



GUIDELINES FOR THE FUNDING FRAMEWORK FOR THE DIGITAL SWITCHOVER

Project: South-East European Digital Television

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1 INTRODUCTION

The switchover from analogue to digital broadcasting may be slowed down or even delayed if left entirely to market forces. One of the most obvious obstacles is linked to the ability and readiness of end users to purchase new receiving equipment (set-top box or integrated digital television set). In this respect, there is a risk of growing inequalities between groups of population, based on economic differences and geographical factors.¹ Additionally, the investment in new transmitting equipment necessary may present a significant financial burden for broadcasters and network operators. To obtain the possible advantages of new technologies, the question of how to make sure that the largest number of people possible can actually use the new technology for their benefit needs to be paramount in the planning.²

Public funding or co-financing models are used very often to eliminate some of the obstacles for a successful digital switchover. Public intervention can be beneficial to overcome a specific market failure or to ensure social or regional cohesion.³ However, when providing financial support from public resources to consumers or to broadcasters, strict regulations and general rules should be applied, in order to avoid irregularities and possible failure of help scheme. The measures should not entail an unnecessary distortion between technologies or companies.⁴

The purpose of this study is to prepare guidelines on how to develop the legal framework for the funding of the digitisation process in the South-East European (SEE) countries included in the SEE Digi.TV project. The study identifies the typical vulnerable groups in the digital switchover process and suggests possible measures to ease the burden associated with the respective group in order to speed up the transition to more advanced transmission technologies and audio-video coding standards. A brief overview of the existing or planned funding schemes in SEE countries is followed by the criteria, under which various types of funding measures may be acceptable from the aspect of European Union's rules on state aids, taking into account the case law developed by the European Commission and by the Court of Justice of the European Union.

¹ *Guide to Digital Switchover*, OSCE, Vienna 2010, p. 80.

² *Guide to Digital Switchover*, p. 78.

³ IP/05/1394.

⁴ 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 (C(2005)3903 final), at 133.

2 VULNERABLE GROUPS AND AVAILABLE FUNDING MEASURES

Generally, persons and entities in need of special support to ease the burden of the digital switchover may be divided in two groups: the consumers, who need to obtain new receiving equipment, and the broadcasters and network operators, who need to invest in new transmitting equipment. Members of both groups who do not have the possibilities or the incentive to themselves embrace the new technology may be considered vulnerable.⁵ Within each group, however, different causes of vulnerability exist, and any funding scheme should be designed in a way to take account of such causes.

2.1 Consumers

2.1.1 Causes of consumer vulnerability

For the audience to be able to enjoy the positive effects of digitisation, it is important that all groups in society have access to broadcasting when the means of broadcasting signal reception changes. The analogue switch-off may result in social exclusion in so far as digital TV is unavailable to some parts of the population. Consumers may be considered vulnerable in the digital switchover process if they are likely to experience difficulties in obtaining the television channels and services that they receive through analogue broadcasts and equipment.

Such difficulties may arise from **economic causes**. The lack of disposable financial resources may hinder or discourage low-income households from buying the end-user equipment required to receive properly the digital signal. Consumers will typically have to buy either an integrated TV set, capable of decoding the digital signal, or a set-top box that plugs in between the aerial and the TV set to decode the digital signal (and possibly a SCART lead to connect the set-top box to the television). Additionally, some households may need to upgrade their existing aerials to receive a reliable DTT signal.⁶ It should be taken into account that all of these are one-off purchases with no on-going charges. Unlike in the previous decade, when the earliest countries started the digital switchover, end-user equipment is now widely available to consumers. We may assume that a significant share of TV sets sold to consumers in recent years is already capable of receiving digital signal, even if the respective country has not yet started the digital switchover. Also, the costs of digitally capable end user equipment are steadily decreasing, so the financial burden of the transition to digital broadcasting may not be too high for the average household. However, it should also be taken into account that several SEE countries are economically less developed and that a more significant share of their population is economically disadvantaged. Special support may be needed especially by those households that cannot afford even the relatively low cost of an ordinary set-top box.

⁵ *Guide to Digital Switchover*, p. 79.

⁶ *Supporting the most vulnerable consumers through digital switchover*. A report by the Ofcom Consumer Panel, November 2004, p. 12.

Non-economic causes of consumer vulnerability in the digital switchover can arise from limitations concerning the consumers' physical abilities (dexterity and mobility), sensory abilities (vision and hearing), cognitive abilities, linguistic abilities (including literacy) or geographic location. Such disabilities may hinder the consumers in obtaining, installing or using the digital end-user equipment. In some cases, specially adapted end-user equipment is required, which may come at a higher cost or may not be so easily acquired. It is important to note that several of the ability related domains are related to the ageing process. Elderly people are more likely to suffer physical, sensory and cognitive impairments than are younger people.⁷ Additionally, the consumers with disabilities may also fall in the group of low-income consumers, which increases their vulnerability.

Recommendations: The range, size and structure of vulnerable groups of consumers in different SEE countries will need to be established by the regulatory authorities in the respective countries, as a part of the planning of the digital switchover. This may be done on the basis of statistical data available, e.g. on the share of population aged over 75, or the number of persons or households receiving social support, job-seeker's allowance or other income-related benefits. Similarly, the number of persons with significant disabilities may be evaluated based on the data of persons receiving disability pensions or disability living allowance, etc. This does not mean, however, that targeted support measures, e.g. subsidies for low-income households, should be only available to those individuals or households already receiving social or disability benefits.

There remains a significant number of vulnerable consumers who do not claim such benefits although they might be entitled to, e.g. due to the complexity of administrative procedures. Linking of targeted support measures to receipt of existing benefits, efforts should still be made to reach those who are entitled non-recipients of benefits.⁸ Ofcom consumer panel noted that those who are likely to be most vulnerable in the digital switchover are those who are socially isolated. These people will have difficulty in finding out about switchover and in understanding what it means. Hence they will not be able to take effective steps to deal with it. People without an adequate network of support from friends, family, neighbours or carers will therefore be particularly vulnerable. Social isolation may be related to age, to various kinds of disability and to low language skills or literacy, therefore it cannot be easily captured by reference to the existing benefits systems.

An important piece of information that should be taken into account is also the percentage of consumers receiving TV services through terrestrial analogue signal, which may vary significantly between different countries. Consumers who receive TV signal via cable or who use IP-television will not be affected by the digital switch-off and should therefore not be considered vulnerable for the purposes of this study, regardless of their economic position or any disabilities.

⁷ J. Freeman, J. Lessiter, *Vulnerable Consumers In Switchover – Who Are They And Where Do They Live?* A report prepared by i2 media research ltd. for the Ofcom Consumer Panel, 2004, p. 5.

⁸ *Supporting Vulnerable Consumers with targeted assistance at and after Digital TV Switchover.* A paper by the Consumer Expert Group on digital switchover for the Department for Culture, Media and Sport and the BBC, April 2006, pp. 10-11.

2.1.2 Measures aimed at economic causes of vulnerability

Economic causes of consumer vulnerability may be offset effectively through various public funding schemes intended to support consumers who cannot afford the digital end-user equipment.

a) Subsidies

One way of increasing the availability of set-top boxes could consist of granting public subsidies **to producers or to vendors** of end-user equipment under the condition that the devices are sold to consumer at a low retail price. However, such funding scheme cannot be recommended, since it can only lower the retail price of the end user equipment in general and is not appropriate for targeting specific vulnerable groups of consumers. It could also lead to overproduction of set-top boxes. From the aspect of competition law, such a scheme would only be acceptable if any producer or vendor of such equipment on the relevant market could participate in it and obtain subsidies under similar conditions. Fixing the maximum retail price of the subsidised equipment might open further competition law issues.

The more acceptable way of reducing the additional costs to consumers of end-user equipment is to subsidise purchases at the level of the consumer. The European Commission has stated that it would view favourably subsidies to consumers for the purchase of digital decoders as long as they are technologically neutral, especially if they encourage the use of open standards for interactivity.⁹ From an administrative perspective, the simplest way to deliver this subsidy would be to distribute a 'voucher' redeemable against purchase of any digital end-user device on the market, to all eligible consumers or households. A voucher could either be included with the TV licence or posted directly to households. On receipt of the voucher, householders would then go to their local retailer and exchange it for a set-top box or for a reduction in price of an integrated TV set.¹⁰

Public subsidies for digital equipment can be aimed either at the whole population or just at specific (vulnerable) groups. The former model came into play especially in countries that undertook the digital switchover relatively early, i.e. at a time when consumers were generally unaware of the advantages of digital television and the end user equipment was more expensive and not easily available. The purpose of such general subsidies may be to speed up the digital TV uptake and to reach the critical mass of users. The conditions attached to such subsidies also provide the general public with an incentive to acquire a receiver with both interactivity and a return channel, rather than a simple receiver without these functionalities.¹¹ The latter model is more appropriate in conditions where the population in general can afford the purchase of set top boxes and the state chooses to provide specific support just to those groups of consumers that could experience special difficulties in obtaining such equipment. The risk with the first scheme (general population) is discouraging purchases, including purchases of more sophisticated equipment

⁹ IP/05/1394.

¹⁰ *Supporting the most vulnerable consumers through digital switchover*. A report by the Ofcom Consumer Panel, November 2004, p. 31.

¹¹ COM(2004) 541 final, at 3.4.2.

than the one subsidised. The risk with the second scheme (targeting vulnerable consumer groups) is trading of devices between subsidised and unsubsidised population groups.¹²

It is important that the rules for possible assistance are suitable for a specific country they apply to. In many countries the perceived welfare gains by digital broadcasting may outweigh the cost of the equipment for many people, especially as the market has been able to provide equipment at a reasonable price. It may be sufficient to inform people about the benefits of digitisation and they will not be opposed to the relatively small investment needed. If there is no extra assistance in a country where many people live near the poverty line, there is a real danger that digitisation will lead to people being cut off from broadcasting and thus from an important source of information. They will not be able to enjoy new digital services and will thus not be beneficiaries of the digital dividend.¹³

In any case, any government plans to subsidise digital take-up might hamper the market momentum for voluntary purchase of digital TV equipment.¹⁴ For this reason, the decision whether to publicly subsidise digital end user equipment, and in what way, should be finalised and publicised early in the digital switchover process. From the audience viewpoint, it is essential to have clear, transparent and fair rules on whether there is a possibility to get free receiving equipment such as set-top boxes or support to purchase such equipment. It is likely that criteria used in other contexts for providing social benefits may not be appropriate.

Rather than providing subsidies directly from the public budget, a BIPE study for the European Commission recommended the setting up of a 'switchover fund', which would consolidate the macroeconomic transfers. The funds could be raised from some of the players that will ultimately benefit from the analogue turn-off (terrestrial broadcasting players, other spectrum users, governments themselves) and would be used to finance some of the measures that will help accelerate the process. Compared with financial transfers through the general public budget, a dedicated fund would provide some specific advantages: higher guarantees of transparency, platform neutrality and proportionality, consensual private/public decision-making.¹⁵ A digitisation fund for such purposes was set up in Austria.

b) Reduction of licence fees or taxes

An alternative measure to subsidies, which would ease in a similar way the consumers' financial burden of the digital switchover, is a temporary reduction of television licence fees (required in most countries for the reception of television) for homes with digital equipment. The advantage of this solution is that it encourages fast digital migration by neutralising its financial effect on consumers, since a part of the resources that would be otherwise spent for licence fees is now channelled into the purchase of digital end-user equipment. Again, such reduction may be available to the population as a whole or just specific vulnerable groups of consumers. However, it should be taken into account that members of vulnerable groups are often already exempt from

¹² COM(2003) 541 final, at 2.2.

