European Commission: DVB-T aid in NRW not permissible

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With its recently announced decision of 23 October 2007, the European Commission declared the notified measures to subsidise the DVB-T switchover in North Rhine-Westphalia (NRW) to be state aid incompatible with the common market and, accordingly, their (planned) allocation to be unlawful. In its preliminary assessment at the opening stage of the proceedings, the Commission had expressed doubts as to whether the measure could be justified.

In November 2005, the Commission declared that the subsidy granted in Berlin-Brandenburg to support the analogue-digital switchover was not compatible with EC state aid rules (see IRIS 2008-1: 7/5). An appeal is pending against the decision in the case of the *Medienanstalt Berlin-Brandenburg* (Berlin-Brandenburg Media Authority - mabb) before the Court of First Instance (CFI) (Case T-24/06). In view of its decision, the German authorities reached an agreement with the Commission to suspend the planned subsidies in NRW and Bavaria for the time being. As regards the planned subsidies for television broadcasters in Bavaria, the proceedings were not continued.

The Commission has now reaffirmed that the funds to be made available constitute state aid and has stated that this is not altered by the fact that the subsidies originate from the share of the licence fees to which the *Landesanstalt für Medien* (North Rhine-Westphalia Media Authority -LfM) is entitled, fees which themselves are regarded as state funds (paras. 60 ff.). The Commission also assumes that both the private television broadcasters to be subsidised and (potentially) the network operator would gain an economic advantage from the measure (paras. 70 ff.). It also refuses to accept Germany’s contention that the so-called Altmark criteria apply, stating that there is no evidence that the issue of a licence to broadcast a private television service constitutes the commissioning of a service of general economic interest in the sense of the discharge of a clearly defined public service obligation (paras. 89 ff.). Moreover, the Commission goes on, the measure is selective and constitutes a distortion of competition: although both the licensing procedure and the procedures to award the telecommunications licence were open and transparent, this does not alter the fact that certain economic players were favoured. From the sectoral point of view, the measure constitutes the one-sided favouring of DVB-T to the detriment of other digital television transmission platforms, such as cable and satellite (paras.

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103 ff.). *Inter alia* , the Commission believes that competition would be distorted since the calculation of the subsidy differentiates between established analogue terrestrial broadcasters and those that that will be broadcasting on the DVB-T platform for the first time (paras. 118 ff.). Finally, there will be an adverse effect on trade.

Nor does the European Commission regard the measure as justified, for example under Article 87(3)(c) of the EC Treaty. Here, such aspects are examined as media diversity, the promotion of regional and local programmes, the guarantee of universal coverage, the introduction of DVB-T in rural and remote areas, the promotion of innovation, the preservation of the terrestrial platform, the elimination of market failure in connection with the digital switchover, and compensation for the return of analogue licences (paras. 138-183).

Entscheidung der Europäischen Kommission vom 23. Oktober 2007 (Az. C 34/2006), KOM(2007) 5109 endg.

http://ec.europa.eu/comm/competition/state_aid/register/ii/doc/C-34-2006-WLAL-de-23.10.2007.pdf

European Commission decision of 23 October 2007 (ref. C 34/2006), C (2007) 5109 final

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