does not, in any event, contradict the finding that Mabb's budget ranks as State resources. By analogy, tax revenue collected from private individuals becomes State resources once the taxes have been levied and collected by the State. Clearly, the costs incurred by Mabb in conferring the advantage constitute a burden for Mabb's budget.

(53) Moreover, Mabb is a public authority established by the State Media Treaty of the *Länder* of Berlin and Brandenburg. The Treaty defines Mabb's organisational structure and assigns to Mabb a broad range of public tasks in the field of broadcasting and frequency management. Moreover, Mabb is subject to legal supervision by the *Land* governments of Berlin and Brandenburg ('staatliche Rechtsaufsicht')<sup>(42)</sup> and its annual budget is subject to control by the Court of Auditors of the *Land* of Berlin<sup>(43)</sup>. The public task of relevance in the present case is laid down in the State Media Treaty as well as in the State Broadcasting Treaty. It is described as the promotion of the technical infrastructure of broadcasting and of projects of new broadcasting transmission technologies<sup>(44)</sup>. More specifically with respect to the digital switch-over, the State Media Treaty assigns to Mabb the task of supervising the digital switch-over and, if necessary, adopting statutes (*Satzung*) defining the necessary measures<sup>(45)</sup>. In particular, Mabb is entitled to lay down specific rules on the allocation of the digital terrestrial frequencies. To this end, it has the right to conclude agreements specifying the development of the digital technology and the overall programme offer<sup>(46)</sup>. Mabb acted on these provisions of the State Media Treaty when it adopted the statutes specifying the conditions of the digital switch-over (*DVB-T Satzung*) on 9 July 2001, when it concluded the Switch-over Agreement (*Umstiegsvereinbarung*) with several terrestrial broadcasters on 13 February 2002 and when it concluded the Agreements with the individual commercial broadcasters on their respective DVB-T licences and the related funding in the course of 2003. The Commission therefore considers that the present measure is imputable to the State.

(54) Finally, Community law cannot permit the rules on State Aid to be circumvented merely through the creation of autonomous institutions charged with allocating aid<sup>(47)</sup>. In spite of allowing for a certain degree of autonomy, the State Media Treaty clearly defines the public tasks to be performed by Mabb and leaves limited discretion to it on how to spend its budgetary resources. In particular, Mabb's autonomy does not preclude its activities and, more specifically, its use of financial resources from being guided by political considerations and not simply by economic considerations. The lack of economic considerations in the present case is apparent, for example, from the fact that the funding is given in the form of non-repayable grants with no direct benefit to Mabb.

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### Economic advantage

- (55) In the decision to initiate the procedure, the Commission held that the measure seemed to favour two groups of beneficiaries, firstly, the commercial service broadcasters as direct beneficiaries and, secondly, the operator of the DVB-T network, T-Systems, as indirect beneficiary.
- (56) At the level of broadcasters, the subsidy granted by Mabb covers some of the CSBs' transmission costs via the DVB-T network for a period of five years. The support thus relieves them of expenses which are part of their normal operating costs.
- (57) Germany has maintained that Mabb's subsidy compensates broadcasters for giving up their previous ATT licences and does therefore not constitute an advantage for them. There are, however, a number of reasons why this argument cannot be accepted.
- (58) Firstly, the subsidy does not take into account in any way the outstanding duration of the different ATT licences. Indeed, the subsidy was also granted to channels which were not previously present in ATT<sup>(48)</sup> or whose ATT licence expired shortly before the analogue switch-off on 28 February 2003<sup>(49)</sup>. In any event, the agreements with the CSBs relate the subsidy exclusively and explicitly to the transmission costs in the new DVB-T network and not to the return of the ATT licences.
- (59) Secondly, since the switch-over was planned several years in advance, Mabb could have limited the duration of the ATT licences to the switch-over date in order to avoid any potential compensation claims on the part of the CSBs. This was the approach followed, for example, in Bavaria and the United Kingdom.
- (60) Thirdly, the CSBs which were present in ATT were already, if not completely then at least partially, compensated for the switch-off of their ATT transmission by the allocation of DVB-T channels. RTL Group and ProSiebenSat.1 were, in fact, allocated more DVB-T channels than they previously had in ATT.
- (61) Fourthly, as regards transmission costs, the subsidy is not designed as temporary support to facilitate the transition during the simulcast phase (which, in the case of the CSBs, lasted only four months), but for the five years after switch-over. More generally, the transmission costs per programme channel are *lower* for DVB-T than in analogue mode so that, even without any subsidy, the broadcasters achieve per channel cost savings by switching to DVB-T.
- (62) At the network level, it appears that the network operator T-Systems receives an indirect advantage stemming from Mabb's subsidy<sup>(50)</sup>. Under agreements between Mabb and the CSBs — of which the financial support is an integral part — T-Systems has the guarantee that the two major German CSBs in particular, which together account for about 90 % of total German TV



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advertising revenue and for close on half of German TV viewing<sup>(51)</sup>, will use its network for five years. The guaranteed participation of the German CSBs is thus important for T-Systems in terms of guaranteed revenue.

- (63) In addition, compared with a situation in which no subsidy is granted, T-Systems might be able to charge CSBs higher transmission prices than under normal market conditions<sup>(52)</sup>, while possibly avoiding the need to charge end-users for access to DVB-T (subscription fees), as happens, for example, in the Netherlands and Sweden. It is however not possible to establish to what extent the transmission fees currently charged by T-Systems and not being subject to price regulation exceed market prices. It is therefore not possible either to quantify the price which the CSBs would have been prepared to pay in the absence of the aid and hence to establish whether there has been a transfer of state resources.

#### Distortion of competition

##### Award of network licences and broadcasting licences

- (64) Germany has argued that the measure does not distort competition since it does not confer a selective advantage on either the commercial broadcasters or on the network operator T-Systems because the respective licences were acquired through open and transparent tender procedures. According to this argument, the tendering has ensured that any broadcaster or network operator could, in principle, have benefited from the funding, so that the measure cannot be regarded as selective. Germany argues that it is in particular in the case of indirect beneficiaries that a measure needs to be selective in order to rank as aid.
- (65) The Commission has doubts that the tender procedures were such as to ensure that the selective economic advantage deriving from Mabb's subsidy would be minimised or even eliminated and thus adequate to prevent a distortion of competition.
- (66) Indeed, at the level of broadcasters, the majority of licences were not subject to any tender procedure. Of the total capacity of 14 DVB-T channels reserved for CSBs and qualifying for Mabb's subsidy, Mabb allocated ten without any tender procedure. The basis for the direct allocation of these channels was that the respective broadcasters (RTL Group, ProSiebenSat.1, BBC World and FAB) were already present in the analogue terrestrial network<sup>(53)</sup>. Contrary to the argument put forward by Germany, there was, in the case of these broadcasters, no tender procedure which could possibly have eliminated the selective advantage conferred by Mabb's funding.
- (67) In the case of the remaining transmission capacity for CSBs, Mabb published a first tender on 8 May 2002 and a second tender on 16 April 2004<sup>(54)</sup>. Although the attribution of licences via a tender is generally preferable to the direct attribution, the Commission considers for the following reasons that the tender procedures in the present case cannot be considered to have minimised or

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even eliminated the economic advantage of Mabb's funding and were thus inadequate to prevent a distortion of competition. Neither of the two tenders gave a binding commitment that Mabb would subsidise the transmission costs. The first tender stated explicitly that the funding would depend on a number of conditions related to the network roll-out. Moreover, the tenders did not give an indication of the possible amount of any funding. The respective tender specifications mentioned only that the annual transmission costs per programme channel were likely to vary between EUR 150 000 and EUR 200 000. The Commission therefore considers that the two tender procedures were not sufficiently transparent to ensure that the advantage deriving from Mabb's subsidy would be adequately reflected in broadcasters' bids or to exclude any degree of selectivity<sup>(55)</sup>.