¹³ Guide to Digital Switchover, pp. 81-82.

¹⁴ P. Iosifidis, *Digital Switchover in Europe*, The International Communication Gazette, Vol. 68, No. 3, pp. 263-264.

¹⁵ BIPE, *Digital Switchover in Broadcasting*. Study for the European Commission, Brussels, 2002, p. 11.

paying licence fees under the relevant national rules; therefore a reduction in fees would not benefit such vulnerable individuals. As with subsidies, this decision obviously has the potential to give financial benefits to people who do not actually need them, as well as those who do.¹⁶ Since TV licence fees are usually collected in order to fund the operation of the national public broadcaster, a significant reduction in licence fees, especially if granted to all households at the same time, might adversely affect the normal functioning of the public broadcaster, unless the loss of revenue is replaced through other public means, e.g. by a government grant.

Some EU Member States allow a reduced rate of VAT on pay-per-view and subscription broadcasting services.¹⁷ This approach does not allow targeted support to vulnerable groups, since the same level of VAT for a certain service must apply to all taxpayers. Targeting would be possible in personal income tax, e.g. if certain categories of vulnerable consumers would be allowed to claim expenses for digital end user equipment as a deduction in income tax. However, such an approach would in all likelihood not be very helpful for the most economically challenged households, since they already do not meet the income threshold above which income tax is paid. In any case, income tax deductions only do not have immediate financial effects for the consumer, which also limits their value for low-income households.

2.1.3 Measures aimed at non-economic causes of vulnerability

Tackling other, non-economic causes of consumer vulnerability in the digital switchover process will require a more complex set of supporting measures, rather than just providing consumers subsidies or other forms of funding, which are the subject of this study. Nevertheless, public resources may be used for the funding of switchover help programmes intended to provide practical support and assistance in obtaining, installing and using digital end user equipment for those who might find getting digital TV more difficult: those aged 75 and over, eligible disabled people, etc.¹⁸ It is vital that the targeted assistance scheme for vulnerable groups should be accompanied by an adequate free helpline. It should also be accompanied by an appropriate instruction package and user guide. There should be a clear duty on the government to get in touch with people who are eligible for the targeted assistance scheme for vulnerable groups.

Special subsidies may be welcome in cases where disabled users require specially adapted equipment in order to be able to watch digital television programmes. Such subsidies should ensure that suitable equipment designed with the user's needs in mind will be readily available at reasonable cost.

¹⁶ *Supporting the most vulnerable consumers through digital switchover*. A report by the Ofcom Consumer Panel, November 2004, p. 17.

¹⁷ COM(2003) 541 final, at 2.2.

¹⁸ Cf. *Digital UK's ten transferable lessons from the UK's digital television switchover programme*, May 2010, pp. 6-7.

2.2 Broadcasters

Digitisation is initially very expensive for broadcasters and network operators who have to make major investments in digital broadcasting and transmitting equipment. They may only see returns of these investments in the long term. Some incentives may be needed in order for private broadcasters to be willing to make the necessary investments. Such incentives may be either direct subsidies available to all broadcasters for the purchase of certain technical equipment, or a reduction or total lifting of the broadcasting licence fee for a certain period, conditional on proceeding with digitisation or an extension of the terms of broadcast licences. The intent of these measures should be to speed up the transition to digital broadcasting and thus offer the consumers a broad variety of digital programmes available early in the digital switchover process, thus encouraging the consumers' uptake of digital end user equipment.

As pointed out by the Council of Europe, an important aspect of public support to broadcasters in the digital switchover should also be the support to **media pluralism**, which may be threatened if only the major players in the media market can afford the investments required for transition to digital broadcasting. For this reason, the Committee of Ministers recommends that governments of the member states should create adequate legal and economic conditions for the development of digital broadcasting that guarantee the pluralism of broadcasting services and public access to an enlarged choice and variety of quality programmes, including the maintenance and, where possible, extension of the availability of transfrontier services. They should protect and, if necessary, take positive measures to safeguard and promote media pluralism, in order to counterbalance the increasing concentration in this sector.¹⁹ The Committee further notes, that in the new technological context, without a secure and appropriate financing framework, the reach of public service broadcasters and the scale of their contribution to society may diminish. Faced with increases in the cost of acquiring, producing and storing programmes, and sometimes broadcasting costs, member states should give public service broadcasters the possibility of having access to the necessary financial means to fulfil their remit.²⁰

In its DVB-T decision the European Commission gave specific indications of acceptable forms of public support for the digital switchover. As regards support to broadcasters and network operators, the Member States might consider the following measures, provided that the measures do not entail an unnecessary distortion between technologies or companies:

- pilot projects and research activities to test, for example, digital transmission technologies and interactive applications;
- grants to companies to develop innovative digital services such as electronic programme guides and mobile applications;
- subsidies to broadcasters to compensate for additional transmission costs when broadcasting analogue and digital TV in parallel to reach all viewers until analogue switch-off (simulcast phase);

¹⁹ Recommendation R (2003)9 of the Committee of Ministers to Member States on measures to promote the democratic and social contribution of digital broadcasting.

²⁰ Rec(2003)9, Appendix.

- funding for the roll-out of a transmission network in areas where otherwise there would be insufficient TV coverage;
- 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;
- 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 transmission capacity should be taken into account. Member States will need to provide the evidence that this has been the case.²¹

In Finland, a three-step approach was used to ease the investment burden on broadcasters. First, there was a cut in operating licence fee paid by the commercial television companies by 50 percent, while digital broadcasters could waive it completely until 31 August 2010. Second, the television licence fee paid by households was increased by 13 percent as of 1 January 2004. Third, the annual television licence fee was to be annually increased as long as both analogue and digital transmissions are carried out (i.e. the simulcast period). A similar fee increase was introduced in Austria in order to fund the Digitisation Fund, which comprises several measures supporting the digitisation of broadcasting. At the same time, in Ireland in 2002 and in Switzerland in 2003 the governments turned down the public broadcasters' requests that the additional costs of broadcasting both analogue and digital channels during the transition period be funded through a temporary increase in licence fees. In the United Kingdom, the so called "digital dividend" is a reduction of the fee paid for the use of the frequency connected to the number of viewers that adopts one of the three digital platforms. These kinds of policies can be a strong incentive for the broadcasters to adopt strategies that help the rapid take up of digital platforms.²²

²¹ 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 (C(2005)3903 final), at 133.

²² *Guide to Digital Switchover*, pp. 91-92.

3 OVERVIEW OF THE FUNDING SCHEMES IN SEE COUNTRIES

3.1 Albania

The Albanian digital switchover strategy discusses the possibility of applying subvention schemes in order to encourage the swift transition to digital broadcasting. The subsidies provided by the state could consist of the following:

- a) investments in building public TV network (directly by the state or through soft loans guaranteed by the state);
- b) financial compensations for the public ART for using the digital technology ensuring thus a national coverage of this public service;
- c) subsidies to viewers for buying digital decoders, making sure they are of a neutral technology, and especially if they encourage open standards for interaction;

The strategy notes that the effectiveness of the digital networks will mainly depend on the purchase of decoders by the population. If the proper incentives are not offered, the viewers will not be motivated to purchase the decoders to watch the programs which they are at present viewing for free through the analogue receivers even if such programs are offered free of charge by the digital platforms. This is why the subvention of decoders is indispensable in implementing the digital islands. The present cost of decoders is approximately EUR 40. At least a partial subvention of this cost should be provided for families “in need” according to defined criteria, based mainly on the level of incomes. According to the data in 2008, the number of such families in Albania is estimated at 7%. The final choice on the subvention scheme used has not yet been made.

3.2 Austria

In Austria, an important part of the strategy for quick and smooth digital switchover was the Digitisation Fund, established in 2004 by the legislator. The resources of the fund are earmarked for promoting digital transmission technologies and digital applications based on European standards in connection with broadcasting programs. The fund was set up at Rundfunk und Telekom Regulierungs- GmbH (the Austrian Regulatory Authority for Broadcasting and Telecommunications) and is endowed with EUR 6.75 million annually from Austrian broadcasting fees which are collected together with ORF programming fees but generally allocated to the federal budget. Since the year 2009 the fund is endowed with EUR 500 000 annually which reflects its declining nature. The fund’s structure is based on private public partnerships. Only companies operating in the electronic media market (such as network operators, broadcasters or manufacturers of consumer electronics) can apply for subsidies for projects that are compatible with the Digitisations Fund’s guidelines. A maximum of 50% (or less) of the project’s costs can be subsidised.

Grants from the Austrian Digitisation Fund are awarded according to technology-neutral criteria with due attention to all transmission means and platforms for digital broadcasting. Award decisions are made by the Managing Director of RTR-GmbH's Broadcasting Division. However, before fund allocation, the Austrian Communications Authority (KommAustria) must be given the opportunity to comment on decisions.

According to Paragraph 9 b of the KommAustria Act, the funds resources can be used for the following in particular:

1. Carrying out scientific studies and analysis on technical and economic programme-related and consumer-oriented questions in relation to the introduction of the digital transmission of broadcast programmes;
2. Subsidising pilot projects and research plans for the digital transmission of broadcast programmes;
3. The development of programmes and additional services, in particular services such as electronic programme guides, navigators, interactive and mobile applications, which underline the additional programme-related and interactive applications of digital broadcasting and exceed conventional broadcasting applications;
4. Measures which can be used as public information on the digital transmission of broadcast programmes;
5. The planning and installation of a terrestrial transmitter infrastructure for the transmission of digitally broadcasted programmes taking into consideration the optimisation of coverage and reaching an adequate level of coverage in rural areas, as well as the planning and installation of other infrastructure, as long as a more efficient level of coverage for the population is provided with digitally broadcasted programmes;
6. Supporting the purchase of customer premises equipment (CPE) which is necessary to receive digitally transmitted broadcast programmes;
7. Supporting broadcasters to facilitate the switch from analogue to digital transmission;
8. Measures to create financial incentives for consumers who switch to receiving digitally transmitted television programmes at an early stage;
9. Financing the expenses of KommAustria and RTR-GmbH for the development and implementation of the digitisation concept.

