
Changes to legislation: *There are currently no known outstanding effects for the 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). (See end of Document for details)*

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)

- Article 1 The State Aid which the Federal Republic of Germany has...
Article 2 (1) The Federal Republic of Germany shall take all necessary...
Article 3 The Federal Republic of Germany shall inform the Commission, within...
Article 4 This Decision is addressed to the Federal Republic of Germany....
Signature

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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/
- (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
- (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.

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