- (68) At network level, RegTP initiated a first procedure to allocate the frequencies for eight regional multiplexes on 10 July 2002 and a second procedure for one national multiplex on 27 November 2002<sup>(56)</sup>. The Commission considers that these procedures were not sufficient to rule out a possible economic advantage to the network operator T-Systems as a result of Mabb's subsidy and may thus have distorted competition:
- (a) Firstly, Mabb's financial assistance to broadcasters for using the DVB-T network was not mentioned in the tender specifications, nor was its exact amount actually determined at the time the tenders were published. Bidders' knowledge of the existence of the aid could not have been reflected in a correspondingly higher or better bid for the licence. The German argument that bidders could deduce what Mabb's planned financial assistance would be from the Switch-over Agreement signed on 13 February 2002 cannot be accepted. The Switch-over Agreement did not specify how Mabb would assist the roll-out of the DVB-T network, nor did it give an indication of the possible amount of any such funding.
  - (b) Secondly, T-Systems as the operator and owner of the ATT network and as a participant in the earlier DVB-T pilot project in Berlin-Brandenburg enjoyed a considerable advantage over any new entrants when it came to submitting a bid. Even if competitors could consider renting part of T-Systems' terrestrial infrastructure in order to roll-out a DVB-T network, T-Systems as the incumbent operator of the terrestrial networks throughout Germany must still be seen to possess a comparative advantage over any new entrant.
  - (c) Thirdly, T-Systems operates the DVB-T multiplexes formally allocated to the regional public service broadcaster RBB, thereby conferring on T-Systems the additional advantage of operating the part of the DVB-T network reserved for the transmission of the RBB and ARD channels. T-Systems can thus exploit economies of scale and scope not available to competitors.

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- (d) Fourthly, as mentioned in paragraph 15, RegTP's publication for the allocation of the *national* multiplex specified that this multiplex must be operated by one and the same network operator, effectively keeping out regional contenders. It also specified that the respective frequencies for this multiplex were in fact not yet known, adding to the uncertainty of the DVB-T launches.
- (69) The tender procedures at network level were thus characterised by a high degree of uncertainty and intransparency coupled with a strong position of the incumbent terrestrial network operator T-Systems. These elements made it difficult for any company other than the incumbent operator of the terrestrial network, T-Systems, to submit a bid for the operation of the network. Indeed, T-Systems was the only company which submitted a bid for the operation of the relevant multiplexes. In its response to the decision to initiate the procedure, Germany has recognised that the network level is characterised by conditions which are not fully market-driven. Reference is made to the strong position of the network operator T-Systems as the successor to the previous telecommunications monopoly<sup>(57)</sup>. As T-Systems was in a favourable position to operate the DVB-T network, it may have submitted an offer that did not fully correspond to the economic advantage derived from the operation of the network. The tender procedures must be therefore considered insufficient to exclude the selectivity of the measure and thus insufficient to prevent a distortion of competition.
- (70) It may be added that, even if T-Systems submitted a bid during the tender procedure that reflected all direct and indirect economic advantages accruing to the bidder, this would not eliminate the sectoral aid aspects of the measure, which are discussed in paragraphs 74 to 83.

Different level of public support to commercial broadcasters

- (71) At the level of broadcasters, the measure distorts competition in that the share of the transmission costs covered by the subsidy is not the same for all CSBs. The share varies between 28 % and 50 % per DVB-T channel<sup>(58)</sup>. Another element of distortion between the individual CSBs is that RTL Group and ProSiebenSat.1 were allocated more channels in DVB-T than previously in ATT; all of these qualify for a subsidy. In contrast, FAB and BBC World continue to have only one terrestrial channel each and, accordingly, they receive funding only for this one channel.
- (72) The differences in Mabb's subsidy to the respective CSBs distort competition since these broadcasters compete on the same relevant market for free-to-air television broadcasting. The Commission has consistently found that the provision of pay-TV constitutes a market separate from free-to-air television broadcasting<sup>(59)</sup>. The markets are separate in particular with respect to the type of trading relationship which exists between the broadcaster and the revenue provider (e.g. subscriber or advertiser) as well as with respect to the form of funding, with pay-TV being financed primarily by subscription fees while

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free-to-air television is financed by public authorities and/or by advertising revenue<sup>(60)</sup>. In the case at hand, the recipients of Mabb's subsidy compete more specifically with each other for advertising or other commercial revenue since they are commercially funded<sup>(61)</sup>.

- (73) While an element of distortion is present in the case of the CSBs, the measure does not seem to place PSBs at a disadvantage which, however, do not receive assistance by Mabb. The reason is that the DVB-T transmission of PSBs is financed through the compulsory licence fee.

#### Sectoral aid

- (74) The Commission also considers that the measure under investigation is selective in so far as the subsidy is granted to broadcasters who use the DVB-T platform rolled out by T-Systems and does not, for example, support broadcasters who use other transmission platforms. As noted in the decision to initiate the procedure, the measure can therefore be regarded as 'sectoral aid'.
- (75) At the level of broadcasters, sectoral aid helps companies to reach a wider audience and thus to increase their attraction for advertisers as against other media. In merger cases, the Commission has defined a product market for 'media buying' which includes a large number of different types of media<sup>(62)</sup>. 'Media buying' is defined as planning and purchasing time and/or space in various media, including television, radio, newspapers, magazines, billboards and the Internet. From this perspective, sectoral aid to television via DVB-T has the potential to distort competition in a number of other media sectors.
- (76) At the level of network operators, the measure distorts competition in two ways. Firstly, on the *wholesale market*, the presence of a subsidy allows the operator of the DVB-T network to charge broadcasters higher transmission prices than under normal market conditions. Secondly and more importantly, on the *retail market*, the selective support and 'artificial' development of a competing transmission technology affect the viewers' decision between the different broadcasting platforms, in particular DVB-T, cable and direct-to-home satellite.
- (77) In antitrust and merger cases, the substitutability between the different broadcasting platforms at retail level has been decided on a case-by-case basis<sup>(63)</sup>. More recently, however, there is a tendency to define a *single* market for broadcasting services, irrespective of the transmission platform<sup>(64)</sup>. This reflects *inter alia* the advent of DVB-T, which has increased the capacity of the terrestrial platform, and the decrease in the prices for reception equipment such as satellite dishes or set-top boxes, which has reduced the 'lock-in effect'<sup>(65)</sup>.
- (78) In Germany all three transmission platforms offer a large number of free-to-air television channels, which points to a certain similarity of offer. More specifically, the current offer of in total 28 channels in DVB-T in Berlin-Brandenburg is nearly as comprehensive as the offer in analogue cable (with