In 2005, RTR issued guidelines for grant awards from the Digitisation Fund, which had been approved by the European Commission under state aid regulations.²³ The guidelines for the allocation of grants are platform-neutral. The resources of the Digitisation Fund's operations are focused on the following issues:

I. Consumer-oriented measures: 40%

These are grants for consumers that are supposed to facilitate and accelerate the change to digital broadcasting. There are plans to offer incentives to consumers who switch to the digital reception of digitally broadcasted programmes early on, as they notably help to accelerate the introduction process. Additionally, supporting the parts of the population with less purchasing power

²³ European Commission decision of March 16, 2005, C (2005) 586 fin.

will be necessary, if they are in danger of being cut off from the information society due to the costs arising from a switch to receiving digital broadcasting. Special financial funds for the purchase of digital CPE are intended. Grants refer to all CPE independent of their origin. CPE will only receive grants if and insofar as its price on the market represents an obstacle to their purchase. Special set-top-boxes which represent added value to the consumer in comparison to analogue receivers, in other words which go beyond the simple transmission of television signals and can represent the specific advantages of digitisation, will receive grants. An example is interactive set-top-boxes with which the receiver can access additional services such as further information on programmes, online encyclopaedias, Video on Demand and other services.

II. Cushioning of additional costs for broadcasters: 20%

The goal is to cushion the additional costs for the broadcasters arising in the course of switching to digital broadcasting, in particular costs which arise through simultaneous analogue and digital transmission. Possible investments made by the broadcaster necessary for digital transmission can also be subsidised. Only broadcasters, as defined by the Private Television Act, Private Radio Act and ORF Act, are eligible. Costs of the ordinary running of broadcasting operations cannot be funded with money from the Digitisation Fund, as this would exceed the mere cushioning of additional costs. The digitisation concept of KommAustria earmarks a preferably short Simulcast phase (six to a maximum of 12 months from setting up digital coverage in the according region). The grant is, therefore, limited to the appropriate period of time, based on the guidelines of the digitisation concept to offer an incentive to the broadcaster for a quick switch.

III. Research projects to accelerate and facilitate the digitisation of broadcasting: 20%

The co-financing of research and development operations represents an incentive for the market participants to contribute actively to the development of digital broadcasting and to invest in innovative developments and projects. Developments outlining the additional benefits of digital broadcasting will be subsidised. Costs for running programmes and production costs for ordinary television programmes without specific additional benefits will not receive grants. The conclusions of projects receiving grants from the Digitisation Fund must be made accessible to the public.

IV. Administration and communication by RTR: 20%

These are the costs for financing the expenses of KommAustria and RTR for developing and implementing the digitisation concept (e.g. expenses for participation in international conferences on frequency planning) and costs for informing the public about the digitisation of Austrian broadcasting on all platforms. The intention is to guarantee market-independent and objective information about the different platforms. The public should be informed about regulatory activities during the digitisation of broadcasting, the level of digitisation on individual platforms, as well as the newest developments in this field.²⁴

²⁴ Allocation concept for grants of the Digitization Fund of RTR-GmbH for the period 2006 to 2010, Vienna, December 2005, pp. 4-6.

3.3 Bosnia and Herzegovina

The Bosnian and Herzegovinian Digital Switchover Strategy of 2009 proposes that subventions for the population should be applied in the form of vouchers that would cover part of the cost of DVB-T receivers. Subventions are expected to significantly increase transition process to DTT by encouraging citizens to purchase end user devices. In this way, receivers penetration will be followed in the market as well, which will enable TV stations to opt sooner for digitisation of their programme and access to the multiplex.

Subventions will be connected with RTV subscription fee, i.e. only households which comply with this legal obligation will be eligible to receive subvention voucher. In that way, rate of fee collection will increase significantly, and those funds could be used for the digitisation of the Public Broadcasting System of BiH and for additional programme content. For additional acceleration of the digitisation process and reduction of time for simultaneous broadcasting, it is necessary to limit the period of voucher duration to six months from the beginning of transition period.

In order to encourage broadcasters to a swift transition, the strategy proposes that licence fee for radiofrequency spectrum should be reduced in digital broadcasting; while in the transition period simulcasting broadcasters should be exempt from paying the licence fee for analogue broadcasting.

The Action Plan is being prepared, which will specify in detail the funding scheme and time frames of implementation. In addition, the Council of Ministers of BiH adopted in November 2010 a Decision to allocate 2.9 million KM (cca 1.4 million eur) from the accumulated surplus revenues of the Communications Regulatory Authority (CRA) for the partial financing of the digitalisation – purchase of transmission and broadcasting equipment to be used in the process of digitalization for PBS. Further, on September 15, 2011, the Council of Ministers of BiH adopted the Decision related to inclusion of Project of digitalization in the Programme of multiannual capital investments for the period from 2011 – 2014, in the amount of cca. 18,5 mil EUR.

The resources for realisation of this project will be ensured from three sources:

- Budget of institutions of BiH in the amount of cca 6 mil EUR (annually from 2012 to 2014 the instalments in the amount of cca 2 mil EUR);
- From accumulated surplus of revenue of Communications Regulatory Agency BiH in the total amount of cca 8 mil EUR (from which in 2010, it has already been allocated 200 000 EUR, and from 2010 transferred to 2011 the amount of cca 3,5 mil EUR, as well as cca 1.5 mil EUR from 2012 to 2014 per annum);
- From resources paid for allocation of licenses for Universal telecommunications systems in the total amount of cca 4,5 mil EUR (cca 1,9 mil EUR in 2012 and cca 1,2 mil EUR in 2013 and 2014 per annum).

The CRA Council in November 2011 approved a draft revised Rule on Licence Fees to be open for public consultations, which, in short, envisages the reduction in all broadcasting licence fees of up to 50%. This Rule is planned to be adopted in December 2011, and applied in full in 2012.

It should also be noted that the frequency spectrum for digital dividend in Bosnia and Herzegovina is already available but is not being assigned yet.

3.4 Croatia

Background

The state aids that were implemented in the A/D switchover process in Croatia were prescribed in the “Analogue to Digital Television Broadcasting Switchover Strategy for the Republic of Croatia” in chapter 8 “Financing cost framework”. According to the Strategy, the following main items of expenditure from the state budget are identified:

- digital receivers subsidising in a technologically neutral form – pursuant to the decision of the Government of the Republic of Croatia to grant vouchers to natural persons paying RTV fee,
- costs of the promotion campaign with the purpose to inform the public, carried out by the Central State Administrative Office for e-Croatia,
- management costs of the Strategy implementation (analyses, opinions, public surveys, etc.).

According to the Strategy, Governmental subsidies for digital receivers to the citizens – end-users shall significantly contribute to the increase in the number of digital terrestrial television services users in the Republic of Croatia, thus enabling the full digital terrestrial television switchover within deadlines defined by this Strategy – as of 31 December 2010. According to the Strategy, The Central State Administrative Office for e-Croatia shall plan within its part of the state budget of the Republic of Croatia the funds required for the aforementioned subsidies.

Implementation

Regulating the implementation of the Strategy, the Government decided on the manner of distribution of funds and criteria and standards for subsidising natural persons who pay radio and television fee (RTV subscribers), when purchasing receivers of digital terrestrial television signals in the Republic of Croatia. The Government Decision determined the criteria and standards for subsidising natural persons who pay radio and television fee, when purchasing receivers of digital terrestrial television signals:

- Each natural person who pays radio and television fee in the Republic of Croatia, shall be entitled to subsidy in the amount of HRK 75.00 (HRK 200.00)²⁵ for the purchasing of one receiver of digital terrestrial television signals (digital receiver).
- The right to subsidy shall be exercised on the basis of a voucher.

²⁵ Digital Istria – is the pilot project of DTV implementation in Croatian region of Istria. As the pilot project Digital Istria was implemented in 2007, when digital receivers were more expensive, each natural person who paid radio and television fee was entitled to subsidy in the amount of HRK 200.00 for the purchasing of one receiver of digital terrestrial television signals (digital receiver).

- The voucher shall be non-transferrable, and it shall contain first name, surname, address and the subscription number of the natural person who pays radio and television fee, as well as the deadline within which the voucher can be used.
- Vouchers will be distributed to the addresses of natural persons who pay radio and television fee (voucher user) by Transmitters & Communications Ltd. (Odašiljači i veze d.o.o.) in cooperation with Croatian Radiotelevision.
- Vouchers to be valid no later than by 31 December 2010.
- The voucher beneficiary shall be entitled to subsidy when purchasing a digital receiver (built in the TV set or a stand-alone device).
- Transmitters & Communications Ltd. Company shall allocate the amount to retailer's account upon the submission of evidence on the sale of a digital receiver to the voucher beneficiary.
- A copy of the receipt issued by a retailer in the Republic of Croatia for the sold digital receiver on which the retailer indicates the data from the voucher shall serve as proof of sale of the digital receiver.

Total funds for subsidising natural persons who pay radio and television fee in amount of 88.571.887,57 HRK were ensured from two sources: the excess revenues over costs in the budgets for 2006., 2007, 2008 of Croatian Post and Electronic Communications Agency (80% of total funds) and the budget of The Central State Administrative Office for e-Croatia (20% of total funds). In this specific case, besides the Central Office for e-Croatia, the Croatian Post and Electronic Communications Agency was considered as the state subsidy grantor.

State subsidies

The permissibility of state subsidies in the Republic of Croatia has been assessed by the Competition Agency (CA). The CA's Council has permitted state subsidies for the purchasing of receivers, explaining that subsidies are intended for providing incentives to specific economic activities or specific economic areas. The CA's Council has established that the measure that refers to the purchase of receivers represents a more efficient use of the broadcasting frequency spectrum and an increase in the possibility of broadcasting different new services, which could not be used by analogue broadcasting, which eventually represents a broader possibility of choice for each viewer. The CA's Council also established that the granting of subsidy for the purchasing of receivers would enable a digital switchover to RTV subscribers. Problems concerning the possible market failure have been alleviated, as well as the possible social problems deriving from the possibility of the purchase of decoders by RTV subscribers.

With regard to the disruption of market competition, the CA's Council has established that it is reflected only between TV broadcasters that broadcast in the digital technology and broadcasters that broadcast in the analogue technology as well as, possibly, those broadcasters that had to cover the costs of the purchase of decoders themselves. Nevertheless, during the previous implementation of the measures of digitisation of TV signal reception, RTV subscribers could get subsidy when purchasing receivers for the purchase of any type of receivers for the reception of terrestrial, satellite and cable TV signal. This fulfils the main condition of technological neutrality

because procurement and the manner do not cause the disruption of market competition between entrepreneurs that broadcast the programme via different platforms.

It results from all of the above that the measure to provide incentive for the purchase of receivers is directed at the achievement of the goal of general interest, that the state subsidy is proportional to the purpose achieved by it, and that it is transparent and technologically neutral.

Results

During the A/D switchover, there were a total of 1,173,384 natural persons who pay radio and television fee in the Republic of Croatia. 82,466 radio and television subscribers were from the County of Istria to whom subsidy has been granted in the form of vouchers in the amount of HRK 200.00 under the pilot project Digital Istria. To the remaining 1,090,918 RTV subscribers subsidy has been granted in the form of vouchers in the amount of HRK 75.00. 39% of total 1,173,384 granted vouchers were cashed. The amount of subsidy per radio and television subscriber was approximately 50% of the average retail price of DVB-T MPEG-2 Set-Top-Box.

The promotion campaign and management of the Strategy implementation were carried out by the Central State Administrative Office for e-Croatia. The costs of the promotion campaign and management of the Strategy implementation were financed from the state budget of the Republic of Croatia.

3.5 Hungary

Article 44 of the Hungarian Digital Switchover Act provides that in order to guarantee the digital reception of public service programmes, digital set-top-boxes may be subsidised during the three-month period preceding the termination of the public service analogue free-to-air broadcasting in a competition-neutral manner. The subsidy should only be granted upon request and in justified cases and to a justified extent, exclusively to households in social need, already having a capacity to receive analogue terrestrial free-to-air broadcasting as stipulated in a separate piece of legislation. Article 45 specifies as one of the purposes for which the sources allocated for digital switchover may be used, the support to those who do not have a device suitable for receiving digital broadcasting, based on social need as specified in a separate piece of legislation.

The Hungarian Digital Switchover Strategy envisages three possible types of subsidies for the support of the digital switchover:

a) Network development subsidies from the Broadcasting Fund

Managed by the ORTT, the Broadcasting Fund is a separate monetary fund that serves to support public service broadcasting, public broadcasters, non-profit-oriented broadcasters, public service broadcasts and programs, to preserve and further develop culture, to provide for the multicoloured nature of broadcasts, and to support other responsibilities defined in the Radio and

Television Broadcasting Act. The Act contains detailed provisions concerning the utilization of the Fund's resources. Accordingly, the Fund covers:

- the operating expenses of public service broadcasters;
- the operating costs of the ORTT and of the organizations controlling and supervising public service broadcasters;
- the expenses related to program production tenders announced by the ORTT;
- other tender objectives as specified by the Act.

As to the last item, the Radio and Television Broadcasting Act explicitly states that *"the amount payable for the third national terrestrial television broadcasting licence (that is RTL Klub) shall be channelled into the Broadcasting Fund, and such proceeds shall be used to develop broadcasting as well as cable networks used for the distribution of broadcasting services. This money shall not be applied for any other purpose"*.

b) Subsidies for digital set-top boxes

The switch-off of the analogue terrestrial broadcasting in general and more specifically the switch-off of public service channel m1, which may take place in an accelerated manner due to the relative shortage of available frequencies, make the subsidization of set-top box purchases in the period of digital switchover worthy of consideration. Basic requirements for this form of subsidy are as follows:

- Provision of subsidy must be neutral with respect to competition or platform;
- Subsidies may only be granted on social basis;
- Set-top boxes purchased using this subsidy must promote interactivity and interoperability;
- They must be capable of decoding MPEG4 broadcasts.

Platform and competition neutrality means that the subsidy cannot be limited to fund supplementary receivers of a specific platform. However, it must be specified as a precondition that those receiving the subsidy must have sets capable of only analogue terrestrial reception and they must switch over to one of the digital platforms (DVB-T, DVB-S, DVB-C, IPTV, etc.) of their choice. No other substantive requirements related to the set-top box subsidy (free channels or channels available at a low fee) are specified in the strategy. The systems of social aspects underlying the set-top box subsidies may be developed after the initial experience gained in connection with digital switchover have been processed. Simplicity and transparency of the subsidy system as well as minimizing the chances for 'subsidy trade' are high-priority requirements.

Concerning the technical parameters of the set-top boxes to be subsidized, a uniform opinion of those participating at the consultations was accepted. According to this, only those receiving sets should be subsidized that can use any API standard and may as well be capable for the use of interactive services. The final decision concerning the necessity and form of set-top box subsidies should be made upon completion of the multiplex tender, as individual bidders are expected to be assessed also on the role they are willing to play in the distribution of set-top boxes. If State involvement is unavoidable, a system of social criteria must be developed based on the assess-

ment of the initial experience gained from the switchover, but not later than half a year prior to the beginning of the switch-off of m1 (expected to occur in 2009).

c) Subsidy for the innovative application and technology development

The innovative application and technology development becoming available in the field of digital television and radio has good chances to attract European Union subsidies. The FP7 Research and Development Framework Program, which is a central subsidy, granted by the European Union, and the R&D components of the New Hungary Development Plan for 2007-2013 (NFT II.), which is available to domestic entities, can be viable options. In order to ensure the best possible use of these opportunities, special attention should be paid in the course of coordinating the digital switchover to formulating the criteria for the 2007-2013 R&D tenders in a way that encourages innovative digital television and radio development projects.

3.6 Italy

By its 2004 Finance Law, Italy granted a public subsidy of €150 to every user of the broadcasting service who purchased or rented equipment for the reception, free-to-air, of television signals transmitted using digital terrestrial technology (T-DVB/C-DVB). The subsidy ceiling was set at €110 million. While the 2005 Finance Law continued that measure within the same spending limit of €110 million, the subsidy for each digital decoder was reduced to €70. In order to benefit from the subsidy it was necessary to purchase or rent digital terrestrial TV equipment. Consequently, a consumer who chose digital satellite equipment could not receive the subsidy. By a decision adopted in 2007, the European Commission held that those subsidies constituted State aid in favour of digital terrestrial broadcasters offering pay-TV services and cable pay-TV operators. The measure was not 'technologically neutral', as it did not apply to digital satellite decoders.

In 2006, Italy notified a new measure which subsidised by €50 the purchase - by consumers in Sardinia and Valle d'Aosta - of digital TV sets or decoders meeting the following conditions:

- allowing direct and unrestricted access to free-to-air content
- ensuring interactivity
- based on open application programme interface (API).

Reduction at the place of purchase was then reimbursed to the retailer. Aid was subject to certain criteria (that may vary according to the region), such as:

- age of 65 or over
- gross income less than €10,000 per year
- TV licence fee paid.

The European Commission has decided that subsidies for digital decoders granted by Italy in 2006 do not violate EC Treaty state aid rules as they are offered for all decoders, regardless of the transmission platforms, are therefore technology-neutral and proportionate to the objective of promoting the transition to digital TV and to interoperability.

In 2007, an income tax deduction was offered to consumers equal to 20% of the price of a digital TV set/decoder purchased during 2007 and compatible with all existing transmission platforms, up to a maximum deduction of €200 per equipment.

3.7 Former Yugoslav Republic of Macedonia

The Macedonian Digital Switchover Strategy proposes that in the simulcast-period, the AEC could, on a one-time-basis, assist the providers in planning the new digital networks by making available the sophisticated software simulation packages. The stimulation of the planning and construction of networks for digital broadcasting is justified only on those locations where the signal coverage is relatively weak or generally missing, and at the given moment there is no realistic offer and/or economic justification for private construction on those locations.

The Digital Switchover Strategy also provides that, in order to hasten the introduction of digital broadcasting, it will be necessary for the state to prescribe measures to stimulate the merchants and the citizens to purchase digital reception equipment, to encourage the development of the industry for manufacturing STB-devices and to stimulate the operators in planning and construction of the networks for digital broadcasting. Probably, it will be necessary for the state to approve funds for purchasing certain number of STB-devices and their distribution to the interested consumers (viewers), especially for the socially disadvantaged users, and they would pay for these devices in several instalments. According to the Strategy, the method of stimulation should be technologically neutral and it should refer to devices that use open standards for interactivity. The dynamics and the volume of the purchase of these devices should be proposed by the National Coordination Authority for Digitisation.

3.8 Montenegro

The Montenegrin Law on Digital Broadcasting, adopted in July 2011,²⁶ contains provisions enabling the financing/subsidizing the implementation of the first national coverage network, in order to accelerate transition process. It has been determined that the public company Radiodifuzni centar (Broadcasting Centre; RDC) is the designated 1st multiplex and network operator, as this company is in charge of distribution and transmission of national public service broadcasting signals. The Law provides that state and other (EU for example) financial resources will be used:

- for the implementation of national coverage digital terrestrial broadcasting network that shall be used for the 1st multiplex. By this network, minimum 85% of population should be covered and,
- for the additional costs arising from electric power consumption in transition period.

²⁶ published in Official Gazette no.34/11.

Bearing in mind that one of the key elements for successful fulfilment of switchover process is to ensure broad industry consensus and support, particularly from commercial broadcasters, whose natural instinct is to try to avoid the increased content and transmission costs, the Law prescribed provisions establishing economic support for broadcasters. This means that during the transition period, current broadcasters are exempted of payment for transmission cost of their signals within the 1st multiplex, in the case of locations for which they have been authorized by the Agency for Electronic Communications and Postal Service for the use of radio frequencies for their analogue stations. This incentive will result in additional transmission cost for the 1st multiplex and network operator, but it will be covered by state and other financial resources.

Ensuring that most users are equipped with digital receivers has been the main challenge for switchover and a pre-condition for switch-off in many countries. Although this has been considered to be the case in Montenegro too, procurement of set-top boxes for whole population or just specific target groups has not been envisaged by the Law. Therefore, encouragement to deployment of digital receivers by public subsidies still has to be considered again by relevant state authorities.

The Montenegrin Digital Switchover Strategy provides that in order to have a rapid switchover process, it is expected that Montenegro will provide, by means of certain subsidies, funds for the procurement of equipment i.e. basic devices for reception of digital broadcasting signal (STB) for low income households. Likewise, the households living in the areas where other systems for transmission and broadcasting of radio and TV signals are not developed making them dependant on the terrestrial systems only, especially if these are sparsely populated or underdeveloped areas, could also be subsidized when purchasing the STB equipment. Bearing in mind the importance of the process for the improvement of citizens' quality of life, as well as tight deadlines for analogue switch-off, it is vital to devise promptly the financing model for the whole process or parts thereof. To that effect, while amending the legislation, the possibility of the law stipulating the sources of finance should be considered through the establishment of special funds for:

- infrastructure upgrading and development;
- provision of good quality coverage by the digital signal of rural or sparsely populated or underdeveloped areas.

Recognising the importance of stable funding of the activities foreseen by the Strategy, special attention should be paid to the definition of terms and timeframe for the establishment and management of a special fund intended for this process. The funds should be primarily used for subsidizing the transmission and reception equipment (STB), informing and encouraging the end users about deadlines, advantages and benefits of participation in the switchover process, as well as for ensuring that digital signal covers sparsely populated areas in which commercial investors will have no economic interest to deploy digital broadcasting systems. Apart from the central level authorities, also the municipal bodies and institutions should play an important role in setting up the Fund. After considering the funds necessary for this process of public interest, an important set of activities will be timely planning, application and implementation of actual projects using the European funds. In view of the above, according to the Strategy, the main sources of funding for the implementation of switchover process should be the following:

- funds set up in compliance with the Broadcasting Law and the Digital Switchover Law;

- a share of fees for the use of broadcasting frequencies for analogue distribution;
- funds of broadcasters/providers/operators;
- budget of Montenegro;
- EU funds;
- other sources.

3.9 Serbia

The Serbian Strategy for Switchover from Analogue to Digital Broadcasting provides that the acquisition of digital receivers for end users should be subsidised in order to ensure the inclusion of all social groups in the process of switchover. In accordance with economic conditions in the time of the switchover from analogue transmitters to digital broadcasting in Republic of Serbia, following scenarios of subvention for subscribers will be:

- Subsidised costs for acquisition of one STB per household for all users that receive television programs solely by terrestrial reception. The subvention will amount to 25 Euros (~25x1 500 000=37 500 000 Euros);
- Subsidised costs for acquiring one STB per household for all users that pay subscription fee will be reimbursed to 25 Euros (~25x1 600 000 =40 000 000 Euros);
- Subsidised costs for acquiring STBs for the socially endangered persons (~ 50x300 000 =15 000 000 Euros). Dynamics of spending these financial means is set for the fourth quarter of 2011 (12 000 000 Euros) and the first quarter of 2012 (3 000 000 Euros).