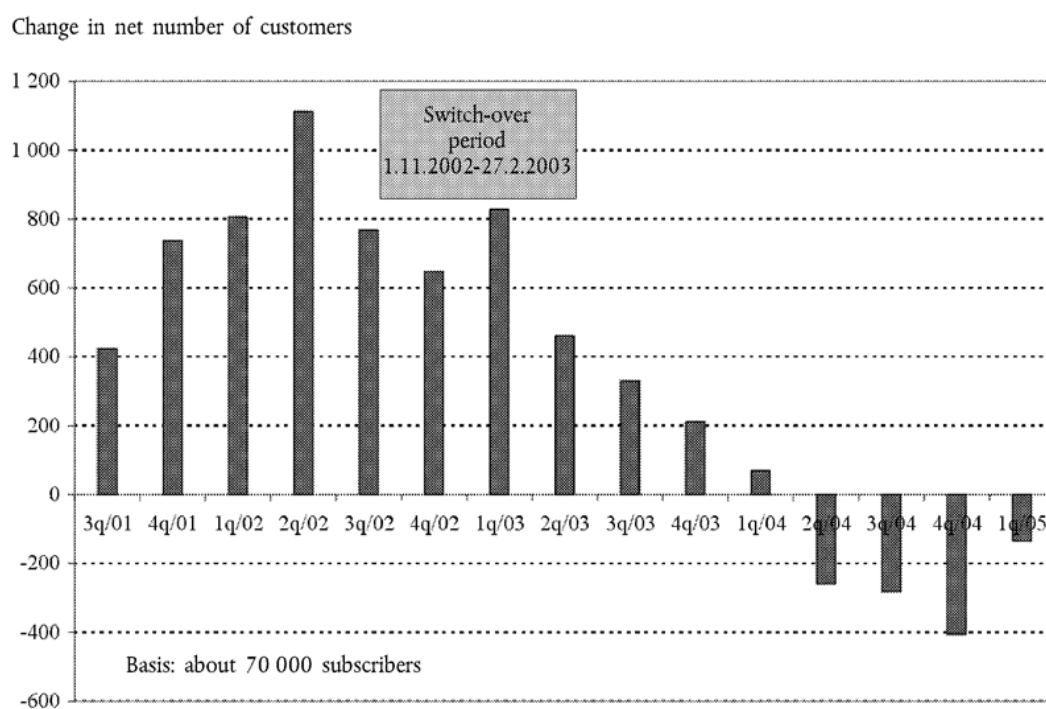
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about 34 channels), which is the most common transmission platform in Berlin-Brandenburg. In particular, DVB-T includes all important programme channels in terms of viewer share and advertising revenue<sup>(66)</sup>. Moreover, the complaints received from satellite and cable operators suggest a perceived substitutability between platforms.

- (79) In the case of Berlin-Brandenburg, there is 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. The data collected during and after the switch-over in Berlin-Brandenburg show that the position of the terrestrial transmission has been strengthened since switch-over and there has been some substitution of cable by terrestrial transmission even though the substitution was initially, i.e. during switch-over, stronger in the other direction<sup>(67)</sup>. Figure 1 shows that, most recently, the share of households in Berlin-Brandenburg relying on terrestrial TV reception has increased very strongly from 5,3 % in 2004 to 11,4 % in 2005.
- (80) Moreover, cable operators have submitted data showing that their churn rate (rate of customers cancelling their subscription) has increased significantly since the digital terrestrial switch-over (see Figure 2)<sup>(68)</sup>. Among the reasons why viewers opt for DVB-T instead of cable, a survey has identified in particular the fact that DVB-T reception is free of charge while cable requires a monthly subscription fee<sup>(69)</sup>.

Figure 2

Change in net number of customers of a regional cable provider in Berlin



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- (81) Germany has maintained that the lack of substitutability is apparent from the fact that no broadcaster has abandoned transmission via satellite or cable following the launch of DVB-T in Berlin-Brandenburg. This argument relates, however, to the *wholesale* transmission market, where broadcasters may indeed regard the different transmission platforms as complementary rather than substitutable. A clear distinction needs to be made between the wholesale market, where broadcasters buy transmission capacity from platform operators, and the retail market, where viewers receive transmissions of broadcasting content from platform operators. In the *retail* market, viewers regard the different transmission platforms as substitutes and migration between the platforms weakens the respective platform operators concerned, most notably cable operators, which suffer an immediate fall in income from subscription fees.
- (82) In view of future applications of the DVB-T network, the distortion of competition may well go beyond the current market structure and affect new markets besides free-to-air television. DVB-T has the potential for supplying pay-TV services, as clearly shown by developments in other Member States<sup>(70)</sup>. Once the DVB-T network is in place, broadcasting transmission may also be combined with telecommunication services.
- (83) Finally, Germany has stated explicitly that one of the objectives of the measure is to promote competition between different infrastructures for television transmission, in particular cable, satellite and terrestrial transmission. According to this view, the measure gives consumers a greater choice and prevents cable from gaining a monopoly in large parts of Berlin-Brandenburg. Leaving aside for the moment the merits of these arguments<sup>(71)</sup>, the Commission notes that Germany seems to acknowledge that there is a certain degree of competition between the different broadcasting transmission platforms.

#### Effect on trade

- (84) The Commission considers that the measure in question affects trade between Member States. CSBs like RTL Group and ProSiebenSat.1 are internationally active on the markets for television advertising and for film rights, where they compete with other broadcasters and telecommunications companies. Terrestrial network operators like Deutsche Telekom's subsidiary T-Systems compete with cable operators and media corporations like UPC (Liberty Media), satellite operators like SES Astra, NSAB and Eutelsat, and others offering infrastructure services to broadcasters. The same internationally active operators compete on the retail transmission market for viewers.

#### V.2. Compatibility assessment

Principles to consider when assessing the compatibility of public support for the digital switch-over

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- (85) The transition from analogue to digital broadcasting ('digital switch-over') has great advantages in terms of more efficient spectrum usage and increased transmission possibilities. These will lead to new and better quality services and to wider consumer choice.
- (86) The Commission actively supports digital switch-over and it has underlined these advantages in the Action Plan eEurope 2005 and in two Communications relating to the digital switch-over<sup>(72)</sup>. In its Communication 'i2010 — A European Information Society for growth and employment'<sup>(73)</sup> the Commission has pointed out that the planned switching off of analogue terrestrial television by 2012 will improve access to spectrum in Europe. Regulation should neither impose nor discriminate in favour of the use of a particular digital platform such as cable, satellite, terrestrial or DSL TV thus adhering to the principle of 'technological neutrality'. As stated in the Framework Directive, this does not preclude a Member State from taking proportionate steps to promote certain specific services where this is justified, for example digital television as a means for increasing spectrum efficiency<sup>(74)</sup>. This means that each platform should in principle compete on its own strengths, but that intervention targeting in correcting market failures that are specific to one platform can be envisaged. In the end, the platforms should prevail which offer the greatest benefit to consumers.
- (87) The Commission recognises that the digital switch-over may be delayed if the process is left entirely to market forces; hence it has no objection of principle to public intervention in this field. Public authorities have various means of facilitating and encouraging digital switch-over, for example, regulatory means, financial support or information campaigns. In its recent State Aid Action Plan, the Commission explains its general approach to State Aid geared to sustainable growth, competitiveness and cohesion. It points out that Member States may use State Aid to overcome a specific market failure or to ensure social or regional cohesion. In such cases, it must, however, be shown that aid is the appropriate instrument to address the issue, it is limited to the minimum necessary and does not unduly distort competition<sup>(75)</sup>.
- (88) It is generally recognised that the switch to digital television may be hindered by certain market failures. Moreover, there is a risk that not all parts of the population can benefit from the advantages of digital television (problem of social cohesion). These problems are more acute in the case of terrestrial TV reception than for other platforms because the terrestrial TV network has relatively little capacity and has so far been used in many Member States to fulfil universal coverage obligations. As explained in more detail in paragraphs 101-107, a market failure might exist, for example, where market players are unwilling to agree to a common timetable to switch to digital TV waiting for others to make the first step (coordination problem) or where market players do not take into account the positive effects of digital switch-

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over on society as a whole because they do not have the right incentives to do so (positive externalities).

- (89) With respect to social cohesion, Member States will want to make sure that all citizens have access to digital TV once analogue TV is switched off. Since the digital switch-over entails some costs for consumers and requires a change in habits, Member States may want to assist in particular disadvantaged groups of society such as elderly people, low-income households or people living in peripheral regions. There is a risk that reception of some regional and local programming may be lost in some areas and that some areas in the far north of Europe may lose TV reception altogether once analogue TV is switched off. Member States may therefore also consider measures to ensure that all geographical areas continue to have appropriate TV coverage. However, as will be shown below, these considerations do not justify the aid which was given in the present case.

#### Legal bases for the assessment of compatibility

- (90) The presence of State Aid in the present case is not called into question by the possible application of the Altmark ruling<sup>(76)</sup>. None of the four criteria (definition and assignment of the service of general economic interest, *ex ante* determination of parameters for compensation, no overcompensation and choice of efficient provider) is met. Germany has, however, invoked Articles 87(3)(c), 87(3)(d) and 86(2) of the EC Treaty to justify the compatibility of the aid.

#### Article 87(3)(c) of the EC Treaty

- (91) In its response to the decision to initiate the procedure, Germany argued that the measure was compatible with the EC Treaty since it was in the Community interest as expressed in particular in the Action Plan eEurope 2005 and in the Switch-over Communications<sup>(77)</sup>.
- (92) The Commission notes that the policy documents cited by Germany encourage the digitisation of broadcasting in general. They do not, however, provide a universal justification why only the digitisation of the terrestrial platform should be aided and not that of other transmission platforms. Moreover, the mere fact that the measure supports the introduction of a new technology does not make it a project of Community interest.
- (93) In addition, Germany has maintained that the Aid promotes the development of an economic sector. It refers to the broadcasting sector in general, which will benefit from the digitisation of the transmission platforms. More specifically, the economic activity targeted by the aid could be described as 'digital transmission of *terrestrial* television signals'.
- (94) In order to decide whether the Aid is necessary and proportionate, the Commission has tried to identify the possible presence of market failures in this economic activity. Several types of market failure have been suggested.



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- (95) Firstly, the development of digital terrestrial broadcasting may be hampered by a coordination problem between market players. Particularly in view of the fact that frequency spectrum is insufficient to transmit analogue and digital TV signals in parallel (the so-called ‘simulcastphase’), all market players must agree on a timetable in order to ensure a short switch-over period.
- (96) Secondly, the switch-over may have positive externalities due to the better use of the frequency spectrum, i.e. the *social* benefit of more channels and services 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. Broadcasters may, therefore, be reluctant to take part in the switch-over.
- (97) Thirdly, the presence of market power may prevent the market from securing the full benefits of competition between operators and, specifically in the present case, it may prevent that the digitisation of broadcasting transmission is being achieved solely by market forces.
- (98) Fourthly, since the investment in the infrastructure is not made by the broadcasters, the network operator faces the risk that the commercial broadcasters may withdraw from terrestrial transmission. Indeed, Germany has indicated that ATT was on a declining trend and that broadcasters were considering abandoning this platform.
- (99) Fifthly, the existence of uncertainty may prevent innovations and the development of new services in this market.
- (100) On these points, it should be assessed, firstly, whether these are *true* market failures which prevent the market from achieving economic efficiency, secondly, whether State Aid is the appropriate remedy for such market failures and, thirdly, whether the aid granted is the minimum necessary to achieve the objective. It is only if these conditions are met that necessity and proportionality, the criteria to be met for approval of the aid under Article 87(3)(c), can be considered to be present.

#### The coordination problem

- (101) The Commission recognises that the coordination problem between market players may, in principle, represent a ‘market failure’. The problem arises because broadcasters need to agree on common dates for switching off analogue transmission and for switching on digital transmission so as to overcome the lack of frequency spectrum and to minimise the costs of parallel transmission. Consumers might not be willing to shift to the digital platform until it carries a large number of broadcasters. Accordingly, broadcasters might wish to await the arrival of other broadcasters before moving to the digital platform themselves. In the absence of coordination, this approach might delay the switch-over. There is therefore an interest in limiting the

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duration of the simulcast phase and in achieving simultaneous switch-over of broadcasters.

- (102) State Aid to reduce the burden of transmission costs does not, however, seem to be the appropriate instrument for addressing this problem. The broadcasters do not own the frequency spectrum but operate on the basis of licences. The licences for ATT were awarded for a limited period, i.e. seven years in the case of Berlin-Brandenburg. Accordingly, the authorities could have resolved the coordination problem by setting a common expiry date for all analogue licences<sup>(78)</sup>.

#### Positive externalities

- (103) Accelerating the switch-off process of analogue television in order to reap the benefits of the better use of the freed-up spectrum is, in principle, a valid objective for public intervention. It should be assessed, however, to what extent public support of broadcasters' transmission costs is necessary and proportionate to achieve this goal.
- (104) Germany has argued that the subsidy is needed to free up the spectrum by *compensating* CSBs for giving up their ATT licences. As explained in more detail in paragraphs 57-61<sup>(79)</sup>, there are, however, a number of reasons which contradict this line of argument. To sum up, the reasons are that Mabb could have limited the ATT licence to the switch-over date; the CSBs present in ATT had already been compensated by the award of DVB-T licences and the subsidy is not conceived or calculated as a compensation payment.
- (105) If the aid is assessed not as a compensation payment but as an incentive for the development of an economic activity, it should be considered that transmission costs for DVB-T are generally lower than for the ATT transmission and that DVB-T allows for additional channels and improved services. Moreover, a report by Mabb points out that the CSBs themselves had an interest to sustain the terrestrial platform as a third platform, on the one hand, in order to limit their dependence on cable and satellite providers and, on the other, to be able to develop mobile and portable applications<sup>(80)</sup>. In particular the latter point illustrates that the CSBs may well be able to internalise some of the positive externalities of the digital switch-over. In any case, Germany has not provided any reasoning or calculations showing that the aid represents the minimum necessary for broadcasters to switch to DVB-T.
- (106) It may be added that, by reducing broadcasters' transmission costs, the aid introduces a distortion in the process of spectrum allocation: the objective of achieving a more efficient use of frequencies implies that those frequencies be allocated in a way that reflects their economic value, without decisions by market operators being affected by the granting of aid.
- (107) To sum up, the Commission considers that, in the present case, aid to broadcasters' transmission costs is not an appropriate instrument for

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encouraging a prompt switch-off of analogue terrestrial broadcasting transmission and the release of frequencies. Regulatory intervention in respect of the transmission licences is an example of a less distortive means of achieving the same goal.