Republic of Serbia will provide these financial means from the budget, as it is under obligation to provide the reception of the television programs to the citizens. If the effects of the economic crises mitigate, there is a possibility for increasing the subvention for subscribers to the extent that it would cover all subscribers of National Broadcasting Company that pay subscription fee, which would lead to the increase to 40 000 000 Euros until the end of first quarter of 2012 (32 000 000 Euros for 2011 and 8 000 000 Euros for the first quarter of 2012). The Ministry of Telecommunications and Information Society applied for the project financed by the pre-accession funds of European Union of 13 500 000 Euros. This project will finance the equipment for the enterprise "Broadcasting equipment" (transmitters and some parts of distribution network).

3.10 Slovenia

The Slovenian Digital Broadcasting Act provides that the dissemination of digital broadcasting may be encouraged in the form of consumer incentives by co-financing the purchase of digital television receivers by socially disadvantaged consumers, who are exempt from paying TV licence fees. The law provides that the receivers co-financed must be technology-neutral and use open standards of interactivity. In 2010, the competent ministry sent a questionnaire to all persons exempt from paying licence fee in order to determine the number of digital receivers needed. Based on the replies received, the ministry purchased by way of public tender (at the price of € 140,000) 4000 set top boxes and distributed them free to the eligible persons who applied.

Since disabled persons who are exempt from TV licence duty were also considered eligible for co-financing, the amount of set top boxes purchased by the ministry turned out not to be sufficient. Therefore, the ministry reimbursed the remaining eligible persons the costs of buying digital receivers, by up to € 50, on the basis of invoices submitted.

The Digital Broadcasting Act also provides that the ministry may co-finance the planning and setting up of networks for digital broadcasting in areas where, despite signal coverage of 92% of the population in the Republic of Slovenia with at least one multiplex system, users are still unable to receive digitally broadcast programming. In 2009, a public call was issued for co-financing the costs of analogue broadcasting to TV content providers in the simulcasting phase (in years 2009 and 2010). Eligible for co-financing were the holders of analogue terrestrial broadcasting licences that had the technical possibility and the right of broadcasting programme content in multiplex A through DVB-T.

4 OVERVIEW OF THE RELEVANT STATE AID REGULATION

4.1 EU legislative framework on state aids

A general legal framework for assessing aids granted by Member States is laid down in Articles 107 – 109 of the Treaty on the Functioning of the European Union (TFEU) (ex Articles 87 – 89 of the Treaty Establishing the European Community – TEC),²⁷ while further substantive and procedural state aid rules are set out in Council and Commission's regulations and other secondary legislation.²⁸ As there is no binding primary or secondary legislation regarding the grants made during the switch-over process, these provisions, as interpreted by the Court of Justice of the EU, are to be applied when assessing the compatibility of Member States' digitisation grants. Commission's decisions and non-binding Communications may be of additional source for argumentation.

Article 107 TFEU lays down the test for state aids. The provisions cover aids given to private undertakings as well as to public undertakings within Article 106 TFEU (ex Article 86 TEC). Article 107(1) TFEU establishes the general principle that state aids are incompatible with the internal market (the so-called incompatible aids): save as otherwise provided in TFEU and TEU, 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 internal market. As ensues from the provision, four conditions must be met cumulatively before classifying an aid as state aid within the meaning of Article 107(1) TFEU: an advantage must be conferred on the recipient of the aid (be it a private or public undertaking); the aid must be provided by a Member State or through state resources;²⁹ such aid must distort or threaten to distort competition;³⁰ and it must (at least potentially) effect the inter-state trade.

²⁷ Article 3 TEU and Articles 3-6, 14, 42, 50, 93, 106, 119 and 346 TFEU, as well as Protocol (no.26) on Services of General Interest and Protocol (no.27) on the Internal Market and Competition are also of relevance.

²⁸ Council Regulation (EC) No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article 93 of the EC Treaty (the so-called Procedural Regulation), OJ L 83, 27.03.1999, p. 1, as amended in 2003 and 2006; Commission Regulation (EC) No 794/2004 of 21 April 2004 implementing Council Regulation (EC) No 659/1999 laying down detailed rules for the application of Article 93 of the EC Treaty (the so-called Implementing Regulation), OJ L 140, 30.04.2004, p. 1, as amended in 2009; Commission Notice on Simplified procedure for the treatment of certain types of State aid OJ C 136 of 16.06.2009, p. 3, and Commission Notice on a Best Practices Code on the conduct of State aid control proceedings OJ C 136 of 16.06.2009, p. 13, forming part of the so-called Simplification Package regarding State aid Proceedings; Notice from the Commission — Towards an effective implementation of Commission decisions ordering Member States to recover unlawful and incompatible State aid, OJ C 272, 15.11.2007, p. 4; Commission notice on the determination of the applicable rules for the assessment of unlawful State aid (notified under document number C (2002) 458), OJ C 119, 22.05.2002, p. 22; Commission notice on the enforcement of State aid law by national courts, OJ C 85 of 09.04.2009, p. 1; Commission communication C(2003) 4582 of 1 December 2003 on professional secrecy in State aid decisions, OJ C 297, 09.12.2003, p. 6; Commission communication concerning the obsolescence of certain State aid policy documents, OJ C 115, 30.04.2004, p. 1; Commission State Aid Action Plan – Less and better targeted state aid: a roadmap for State aid reform 2005-2009 (Consultation document), COM(2005) 107 final; etc. For further details on the legislation in force, please see: http://ec.europa.eu/competition/state_aid/legislation/compilation/toc_11_1_2011_en.pdf.

²⁹ The Court of Justice of the EU has interpreted this prerequisite for the application of Article 107 TFEU at times in a more broad, while at times in a more narrow sense. See, for example, cases 30/59 *Steenkolenmijnen v. High Authority*, *Denkavit*, *Banco de Crédito*, 82/77 *Netherlands Public Prosecutor v. Van Tiggele*, C-72-73/91 *Sloman Neptun Schiffahrts AG v. Seebetriebsrat Bodo Ziesmer der Sloman Neptun Schiffahrts*, C-379/98 *PreussenElektra AG v. Schleswag AG*, 67/85 *Van der Kooy v. Commission*, C-

Article 107(2) TFEU entails a list of three types of aid that are deemed compatible with the internal market: (a) aid having a social character, granted to individual consumers, provided that such aid is granted without discrimination related to the origin of the products concerned; (b) aid to make good the damage caused by natural disasters or exceptional occurrences; (c) aid granted to the economy of certain areas of the Federal Republic of Germany affected by the division of Germany, in so far as such aid is required in order to compensate for the economic disadvantages caused by that division.³¹ These exemptions which apply directly without any discretion of the EU institutions, but are, in practice, of a rather limited impact. Article 107(3) TFEU lists the types of state aid that may be considered by the Council to be compatible with the internal market: (a) aid to promote the economic development of areas where the standard of living is abnormally low or where there is serious underemployment, and of the regions referred to in Article 349, in view of their structural, economic and social situation; (b) aid to promote the execution of an important project of common European interest or to remedy a serious disturbance in the economy of a Member State; (c) aid to facilitate the development of certain economic activities or of certain economic areas, where such aid does not adversely affect trading conditions to an extent contrary to the common interest; (d) aid to promote culture and heritage conservation where such aid does not affect trading conditions and competition in the Union to an extent that is contrary to the common interest; (e) such other categories of aid as may be specified by decision of the Council on a proposal from the Commission. In contrast to exceptions listed in Article 107(2) TFEU, the exceptions in Article 107(3) TFEU are discretionary and their list is not exhaustive as ensues from the safety net provision of Article 107(3)(e) TFEU.

Both the European Commission and the Court of Justice of the EU have been intensively applying and interpreting the provisions of Article 107 TFEU in different cases. As is explained below, some of these cases have dealt with state aids granted within the digitisation process. Due to lack of any specific legislation covering state aids in the switch-over process, the decisions and judgements in these cases are focal for applying state aid rules on the grants made by the Member States for the purposes of digitisation.

Article 108 TFEU (ex Article 88 TEC) lays down the basic rules of procedure for assessing state aids while detailed provisions are contained in the relevant secondary legislation³² and in the case-law of the Court of Justice of the EU interpreting the Treaty and secondary legislation. Some further implementing procedural aspects are regulated in national legislation.³³

83/98P *France v. Ladbroke Racing and Commission*, C-482/99 *France v. Commission (Stardust Marine)*, C-345/02 *Pearle B Vand others v. Hoofdebedrijfschap Ambachten*.

³⁰ The rules on *de minimis* might be relevant for the assessment of this prerequisite. See Commission Regulation (EC) No 1998/2006 of 15 December 2006 on the application of Articles 87 and 88 of the EC Treaty to *de minimis* aid, OJ L 379, 28.12.2006, p. 5.

³¹ Five years after the entry into force of the Treaty of Lisbon, the Council, acting on a proposal from the Commission, may adopt a decision repealing this point.

³² In particular in the Council Regulation (EC) No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article 93 of the EC Treaty (the so-called Procedural Regulation), OJ L 83, 27.03.1999, p. 1, as amended in 2003 and 2006, and in the Commission Regulation (EC) No 794/2004 of 21 April 2004 implementing Council Regulation (EC) No 659/1999 laying down detailed rules for the application of Article 93 of the EC Treaty (the so-called Implementing Regulation), OJ L 140, 30.04.2004, p. 1, as amended in 2009.

³³ E.g. in the Slovene Monitoring of State Aids Act (OJ RS, No. 37/2004) in force as of 1 May 2004, and in the documents issued on its basis.

Article 108(1) TFEU focuses on the review of existing state aids, i.e. of different types of aids categorized as existent in the Procedural Regulation 659/99 as well as in the case-law: (a) aid existent before the entry into force of the Treaty of Rome; (b) aid which has been given the green light under Article 107(3) TFEU; (c) aid which has been notified to the Commission pursuant to Article 108(3) TFEU, where the Commission has taken no action within the requisite time; (d) aid that is not recoverable because the limitation period for its recovery has expired; (e) aid that did not initially constitute aid, and only became one due to the evolution of the internal market. Article 108(1) TFEU states that in cooperation with Member States, the Commission keeps under constant review all systems of aid existing in those States, and proposes to the Member States any appropriate measures required by the progressive development or by the functioning of the internal market.

Article 108(2) TFEU provides that if, after giving notice to the parties concerned to submit their comments, the Commission finds that aid granted by a State or through State resources is not compatible with the internal market having regard to Article 107 TFEU, or that such aid is being misused, it shall decide that the State concerned shall abolish or alter such aid within a period of time to be determined by the Commission. If the State concerned does not comply with this decision within the time set, the Commission or any other interested State may, in derogation from the provisions of Articles 258 and 259 TFEU, refer the matter directly to the Court of Justice of the EU.