#### Strengthening of competition between transmission platforms

- (108) Germany has argued that the availability of an additional transmission platform increases competition for the transmission of broadcasting signals and acts as an incentive for the incumbent operators of the other platforms to improve and update services.
- (109) Germany has, however, not provided convincing evidence that broadcasting transmission in Berlin-Brandenburg is characterised by a structural competition problem or that DVB-T could help in resolving certain market rigidities<sup>(81)</sup>. Even leaving aside terrestrial transmission, cable and satellite offer a large range of free-to-air television channels and are generally available. There is also competition among different cable operators for the connection to households. More competition is emerging from television via broadband (e.g. DSL), which is about to establish itself as an additional platform for broadcasting transmission.
- (110) In such circumstances, in which the market appears capable of supporting various platforms, use of State Aid to steer the market in a certain direction is not needed and might discourage the development of alternatives such as DSL. As noted in the Commission's Switch-over Communication, '*in principle, each network should compete on its own strengths*'<sup>(82)</sup>. This is to ensure that selective aid does not jeopardise past and future investments in other networks.
- (111) It may be added that, if there were a competition problem at network level, aid to the network operator would have been a more transparent way of assisting the development of the digital terrestrial platform. The questions as to whether and to what extent aid was needed to develop a terrestrial network could have been determined via an open tender procedure for the award of the network licences.
- (112) Accordingly, the Commission rejects the view that state aid to broadcasters is an appropriate means of stimulating competition between transmission platforms.

#### Risk for network operator

- (113) As regards the risk borne by the network operator, the switch-over in Berlin-Brandenburg was the first in Europe and its success was therefore particularly uncertain.
- (114) However, as suggested by the launch of other transmission platforms (satellite, ADSL), there is no particular reason to believe that the market cannot cope with this type of risk. Moreover, there are *Länder* — Hessen is one example —

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in which DVB-T was launched without public support when the success of the switch-over in Berlin-Brandenburg was still uncertain.

#### Promotion of innovation and specific advantages of the terrestrial platform

- (115) It is suggested that the DVB-T network will serve to promote innovation by offering interactivity and additional capacity for new media and telecom services. It will also have specific advantages such as portability and mobility.
- (116) Interactive services require a return channel for content. However, as for satellite, DVB-T does not provide for a return channel and has only one channel which carries the signal to the end user<sup>(83)</sup>. Accordingly, interactivity is not an intrinsic feature of DVB-T<sup>(84)</sup>.
- (117) As for other services, it is important to note that in Berlin-Brandenburg neither the capacity allocation nor the public support is focused on any innovative media or telecom services in particular. With respect to capacity, only one multiplex is currently allocated to new media services. With respect to the public support, only the transmission of television channels is subsidised and not the provision of any other services.
- (118) Lastly, the DVB-T technology is said to have the advantage of mobile reception. However, in order to receive DVB-T signals in mobile mode, the equipment entails a very high consumption of energy which goes beyond the capacity of current handheld equipment and would only work in cars and trains or on boats<sup>(85)</sup>. Moreover, trials have shown considerable problems with the reception of DVB-T signals when vehicles move at higher speed.
- (119) Accordingly, DVB-T does not represent a clearly superior technological solution with respect to other platforms and it is not for reasons of market failure that DVB-T is not being developed. On the contrary, the technical and economic conditions in Berlin-Brandenburg are such that various and competing market-based solutions can be developed. In those circumstances, public support of DVB-T represents an unjustified departure from the principle of technological neutrality and may hamper the roll-out of other platforms, e.g. DSL, which might have other advantages in terms of innovation and technology and are capable of developing autonomously.

#### Conclusion regarding Article 87(3)(c) of the EC Treaty

- (120) The analysis conducted in the light of Article 87(3)(c) has identified two potential market failures specific to the digital switch-over of the terrestrial broadcasting platform: coordination problems between the different market players in achieving a smooth switch-over process and positive externalities associated with the freeing-up of frequency spectrum. While these market failures may, in principle, justify a departure from the principle of technological neutrality, they cannot serve as justification for the aid granted in the present case. Accordingly, the Commission is not convinced that the aid is an appropriate, necessary and proportionate instrument to remedy a market failure and to promote the roll-out of DVB-T. Even if account is taken of

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the fact that the amount of aid is relatively low in absolute terms and that the distortion of competition at broadcasting level is rather limited, the aid amounts, in case of some channels, to close to half of the transmission costs and may have influenced the choice of broadcasters in favour of the DVB-T platform, thereby causing a more important distortion of competition at network level.

Article 87(3)(d) of the EC Treaty

- (121) Germany has argued that the establishment of a pluralistic broadcasting system is part of the culture competence of the Member States, which the Community, as stated in Article 151(4) of the EC Treaty, has to take into account in its assessment under the State Aid rules.
- (122) The Commission agrees that, as stipulated by Article 151(4) of the EC Treaty, cultural aspects, and in particular the promotion of cultural diversity, shall be taken into account in the Community's action. The Commission considers however that the 'culture' derogation enshrined in Article 87(3)(d) must, as any exception, be applied narrowly and in cases where the culture product is clearly identified or identifiable<sup>(86)</sup>. In the present case, the aid concerns the transmission of broadcasting signals and is not related to any particular cultural content that would otherwise not be broadcast. Nor is the aid targeted at certain types of broadcaster, e.g. small local operators, which would not otherwise be present on the terrestrial platform.

Article 86(2) of the EC Treaty

- (123) In its response to the decision to initiate the procedure, Germany made a brief reference to the argument that the transmission of broadcasting channels via DVB-T qualified as a service of general economic interest ('SGEI'). It maintained that the SGEI consists in the achievement of the switch-over from analogue to digital transmission in order to promote technological innovations such as mobile and portable reception, to safeguard competition between different transmission platforms and to promote pluralism.
- (124) More specifically, Germany stated that the aid to the CSBs was justified in order to compensate them for their 'participation in the digital switch-over and the broadcasting of programme channels via digital terrestrial transmission' ('Teilnahme am digitalen Übergang und Ausstrahlung der Programme über die digitale Terrestrik'). It added that the CSBs have been entrusted with this SGEI by public agreements assigning the transmission capacity and determining the financial support. Without support, the CSBs would have been reluctant to use and build up the DVB-T network, and this would have put at risk the future of the terrestrial platform, in which there is a public interest.
- (125) The Commission considers, firstly, that national authorities have to define the SGEI clearly and entrust it explicitly to a particular undertaking. In the present case, Germany seems to have made the SGEI argument on an ad hoc basis.