Article 108(2) TFEU applies to existing aids in relation to which questions have been raised pursuant to Article 108(1) TFEU, as well as to new aids that have not been cleared pursuant to the preliminary investigation under Article 108(3) TFEU.

The procedure for new state aids is set out in Articles 108(3) and 108(2) TFEU. The first stage consists of prior notification of any plan to grant aid, and of preliminary (*prima facie*) assessment of the aid by the Commission. Article 108(3) TFEU states that Member States must inform the Commission, in sufficient time to enable it to submit its comments, of any plans to grant or alter aid (if such plans are not notified to the Commission, the aid is unlawful). If it considers that any such plan is not compatible with the internal market having regard to Article 107 TFEU, the Commission initiates without delay the procedure of fuller investigation provided for in 108(2) TFEU. The Member State concerned must not put its proposed measures into effect until this procedure has resulted in a final decision (the standstill clause is in effect throughout the preliminary as well as the formal stage of the procedure, in case of its breach, the aid is unlawful, however not necessarily incompatible).³⁴ According to case-law of the Court of Justice of the EU, the preliminary-review procedure is to take no more than two months:³⁵ unless the Commission decides to approve the aid (according to the Lorenz rule, formed by the Court of Justice of the EU, it is deemed that the Commission gives green light to the aid if it does not react in two months), i.e. when it is clear that the aid is compatible with the internal market, thereby enabling the state to

³⁴ An aid is also called »unlawful« if it exceeds the amount of the aid cleared. If the Commission learns of an unlawful aid, it must immediately assess its compatibility with the internal market.

³⁵ 120/73 *Gebrüder Lorenz GmbH v. Germany*. See, however, 301/87 *Boussac* where the Court has stated that in cases of non-notified aids, the Commission is not bound by the two-month period. It must, however, decide as soon as possible.

implement the aid, it should proceed to the more complete review under Article 108(2) TFEU. In its decision issued within the Article 108(2) TFEU procedure, the Commission may decide that the aid is compatible or incompatible with the internal market, or may attach conditions to the positive decision. While national courts have jurisdiction for applying Article 108(3) TFEU, only the Commission may assess the compatibility of the aid with the internal market.³⁶

In contrast to the Commission's decision on the compatibility of the aid, taken during the stage of the preliminary procedure, the final formal decision issued after performing the adversarial procedure under Article 108(2) TFEU, may be challenged pursuant to Article 263 TFEU. The nullity action may be filed with the Court of Justice of the EU by the Member State whose aid has been declared incompatible with the internal market (also its state body setting the aid programme), the beneficiary of the state aid, as well as competitors of the beneficiary if they can show individual concern.

According to Article 108(2) TFEU, in certain exceptional circumstances, aid may be granted in derogation from the provisions of Article 107 TFEU. Namely, on application by a Member State, the Council may, acting unanimously, decide that aid which that State is granting or intends to grant is considered to be compatible with the internal market, in derogation from the provisions of Article 107 TFEU or from the regulations provided for in Article 109 TFEU, if such a decision is justified by exceptional circumstances. The case-law of the Court of Justice of the EU has interpreted this provision narrowly. If, as regards the aid in question, the Commission has already initiated the procedure, the fact that the State concerned has made its application to the Council has the effect of suspending that procedure until the Council has made its attitude known. If, however, the Council has not made its attitude known within three months of the said application being made, the Commission is to give its decision on the case.

Article 109 TFEU (ex Article 89 TEC) empowers the Council, acting on a proposal from the Commission and after consulting the European Parliament, to make any appropriate regulations for the application of Articles 107 and 108 TFEU and to determine the conditions in which Article 108(3) TFEU shall apply and the categories of aid exempted from this procedure. According to Article 108(4) TFEU, the Commission may adopt regulations relating to the categories of state aid that the Council has, pursuant to Article 109 TFEU, determined may be exempted from the procedure provided for by Article 108(3) TFEU.

Pursuant to the case-law of the Court of Justice of the EU³⁷ and relevant secondary legislation drafted on the basis of such case-law (i.e. Articles 14 and 15 of the Procedural Regulation

³⁶ 78/76 *Steinike und Weinling v. Germany*, C-199/06 *CELF and Ministre de la Culture et de la Communication*, 120/73 *Lorenz v. Germany*.

³⁷ 70/72 *Commission v. Germany (Kohlegesetz)*, 121/73 *Markmann KG v. Germany and Schleswig-Holstein*, 122/73 *Nordsee, Deutsche Hochseefischerei GmbH v. Germany and Rheinland-Pfalz*, 141/73 *Fritz Lohrey v. Germany and Hessen*, C-188/92 *TWD Textilwerke Deggendorf GmbH v. Germany*, C-75/97 *Belgium v. Commission*, C-183/91 *Commission v. Greece*, C-348/93 *Commission v. Italy*, C-277/00 *Germany v. Commission (SMI)*, C-480/98 *Spain v. Commission*; joined cases C-67/85, C-68/85 and C-70/85 *Kwekerij van der Kooy BV and others v. Commission*, T-459/93 *Siemens v. Commission*, C-223/85 *RSV v. Commission*, C-5/89 *Commission v. Germany (BUG-Alutechnik)*, C-24/95 *Land Rheinland-Pfalz v. Alcan Deutschland GmbH*, T-115/94 *Opel Austria GmbH v. Council*, C-372/97 *Italy v. Commission*, joined cases C-74/00P and C-75/00 *P Falck and Acciaierie di Bolzano v. Commission*, T-308/00 *Gencor v. Commission*, T-369/00 *Département du Loiret v. Commission*, C-415/03 *Commission v. Greece*, C-232/05 *Commission v. France*, C-207/05 *Commission v. France*, C-404/00 *Commission v. Spain*; C-280/95 *Commission v. Italy*; C-

659/1999, and Articles of the Implementing Regulation 794/2004), unlawful aids must be recovered by the Member State from the recipient of the aid. Damages actions may also be filed in national courts by individuals that have suffered loss due to unlawful aid granted.³⁸

4.2 European Commission's Communications

The European Commission's position on the grants made for the purposes of the switch-over process can be detected in one of its Communications forming integral part of its digital switch-over package. According to the 2003 Switchover Communication,³⁹ the regulation must be proportionate and technologically neutral. The Communication emphasizes that in terms of political feasibility, switch-off in a given territory can only take place when nearly all households receive digital services. In order to promote the fast and efficient achievement of this objective, all transmission networks should be taken into account (primarily cable, satellite or terrestrial). This approach recognises that network competition contributes to the roll-out process. This is in line with the spirit of 'new regulatory framework for electronic communications', which is based on market initiative and technological neutrality. It encourages facilities-based competition and investment, thus contributing to the multi-platform approach of Europe. This implies a regulatory level playing field. In principle, each network should compete on its own strengths. Any public support for one particular option cannot be excluded but should be justified by well-defined general interests, and implemented in a proportionate way. Otherwise it would appear discriminatory and could jeopardise investments in other networks. In particular, each individual network should not necessarily enjoy the same position in the digital landscape as in the analogue landscape. The objective should be to achieve a fast and efficient switchover. Efficiency should include preserving the general interest missions of broadcasting, while limiting public expense. Finally, any public financial support to digital broadcasting needs to be compatible with state aids rules under European law, as well as Commission orientations on the use of structural funds.⁴⁰

State funding of public service broadcasting is regulated in the Communication from the Commission on the application of State aid rules to public service broadcasting may be of further relevance.⁴¹

6/97 Italy v. Commission, C-52/84 Commission v. Belgium, C-499/99 Commission v. Spain, C-42/93 Spain v. Commission, C-142/87 Commission v. Belgium, 303/88 Italy v. Commission (ENI-Lanerosi), C-305/89 Italy v. Commission (Alfa Romeo), C-390/98 H.J. Banks & Co. Ltd v. The Coal Authority, Secretary of State for Trade and Industry (Banks), joined cases C-328/99 and C-399/00 Italija and SIM 2 Multimedia SpA v. Commission, etc.

³⁸ Such actions will, in principle, be filed against the Member State that has granted the aid. However, national law may enable filing such actions against the beneficiary. See, for example, C-39/94 *Syndicat français de l'Express international and others v. La Poste and others*, C-390/98 *H.J. Banks & Co. Ltd v. The Coal Authority, Secretary of State for Trade and Industry*.

³⁹ COM(2003)541 final, Communication from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions on the transition from analogue to digital broadcasting (from digital 'switchover' to analogue 'switch-off').

⁴⁰ See pp. 14 and 15 of the Communication.

⁴¹ OJ C 257, 27.10.2009, p.1 <http://eurlex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2009:257:0001:0014:EN:PDF>.

4.3 Relevant case-law of the European Commission and of the EU Court of Justice

The European Commission has adopted several decisions regarding state aid grants in the field of digital switchover which are focal for understanding the Commission's position on the compatibility of such grants with state aid law of the EU.

Some of the decisions had been challenged at the General Court that had so far dismissed the nullity actions. In one of the cases, the applicant had lodged an appeal against the General Court's judgements, and the Court of Justice dismissed it. These judgements are of great importance for understanding how state aid rules in the EU are to be applied in the field of digitisation.

4.3.1 The *Berlin-Brandenburg* case

European Commission decision

On 9 November 2005, the European Commission issued a decision 2006/513/EC on the aid the Federal Republic of Germany (its Medienanstalt Berlin-Brandenburg (MABB) as an issuer of the aid) had granted with the purpose of introducing digital terrestrial television (DVB-T) in the federal state Berlin-Brandenburg.⁴² Without notifying the Commission, MABB gave the subsidies worth some € 4 million to commercial broadcasters, for example RTL and ProSiebenSat.1, to meet part of their transmission costs via the DVB-T network launched in November 2002. In return, the broadcasters undertook to use the DVB-T network licensed to the company T-Systems for at least five years.⁴³

Following complaints by the Association of Private Cable Network Operators (Verband Privater Kabelnetzbetreiber e.V. (ANGA)) filed with the Commission in December 2002,⁴⁴ the Commission initiated the formal investigation procedure laid down in Article 88(2) TEC (now Article 108(2) TFEU) in July 2004. After consulting market operators, the Commission concluded that the subsidy granted by MABB to the commercial broadcasters constituted aid within the meaning of Article 87(1) TEC (now Article 107(1) TFEU). In the Commission's view, the aid was not compatible with the common market. The aid was not based on any specific switchover costs and was decided after the switchover had been agreed. Different amounts of funding were given

⁴² Case C(2005)3903 final). OJ 2006 L 200, p. 14. See the Commission's press release IP/05/1394 of 9 November 2005.

⁴³ IP/05/1394.