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In fact, the alleged public service compensation is paid to the *commercial* broadcasters, which, in contrast to the public service broadcasters, are not charged with any public service task. Instead, supporting the transmission costs of CSBs confers an advantage on their normal commercial operation.

- (126) The arguments that the aid is 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 even appears that they are more suitable for achieving a quick and smooth switch-over process and ensuring pluralism through a broad range of broadcasting channels.
- (127) As for the promotion of innovation by means of DVB-T, the main arguments have already been assessed in paragraphs 115-119. In particular, it should be noted that the SGEI is declared to be the promotion of innovative services which, however, do not receive direct financial support, are not carried out by the CSBs receiving the aid and are not defined in a sufficiently clear manner.
- (128) As for the objectives of protecting competition between broadcasting platforms and ensuring pluralism, there are, as noted in paragraphs 108-112, no indications that in the region of Berlin-Brandenburg there are economic factors causing a structural competition problem or the risk of abuse of a dominant position with respect to the transmission infrastructure which would hamper the distribution of content and endanger pluralism. Moreover, the argument that CSBs need to be assisted in order to make DVB-T a commercial success cannot be accepted as a valid justification for supporting it as a SGEI.

## VI. PRACTICAL APPLICATION OF STATE AID RULES TO PUBLIC SUPPORT FOR THE DIGITAL SWITCH-OVER

- (129) Before formulating its conclusions, the Commission wishes to give some indications to both public and economic actors on the practical application of its policy with respect to public support for the digital switch-over. These indications are derived from the application of the principles set out in the Action Plan and the Communications quoted in paragraph 86 to specific case examples. Member States remain, of course, under an obligation to notify to the Commission all below mentioned measures ranking as State Aid before they put these measures into effect. The Commission then investigates whether the general considerations put forward below fully apply to the notified measures.
- (130) There are numerous possibilities for Member States to actively promote the digitisation of broadcasting in ways which are compatible with European State Aid law and, hence, with the ultimate goal of growth, competitiveness and social cohesion.

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- (131) In the present case, the Commission did not further investigate subsidies to 6 000 households receiving social welfare allowances in order to buy set-top boxes.
- (132) The Commission has also approved a Digitalisation Fund in Austria which comprises several measures supporting the digitisation of broadcasting<sup>(87)</sup>. The measures include:
- (a) pilot projects and research activities to test, for example, digital transmission technologies and interactive applications;
  - (b) subsidies to individuals for the purchase of set-top boxes for any platform to prevent the exclusion of low-income households from access to TV reception and to reach a critical mass of users;
  - (c) grants to companies to develop innovative digital services such as electronic programme guides and mobile applications;
  - (d) subsidies to broadcasters to compensate for additional transmission costs when broadcasting analogue and digital TV in parallel ('simulcast phase').
- (133) Apart from such measures on which the Commission has already pronounced itself, Member States may also consider other forms of support provided that the measures do not entail an unnecessary distortion between technologies or companies. Under such conditions, Member States may, for example, consider the granting of:
- (a) subsidies to consumers for the purchase of digital decoders. Such subsidies should be technologically neutral as described above. In granting subsidies, the authorities may encourage the use of open standards for interactivity. Open standards enable consumers to benefit from interactive services offered by different operators. Examples of interactive services are electronic programme guides, news search, games or e-commerce.
  - (b) funding for the roll-out of a transmission network in areas where otherwise there would be insufficient TV coverage;
  - (c) financial means to public service broadcasters to enable them to be broadcast via all transmission platforms in order to reach the entire population. In this context, Member States have to set out clearly any obligations on the public service broadcasters as to which transmission platforms should be used;
  - (d) financial support as fair compensation to broadcasters which are required to give up the use of analogue spectrum before the expiration of the licences. The compensation should take into account the actual costs of the switch-over to broadcasters including costs to adapt equipment to digital transmission and to broadcast in another channel/multiplex where applicable and including spectrum costs. When calculating spectrum costs the granting of digital

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transmission capacity should be taken into account. Member States will need to provide the evidence that this has been the case.

- (134) The Commission confirms that the digitisation of broadcasting is an objective of common interest. With the present decision, it, however, wishes to underline that the granting of State Aid should always follow a process of clearly identifying the problem to be addressed and of choosing the least distortive means of resolving it. Only well-targeted aid is in line with the overall objective of ensuring fair competition and promoting competitiveness and technological development in Europe.

## VII. CONCLUSION

- (135) For the reasons set out above, the Commission concludes that the subsidy granted by Mabb to the commercial broadcasters constitutes 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 as required by Article 88(3) of the EC Treaty and was illegally put into effect without Commission authorisation. It must be recovered from the commercial broadcasters involved.
- (136) Although the subsidies granted by Mabb also appear to have conferred an indirect advantage at the level of network operations, it is not possible to establish whether there has been an actual transfer of State resources to T-Systems within the meaning of Article 87(1)<sup>(88)</sup>. Moreover, as the onus in the first place was on the broadcasters to behave as diligent operators and to verify whether the aid they were offered had been notified and approved, the Commission considers that it is of prime importance to recover the aid from the direct beneficiaries,

HAS ADOPTED THIS DECISION:

### *Article 1*

The State Aid which the Federal Republic of Germany has implemented for the introduction of digital terrestrial broadcasting in Berlin-Brandenburg and granted to the commercial broadcasters present on DVB-T is incompatible with the common market.

### *Article 2*

1 The Federal Republic of Germany shall take all necessary measures to recover from the beneficiaries the aid referred to in Article 1 and unlawfully made available to the beneficiaries.

2 Recovery shall be effected without delay and in accordance with the procedures of national law provided that they allow the immediate and effective execution of the decision. The aid to be recovered shall include interest from the date on which it was at the disposal of the beneficiaries until the date of its recovery.

3 The interest to be recovered under paragraph 2 shall be calculated in accordance with the procedure laid down in Articles 9 and 11 of Commission Regulation (EC) No 794/2004<sup>(89)</sup>.



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Interest shall be calculated on the basis of the reference rate used for calculating the grant-equivalent of regional aid.

4 Within two months of the notification of the present decision, the Federal Republic of Germany shall enjoin all beneficiaries referred to in Article 1 to reimburse the unlawful and incompatible aid and the interests due.

*Article 3*

The Federal Republic of Germany shall inform the Commission, within two months of notification of this Decision, of the measures already taken and planned to comply with it. It will provide this information using the questionnaire attached in the Annex of this Decision. The Federal Republic of Germany shall submit within the same period of time, all documents giving evidence that the recovery proceedings have been initiated against the beneficiaries of the unlawfully granted and incompatible aid.

*Article 4*

This Decision is addressed to the Federal Republic of Germany.