⁴⁴ After sending the complaint by fax on 16 December 2002, ANGA sent the Commission a letter on 26 March 2003 urging it to initiate the procedure and to suspend the granting of the aid. 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 – MABB. The latter supplied further information on 23 October 2003 and on 4 February 2004. 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. The Commission decided that this complaint would not be examined as part of the investigation procedure. Since the complaint dealt 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 (E 3/2005, C (2007) 1761 FINAL).

without objective justification to broadcasters, who already benefited from receiving free digital licences which allow greater transmission capacity at lower cost per channel. The subsidies also indirectly favoured the DVB-T network over competing TV platforms, such as cable and satellite, disregarding the principle of technological neutrality.⁴⁵

The Commission recognised that the digital switchover may be delayed if left entirely to market forces and that public intervention can be beneficial, through for example regulation, financial support to consumers, information campaigns or subsidies to overcome a specific market failure or to ensure social or regional cohesion. In the Commission's view, the Member States must demonstrate that aid is the most appropriate instrument, is limited to the minimum necessary, and does not unduly distort competition. In the case of Berlin-Brandenburg none of these conditions were met. Although the Commission recognised the existence of certain market failures, it found that the aid was neither the most appropriate instrument nor necessary to solve these problems. Since the addressee, i.e. the Federal Republic of Germany, did not notify the grant to the Commission as required by Article 88(3) TEC (now Article 108(3) TFEU) and was illegally put into effect without Commission authorisation, the Commission ordered Germany to recover from the beneficiaries, i.e. the commercial broadcasters, the aid which was unlawfully made available to them (about half the total grant).

The Commission decision is of great importance not only for its application of state aid rules on the facts of the Berlin-Brandenburg case, but for the paragraphs where the Commission gives general indications on the compatibility of the digitisation grants with the EU state aid legislation. According to Commission, there are numerous possibilities for Member States to actively promote the digitisation of broadcasting in ways which are compatible with state aid law of the EU and, hence, with the ultimate goal of growth, competitiveness and social cohesion.

The Commission explains in its decision that in the Berlin-Brandenburg case, it did not further investigate subsidies to 6000 households receiving social welfare allowances in order to buy set-top boxes. It emphasizes that it has also approved a Digitalisation Fund in Austria which comprises several measures supporting the digitisation of broadcasting, including: pilot projects and research activities to test, for example, digital transmission technologies and interactive applications; 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; grants to companies to develop innovative digital services such as electronic programme guides and mobile applications; subsidies to broadcasters to compensate for additional transmission costs when broadcasting analogue and digital TV in parallel (the so-called simulcast phase). Apart from such measures on which the Commission has already taken its position, Member States may, in Commission's view, 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 subsidies to consumers for the purchase of digital decoders whereby such subsidies must be technologically neutral. In granting them, the authorities may encourage the use of open standards for interactivity that enable consumers to benefit from interactive services offered by different operators (e.g. electronic programme guides, news search, games or e-commerce). Further, Member States may consider

⁴⁵ IP/05/1394.

funding for the roll-out of a transmission network in areas where otherwise there would be insufficient TV coverage. Financial means to public service broadcasters to enable them to be broadcast via all transmission platforms in order to reach the entire population may also be granted. 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. Member States may also grant 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 transmission capacity should be taken into account, the Member States will need to provide the evidence that this has been the case.

While the Commission confirmed that the digitisation of broadcasting is an objective of common interest, it underlined 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. It emphasized that only well-targeted aid is in line with the overall objective of ensuring fair competition and promoting competitiveness and technological development in Europe.

The Commission has later dealt with similar German cases regarding subsidies granted during the digitisation process in other German states, and applied similar reasoning as in the Berlin-Brandenburg case.⁴⁶

Actions for review of legality of the Commission decision

The Federal Republic of Germany, MABB, and FAB Fernsehen aus Berlin, all filed nullity actions in the Court of First Instance in Luxembourg (now the General Court) against the Commission on the basis of Article 230 TEC (now Article 263 TFEU).

a) T-21/06 Federal Republic of Germany v. European Commission

In support of its action filed with the General Court on 21 January 2006, the Federal Republic of Germany submitted, in particular, that the aid granted was indeed compatible with the common market, and complained that the Commission made numerous errors of judgment and assessment in its application of Article 87(3)(c) TEC (now Article 107(3)(c) TFEU). Instead of carrying out an assessment under Article 87(3)(c) TEC, the Commission used a new method of assessment of market failure which, in the way it was carried out, was not suitable to determine the compatibility of the aid with the common market. Furthermore, Germany submitted that the Commission did not carry out adequate assessment under Article 87(3)(b) TEC (now Article 107(3)(b) TFEU) of the compatibility of the aid granted. In addition, Germany claimed that the Commission infringed general principles of law, i.e. the principle of sound administration and the principle of the right to be heard.

⁴⁶ See, for example, decision C 33/06 DVB-T in Bavaria of 23/10/2007. In the case of introduction of DVB-T in North Rhine-Westphalia (decision of 23 October 2007), the formal proceedings were closed due to termination of the contested measure.

In its judgement issued on 6 October 2009, the General Court did not agree with the applicant's argumentation and dismissed the action entirely.

b) T-24/06 Medienanstalt Berlin-Brandenburg v. European Commission

MABB being the issuer of the aid, stated in its action filed on 24 January 2006 that the contested decision erred in law as essential formal requirements had been infringed. The Commission had in its view, in particular, infringed the obligation to state reasons as it had not explained comprehensively why this should be regarded as a case involving state aid. Second, the applicant alleged infringement of Article 87 TEC (now Article 107 TFEU). It contended that there was no aid within the meaning of Article 87(1) TEC (now Article 107(1) TFEU), and claimed that if there had in fact been aid, that would be compatible with the common market under Article 87(3)(c) and (d) TEC (now Article 107(3)(c) and (d) TFEU). Finally, MABB based its action on the fact that the contested decision infringed Article 86(2) TEC (now Article 106(2) TFEU) since, in so far as there had been aid, that would be compatible with the common market.

Argumentation put forward by MABB, too, did not persuade the General Court. It issued a decision on 6 October 2009 dismissing the action.

c) T-8/06 FAB Fernsehen aus Berlin v. European Commission

Another judgement was issued by the General Court on 6 October 2009 in the nullity actions proceedings in the Berlin-Brandenburg case. The review of legality of the Commission's decision was initiated on 12 January 2006 by one of the commercial broadcasters. Here, too, the General Court did not share the view of the applicant.

Appeal to the Court of Justice

Since the General Court dismissed its action, the Federal Republic of Germany being the applicant in the case T-21/06 *Federal Republic of Germany v. European Commission*, lodged an appeal to the Court of Justice according to Article 225 TEC (now Article 256 TFEU). In its judgement issued on 15 September 2011 (C-544/09 *Federal Republic of Germany v. European Commission*), the Court dismissed the action due to lack of any statutory ground of appeal.

The other two applicants in the review of legality procedures at the General Court did not lodge an appeal thereby making the Commission's decision final.

4.3.2 The *Digitalisierungsfonds* case

In its decision in the *Digitalisierungsfonds* case (N622/03) of 16 March 2005,⁴⁷ the European Commission found that Austrian aid granted for the purposes of the digitisation process in Austria was compatible with the common market.

The aim of a multifaceted measure adopted by Austria in 2003 was to support the introduction of digital television transmission technologies and applications for broadcasting and to facilitate the switchover from analogue to digital television in Austria. Brought forward in five separate categories, the scheme aimed at supporting projects in the form of:

- pilot projects and research activities regarding the digital transmission of broadcasting;
- development of electronic programme guides, navigators, interactive and mobile applications which make use of the additional programming and interactive benefits of digital transmission;
- grants contributing to broadcasters' additional costs (intended to co-fund the directly attributable, actually incurred eligible costs of broadcasters due to continued additional analogue transmission via cable, terrestrial or satellite transmission operators during a defined simulcast phase);
- financial incentives for consumers to switch to digital reception at an early stage as "early adopters" necessary to reach a critical mass of users of such equipment;
- subsidies for low-income consumers purchasing terminal equipment targeted to prevent the exclusion of low-income households from access to digital television by providing financial support for the purchase of set-top boxes for digital TV.

The planned annual amount for the overall measure was € 7.5 million per year and was financed via the central federal budget with funds from the licence fees. The measure initially favoured digital terrestrial television, however, the Austrian authorities have, during the notification process, modified the measure subsequently in order to promote the digitisation of all broadcasting transmission networks (terrestrial, cable and satellite).

The Commission was of the opinion that the notified scheme undoubtedly conferred an economic advantage to the beneficiaries, and was selective since it was partially targeted towards undertakings active in the sectors related to the digitisation of television, for instance broadcasters and partially, directly or indirectly, towards undertakings active in the market for digital transmission services. The Commission has also detected the element of distortion of competition as some of the broadcasters were put on an unequal footing due to the proposed measures. In addition, financial incentives and subsidies to end purchasers might have resulted in indirect benefits to network operators and terminal equipment manufacturers. Competition between undertakings which would benefit from the scheme and the ones which would not receive funding would also be distorted.

The effect on trade between Member States was also confirmed, as providers of broadcasting transmission services compete cross-border with each other as well as with other providers of

⁴⁷ OJ C 228, 17 September 2005, p.12.

electronic communications services. In addition, broadcasters operate on the advertising markets and purchase content rights across borders, competing with companies from other Member States, while manufacturers of terminal devices are competing on an international level with other equipment manufacturers.

Austrian authorities have argued in their notification of 12 December 2003 that the measure was compatible with TEC as it was in line with the eEurope Action plan and thus, for this sole reason, should be considered a project of Common European Interest. In the Commission's view, such a derogation was not applicable in the case at hand as a project could only be defined as a project of common European interest if it formed part of a transnational European programme supported jointly by a number of Member States.

The Commission was of the opinion that Austrian authorities have designed the notified measure in such a way that it clearly addresses some of the identified problems during the introduction of digital television. The scheme provides well-defined financial incentives for broadcasters and end users switching to digital TV as well as to parties involved in development activities, while respecting the principles of transparency, proportionality and technological neutrality and was thus compatible with Article 87(3)(c) TEC.

4.3.3 The *Digital Replacement Licences* case

An example of a measure which the Commission did not consider to constitute state aid at all were the Digital Replacement Licences issued by Ofcom in December 2004 to the terrestrial broadcasters (Channel 3, Channel 4, Channel 5 and Public Teletext) in the United Kingdom (NN64/2005).⁴⁸ The licences replaced existing analogue licences and contained various obligations related to the digital switchover. In view of these obligations and of the diminished scarcity value of the broadcasting licences, the regulator reduced the broadcasting licence fees.

In its decision issued on 25 January 2006, the Commission has decided that the measure did not confer an advantage to the licensees and did therefore not constitute state aid within the meaning of Article 87(1) TEC. It explained that such measure was an intrinsic element of the licensing process, aiming to bring the fee into line with the market value of the Digital Replacement Licences, and not a discretionary measure relieving licensees of their normal operating costs. The revision of licensing arrangements is an example of how the transition to the digital mode can be encouraged and organised without relying on subsidies that could distort competition and taking into account both the advantages and the disadvantages that the operators derive from the switchover.

⁴⁸ C(2006)83 final; http://ec.europa.eu/eu_law/state_aids/comp-2005/nn064-05.pdf.