Done at Brussels, 9 November 2005.

*For the Commission*

Neelie KROES

*Member of the Commission*

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- (1) [OJ C 216, 28.8.2004, p. 5](#): state aid C 25/2004 (ex NN 36/04) — Introduction of digital terrestrial television (DVB-T) in Berlin-Brandenburg.
- (2) DVB-T stands for digital video broadcasting over a terrestrial network. Other forms of digital video broadcasting are DVB-S (by satellite) and DVB-C (by cable).
- (3) Case E 3/2005 (ex CP 43/2003).
- (4) See footnote 1.
- (5) By letters of 29 September 2004 and 22 October 2004.
- (6) By letter of 30 September 2004 in each case.
- (7) By letter of 25 October 2004.
- (8) By letters of 25 April 2005, 4 May 2005, 1 June 2005 and 4 August 2005.
- (9) By letters of 6 December 2004, 26 January 2005 and 11 February 2005.
- (10) By letters of 21 January 2005, 26 January 2005, 29 April 2005 and 10 June 2005.
- (11) By letters of 6 May 2005, 24 May 2005 and 4 August 2005.
- (12) By letter of 31 May 2005.
- (13) On 22 November 2004, 2 March 2005, 12 April 2005 and 28 April 2005 respectively.
- (14) Arbeitsgemeinschaft Fernsehforschung (AGF) is a co-operation of the main German broadcasters to gauge TV viewing behaviour.
- (15) SES/ASTRA is the largest satellite operator in Germany and publishes, every year, the German Satellite Monitor on the importance of the different TV transmission platforms.
- (16) See Media Perspektiven, 12/2003, p. 560; Media Perspektiven, 7/2004, p. 299 and ALM/GSDZ Digitalisierungsbericht 2005, p. 65.
- (17) Federal Ministry of Economic and Technological Affairs (2000): *Einführung des digitalen Rundfunks in Deutschland, 'Startszenario', Sachstandsbericht und Empfehlungen der Initiative 'Digitaler Rundfunk' zur Digitalisierung von Hörfunk und Fernsehen unter Berücksichtigung der Verbreitung über Kabel, Satellit und TV-Sender.*
- (18) *Staatsvertrag über die Zusammenarbeit zwischen Berlin und Brandenburg im Bereich des Rundfunks* of 29 February 1992 (State Media Treaty — *MStV*), in the version of 1 January 1999 (Federal Government Gazette, p. 130), as last amended by the Law of 15 June 2001 (Federal Gazette, p. 185).
- (19) RBB is member of the ARD group. On 1 May 2003, ORB ('Ostdeutscher Rundfunk Brandenburg') and SFB ('Sender Freies Berlin') merged to become RBB.
- (20) A multiplex is a block of digital frequencies used for broadcasting and, in the case of Berlin-Brandenburg, has four channels.
- (21) Since 13 July 2005, the Telecommunications and Postal Regulatory Authority has been renamed Federal Network Agency ('Bundesnetzagentur').
- (22) Official Gazette RegTP No 13/2002, Act No 22/2002, p. 1010.
- (23) See paragraph 15.
- (24) On account of coordination problems with Poland, RegTP did not in the end allocate service area Berlin 4 (*Kanal 47*).
- (25) Official Gazette RegTP No 6/2002, Act No 6/2002, point 1.6.
- (26) Official Gazette RegTP No 23/2002, Act No 36/2002, p. 1695. As a minimum service requirement within the national requirement, Channel 33 was established for the Berlin-Potsdam area with a starting date of 28 February 2003.
- (27) Official Gazette RegTP No 23/2002, Act No 36/2002, p. 1695, II. General.
- (28) Berlin Official Gazette, p. 3538; Brandenburg Official Gazette/Annex., p. 1099.

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- (29) *Staatsvertrag über den Rundfunk im vereinten Deutschland* of 31 August 1991 (State Broadcasting Treaty — *RStV*), in the version of 1 July 2002, Official Gazette, p. 162.
- (30) Berlin Official Gazette, No 25 of 24 May 2002, p. 1875.
- (31) The procedure is specified in Section 28(5) of the State Media Treaty. See, for example, the agreement between DSF and Mabb. The transmission of 9Live within the same multiplex (K 56) is solely on a trial basis at the initiative of the network operator T-Systems.
- (32) Berlin Official Gazette of 16 April 2004.
- (33) The agreement with RTL Group was signed on 3 June 2003, the agreement with ProSiebenSat.1 on 4 December 2003.
- (34) Germany has maintained that the transmission costs of ProSiebenSat.1 are higher than for the RTL Group. Data submitted by T-Systems on 24 May 2005 show however that in 2003 and 2004 the transmission costs of ProSiebenSat.1's multiplex were lower than those of RTL's multiplex.
- (35) The Agreements with FAB were signed on 2 June and 22 August 2003, and the Agreement with BBC World on 2 December 2003.
- (36) On the initiative of the network operator T-Systems and with the approval of Mabb, 9Live is transmitted within the same multiplex only on a trial basis. As yet, 9Live has not benefited from any formal capacity allocation or from any assistance from Mabb.
- (37) Berlin Official Gazette, No 25, 24 May 2002, p. 1875, and Berlin Official Gazette of 16 April 2004.
- (38) Fourteenth Report of the Commission to determine the financial requirements of broadcasters (KEF), pp. 99 and 107.
- (39) [OJ L 108, 24.4.2002, p. 33](#).
- (40) See the judgement of the Court of First Instance of 12 December 1996 in case T-358/94, *Air France v. Commission*, ECR [1996] II-2109 and the judgement of the Court of 16 May 2002 in case C-482/99, *France v Commission, Stardust Marine* [2002] ECR I-4397.
- (41) State Media Treaty, in particular Sections 7 and 8.
- (42) State Media Treaty, Section 18.
- (43) State Media Treaty, Section 17.
- (44) See paragraph 19.
- (45) State Media Treaty, Section 46(3).
- (46) State Media Treaty, Section 46(4): '*Die Medienanstalt kann durch Satzung besondere Regelungen für die Vergabe digitaler terrestrischer Frequenzen treffen. [...] Die Zuweisung kann durch öffentlich-rechtlichen Vertrag erfolgen, in dem die Entwicklung der digitalen Technologie und des Gesamtangebots festgelegt wird.*'
- (47) Case C-482/99, at 23, and the references cited there.
- (48) This is true for the channels DSF, Eurosport and Viva Plus as well as for the channels Super RTL, N24 and Kanal 1, which belong to broadcasters previously present in ATT.
- (49) The analogue terrestrial licence of RTL II expired on 30 September 2002 and that of ProSieben on 28 November 2002.
- (50) 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.
- (51) Media Perspektiven, Basisdaten: Daten zur Mediensituation in Deutschland 2004, pp. 11 and 18; AGF/GfK Fernsehforschung and I-Punkt Deutschland, based on Nielsen Media Research.
- (52) In particular, T-Systems' pricing in the DVB-T network is currently not subject to regulation since RegTP has not yet analysed the broadcasting transmission services market under the new regulatory framework for electronic communication networks and services, under which this is 'market 18': broadcasting transmission services, to deliver broadcast content to end users. See Commission Recommendation 2003/311/EC of 11 February 2003.
- (53) State Media Treaty, Section 6a.

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- (54) See paragraphs 16-17.
- (55) In a fully transparent and open tender procedure, the bidding broadcasters could be expected to transfer part or all of the advantage deriving from a subsidy into higher or qualitatively better bids for the licence.
- (56) See paragraphs 13-15.
- (57) Reply of Germany of 24 September 2004, point 1.3.2, p. 32 (*'Der Umstieg hätte voraussichtlich [...] ohne jede finanzielle Förderung realisiert werden können, wenn im Bereich der Organisation des Sendernetzbetriebes voll marktkonforme Bedingungen bestanden hätten.'*) (*'T-Systems als Nachfolger des früheren Fernmeldemonopols'*).
- (58) 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.
- (59) More recent decisions are, for example, Telenor/Canal+/Canal Digital (COMP/C.2/38.287, 29 December 2003), Newscorp/Telepiù (COMP/M.2876, 2 April 2003), BSKyB/Kirch Pay TV (COMP/JV.37, 21 March 2000), Telefonica Endemol (COMP/M.1943, 11 July 2000) and TPS II (COMP/JV.57, 30 April 2002).
- (60) European Commission, DG Competition, Market Definition in the Media Sector — Comparative Legal Analysis, Volume I, December 2002, p. 73.
- (61) This is also true for BBC World, which describes itself explicitly as commercially funded.
- (62) Commission decision of 4 September 2001 (Case COMP/M.2558 — *Havas/Tempus*; OJ C 319, 14 November 2001, paragraph 9, and the references cited there).
- (63) For an overview of recent cases, see Commission decision Telenor/Canal+/Canal Digital (COMP/C.2/38.287, 29 December 2003, in particular paragraphs 32-50).
- (64) See TPS I (IV/36.237, 3 March 1999, paragraph 30), British Interactive Broadcasting/Open (IV/36.539, 15 September 1999, OJ L 312, paragraph 26) and Telenor/Canal+/Canal Digital (COMP/C.2/38.287, 29 December 2003, paragraph 50).
- (65) A 'lock-in effect' exists where households are not ready to make an investment in another form of transmission so that switching between the different platform is unlikely; see Commission Decision *MSG Media Service* (OJ L 364, 31.12.1994, paragraph 42).
- (66) The programme channels present in DVB-T in Berlin-Brandenburg accounted for more than 80 % of the viewers and for more than 90 % of the TV advertising revenue in Germany in 2004; see references in footnote 51.
- (67) In the short-term, cable operators attracted those viewers wishing to maintain analogue reception; this, however, was a one-off effect which ceased after the digital switch-over. In the medium term, they have been losing subscribers to the subscription-free DVB-T platform.
- (68) The negative trend in the number of cable subscribers evident from Figure 1 is further substantiated by data from other cable operators. Data from one other regional cable operator show a peak in the absolute number of subscribers in the 2nd quarter of 2003, but since then (until the 2nd quarter of 2005) a steady decrease of some 7 % in total. Data from a third cable operator active in Berlin-Brandenburg show in 2004 an increase in the churn rate of 50 % relative to 2003, but at least part of this increase has to be attributed to a price increase in September 2004.
- (69) See 'Berlin/Potsdam: Erste DVB-T-Region Deutschland', in: *Media Perspektiven* 12/2003, p. 565.
- (70) Notably in Italy, France, Sweden and the United Kingdom.
- (71) The merits of these arguments will be assessed in the section dealing with Article 87(3)(c).
- (72) COM(2002)263 final, 'eEurope 2005: An information society for all', COM(2003)541 final, 'Communication from the Commission on the transition from analogue to digital broadcasting (from digital "switch-over" to analogue "switch-off")', and COM(2005)204 final, 'Communication from the Commission on accelerating the transition from analogue to digital broadcasting'.
- (73) COM(2005)229 final, 1 June 2005.
- (74) OJ L 108, 24.4.2002, p. 33.

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- (75) These long-standing basic principles of Community state aid policy have recently been confirmed in the State Aid Action Plan: Less and better targeted state aid: a roadmap for state aid reform 2005-2009. [http://europa.eu.int/comm/competition/state\\_aid/others/action\\_plan/](http://europa.eu.int/comm/competition/state_aid/others/action_plan/)
- (76) Judgement of 24 July 2003 in case C-280/00 *Altmark Trans GmbH* [2003] ECR I-7747, at 88-94.
- (77) See footnote 72.
- (78) See paragraph 59.
- (79) See paragraphs 57-61.
- (80) Mabb (2003): Berlin goes digital, p. 14: 'Es gibt aber ein Interesse der privaten Veranstalter an der Erhaltung des dritten Weges, einerseits um nicht allein in die Abhängigkeit von Kabel und Satellit zu geraten, zum anderen um mobile und portable Nutzungen entwickeln zu können.'
- (81) Germany has highlighted the strong market position of cable networks in Berlin-Brandenburg. It explains, however, that this position results mainly from court rulings which enable landlords to oblige tenants to pay for cable subscription as part of their rent. As Germany itself concedes, DVB-T can, in this situation, hardly challenge the market position of cable networks.
- (82) COM(2003)541 final, 'Communication on the transition from analogue to digital broadcasting (from digital "switch-over" to analogue "switch-off")'.
- (83) Interactivity can be achieved only by deploying DVB-RCT (Return Channel Terrestrial), which involves additional costs and a more expensive set-top box, or by conventional return channels like the telephone or an interactive cable connection.
- (84) Unlike digital cable, which may be upgraded with a return channel to provide advanced interactive services, in parallel with the pure transmission of broadcasting signals.
- (85) The DVB project has therefore developed a new transmission standard, DVB-Handheld (DVB-H), but the latest information on the DVB-H standard is that commercial deployments may be more than three years away (see Analysys Study, August 2005).
- (86) Commission Decisions NN 88/98, BBC 24-hours (OJ C 78, 18.3.2000) and NN 70/98, 'Kinderkanal and Phoenix' (OJ C 238, 21.8.1999).
- (87) N622/03 Digitalisierungsfonds — Austria, Commission decision of 16 March 2005, see [http://europa.eu.int/comm/competition/state\\_aid/decisions/additional\\_docs.html](http://europa.eu.int/comm/competition/state_aid/decisions/additional_docs.html)
- (88) In this respect, the case is different from the Court judgement of 13 June 2002 in case C-382/99 *The Netherlands v Commission, Dutch Service Stations* [2002] ECR I-5163, at 60-69 where oil companies were considered indirect beneficiaries of an aid granted to Dutch service stations. In that case, the aid had the effect of releasing the oil companies from a contractual obligation to grant a discount to the service stations. In contrast, in the present case, there is no automatic and quantifiable relationship between the amount of aid given to the CSBs and the transmission fees charged by T-Systems. Only for some broadcasters in case of a *change* in the fee, such a relationship exists but since switch-over, transmission fees have been stable.
- (89) OJ L 140, 30.4.2004, p. 1.

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