4.3.4 The *Teracom* case

The Commission's decision No C 24/2004 issued on 20 December 2006⁴⁹ dealt with support granted by Sweden to the Swedish terrestrial network operator Teracom AB and certain of its subsidiaries in connection with the establishment of digital terrestrial television in Sweden. The complainants had argued that Teracom had received direct and indirect (through the public-service broadcasters SVT and UR) financial support from the Swedish State. This support had allegedly been used to give digital terrestrial transmission in Sweden an unfair competitive advantage over other types of digital transmission platforms such as cable and satellite. The measures assessed in the Commission's decision were the following:

- a) indirect financial support to Teracom through allegedly excessive transmission fees paid by SVT in return for Teracom's transmission services provided on both the analogue and the digital terrestrial network;
- b) direct financial support by means of a state credit guarantee granted to Teracom; and
- c) direct financial support in the form of a conditional shareholder contribution, to be repaid by Teracom.

The Commission found that there were no indications that the investigated measures conferred an economic advantage upon Teracom or any of its subsidiaries. As in the *Digital Replacement Licences* case, the Commission therefore concluded that the measures which Sweden has implemented do not constitute aid within the meaning of Article 87(1) TEC.

4.3.5 The *Contributi ai decoder digitali* case

Apart from the decisions presented above which are already final, a further decision to initiate the formal investigation procedure has been adopted by the European Commission on 21 December 2005 in case C52/05 *Contributi ai decoder digitali*. A nullity action has been filed with the General Court that has so far not issued a judgement.

Commission decision of 24 January 2007⁵⁰ deals with state aid implemented by the Italian Republic for the subsidised purchase of digital decoders. Italian legislation provided for a public grant of € 150 for users who purchased or rented a set up box or decoder capable of receiving TV signals transmitted using digital terrestrial technology and the associated interactive services,⁵¹ and allocated a total budget of € 110 million for this purpose. The scheme in question ceased to apply on 1 December 2005. The measure has been very successful. Some 2 million Italian nationals have bought a subsidized decoder. This figure represents 50% of all the decoders sold up to November 2005. The other 50% were purchased by consumers without the grant, even though the decoders were of the type eligible for it. Thanks to the economies of scale in

⁴⁹ http://ec.europa.eu/competition/state_aid/register/ii/doc/C-24-2004-WLWL-en-20.12.2006.pdf.

⁵⁰ C(2006) 6634.

⁵¹ A grant for the decoder was later changed to € 70. Some further prices were set for the set-top-boxes purchased in Sardinia and Valle d'Aosta.

production resulting from this increase in demand, the consumer price of interactive decoders has also decreased from €300/€350 to around €150.

However, the Commission concluded that the subsidy granted by Italy to digital terrestrial broadcasters offering pay-TV services and cable pay-TV operators for the purchase of decoders capable of receiving programmes broadcast using digital terrestrial technology constitutes aid within the meaning of Article 87(1) TEC. In the Commission's view, the aid was not compatible with the common market. In particular, it discriminated between: on the one hand, incumbent terrestrial broadcasters and cable network operators already on the market, and, on the other hand, satellite operators and other terrestrial broadcasters which could not operate at the time. It was not notified to the Commission by the Member State as required by Article 88(3) TEC and was unlawfully put into effect without Commission authorisation. Therefore, it had to be recovered from the digital terrestrial broadcasters offering pay-TV services and from the cable pay-TV operators involved.

4.3.6 Other relevant Commission decisions

In the following cases, the Commission has found the state aid to be compatible with the internal market due to the facts of the cases that enable applying the exemption provisions:

- case N 270/2006: Italian subsidies to digital decoders with open API⁵² are an aid compatible via Article 107(3)(c) TFEU
- case N 107/2007: Italian subsidy for iDTV and digital decoders are also an aid compatible via Article 107(3)(c) TFEU
- case N 111/06: *Aide TNT pour les régions sans simulcast*⁵³ is compatible aid via 107(2)(a) TFEU
- case N 546/06 *Fonds d'aide à des particuliers dans la perspective de la fin de la radiodiffusion analogique* presents compatible aid via 107(2)(a) TFEU
- case N 103/2007: Spanish support for the acquisition of digital decoders and for the adaptation of antennas in Soria⁵⁴ is an aid compatible via Article 107(3)(c) TFEU.

Some further decisions have been adopted by the Commission dealing with state aid measures in the field of digitisation. The argumentation is mainly based on the principles set out by the Commission in its focal decisions presented above.

4.4 National state aid regulation

In European Union Member States (Austria, Hungary, Italy, Slovenia), the state aid rules laid down in Articles 107–109 TFEU apply directly. Member States have no national state aid regula-

⁵² http://ec.europa.eu/competition/state_aid/register/ii/doc/N-270-2006-en-WLWL-24.01.2007.pdf.

⁵³ http://ec.europa.eu/eu_law/state_aids/comp-2006/n111-06.pdf.

⁵⁴ http://ec.europa.eu/competition/state_aid/register/ii/doc/N-103-2007-WLWL-ES-25.09.2007.pdf.

tion apart from that adopted for the purposes of efficient implementation of state aid rules of the European Union. Slovenia, for example, has, for these reasons, adopted the Monitoring of State Aids Act⁵⁵ which is in force as of 1 May 2004. It sets out detailed rules of the notification procedure, of the duty to report to the Commission, as well as of the assessment of those aids which need not be notified to the Commission. Some further secondary legislation has been adopted on the basis of the Monitoring of State Aids Act.

Other SEE countries that are not yet EU Member States retain in force their national state aid legislation; however, this legislation has already been aligned in most cases with the basic principles of EU state aid rules. The candidate countries (Croatia, former Yugoslav Republic of Macedonia, Montenegro) are bound by their association agreements with the EU to implement such state aid rules in their national legislation.⁵⁶ The remaining three countries have also shown interest in future EU membership. Albania and Serbia have already submitted application for membership, and Bosnia and Herzegovina has also been recognised by the European Commission as potential candidate country. Therefore, EU state aid rules, even if not directly binding, are relevant for all countries in SEE region.

Usually, the TFEU state aid provisions are copy-pasted accordingly into national legislation. The candidate countries have made express commitments in their pre-accession agreements to treat national grants of state aid consistent with the EU's rules on state aid, in cases where the aid affects trade with the EU. Enforcement of the state aid rules is left to the candidate countries, which regulate procedures for notifying and clearing state aid measures through their national competition authorities on the European model.

In the final pre-accession stage, existing state aid measures that candidate countries will be permitted to operate beyond the date of accession are catalogued. The candidate countries must notify all aid in effect, and provide assessments from their respective competition authorities, justifying the conformity of these measures with the EU state aid regulation. Provided the Commission does not raise objections, the notified measures are deemed 'existing aid' upon accession and are included in an annex to the Act of Accession. As such, these measures will only be subject to the so-called 'appropriate measures' procedure, whereby the Commission may (in cooperation with the Member State concerned) propose changes to aid measures on a prospective basis. By contrast, if the Commission has objections that cannot be overcome, the measures concerned will be deemed 'new aid' and subject to post-accession clearance by the Commission, including, potentially, modification or even prohibition.⁵⁷

In all states of South East Europe, the state aid rules of the EU will apply directly once they enter the European Union. Enforcement of the rules will pass to the Commission, which has exclusive jurisdiction for assessing the compatibility of state aids with the internal market of the EU.

⁵⁵ OJ RS, No. 37/2004

⁵⁶ In Croatia, for example, no state subsidy is permitted which, regardless of its form, disrupts or may disrupt market competition by giving priority to a state subsidy beneficiary in the market to the extent in which it may impact the meeting of international obligations assumed by the Republic of Croatia resulting from the Stabilisation and Association Agreement between the Republic of Croatia and the European Communities and their Member States (Official Gazette – International Agreements No. 14/01, 14/02, 1/05 and 7/05).

⁵⁷ http://www.publicservice.co.uk/feature_story.asp?id=765.

5 RECOMMENDATIONS

5.1 General

The basic categories of potential beneficiaries of public funding in the digital switchover process are the same regardless of the country concerned: consumers as natural persons on one hand, and on the other hand companies dealing with broadcasting, operation of multiplexes and/or of transmission networks. Nevertheless, the circumstances concerning the digital switchover vary significantly across SEE countries, and it is essential that any type of public funding measures used should be adapted to the specific situation in each country. For this reason, national authorities responsible for the support of the switchover should not simply copy the funding measures already employed in other countries, but should first assess the specific weak points that might slow down the transition to digital broadcasting in the respective country. Any funding schemes should be well planned and based on up-to date information, such as the number of consumers, the penetration of digital signal, the average costs of switchover for households and for broadcasters, etc. The availability of public subsidies or other support measures should be well publicised to the prospective beneficiaries, so that the application of such measures is transparent and available under equal conditions to all eligible persons and entities.

Any funding of private entities from public resources may potentially constitute state aid in the meaning of Article 107 TFEU. This is directly relevant for EU Member States (IT, AT, HU, SI) and candidate countries (HR, ME, MK), but also of interest to other SEE countries that have expressed the intention to join the EU in the future (AL, RS, BA). Various types of funding measures may be used in the digital switchover process and generally, a case-by-case assessment is required to determine whether a particular measure is compatible with state aid rules. Four basic conditions must be met cumulatively to qualify a measure as state aid within the meaning of Article 107(1) TFEU:

- an advantage must be conferred on the recipient of the aid (be it a private or public undertaking);
- the aid must be provided by a Member State or through state resources;⁵⁸
- such aid must not distort or threaten to distort competition;⁵⁹
- the aid must (at least potentially) effect the inter-state trade.

The exception provisions of Article 107(2) and (3) may be of relevance.⁶⁰ Decisions of the European Commission and judgements of the Court of Justice of the EU offer important guidance for

⁵⁸ The Court of Justice of the EU has interpreted this prerequisite for the application of Article 107 TFEU at times in a more broad, while at times in a more narrow sense. See, for example, cases 30/59 *Steenkolenmijnen v. High Authority, Denkvit, Banco de Crédito*, 82/77 *Netherlands Public Prosecutor v. Van Tiggele*, C-72-73/91 *Sloman Neptun Schiffahrts AG v. Seebetriebsrat Bodo Ziesmer der Sloman Neptun Schiffahrts*, C-379/98 *PreussenElektra AG v. Schlesweg AG*, 67/85 *Van der Kooy v. Commission*, C-83/98P *France v. Ladbroke Racing and Commission*, C-482/99 *France v. Commission (Stardust Marine)*, C-345/02 *Pearle B Vand others v. Hoofdebedrijfschap Ambachten*.

⁵⁹ The rules on *de minimis* might be relevant for the assessment of this prerequisite. See Commission Regulation (EC) No 1998/2006 of 15 December 2006 on the application of Articles 87 and 88 of the EC Treaty to *de minimis* aid, OJ L 379, 28.12.2006, p. 5.

⁶⁰ http://ec.europa.eu/competition/publications/cpn/cpn2006_1_23.pdf, p. 24.

assessing the (in)compatibility of a measure with EU state aid rules. According to Commission, there are numerous possibilities for Member States to actively promote the digitisation of broadcasting in ways which are compatible with state aid law of the EU and, hence, with the ultimate goal of growth, competitiveness and social cohesion. The Commission has stressed several times, that any measures should not entail an unnecessary distortion between transmission technologies (terrestrial, cable, and satellite) or companies.

Rather than funding directly from the state budget, the states may consider setting up a special digitisation fund tasked with distributing subsidies and grants for the purposes of supporting the digital switchover. Such fund should operate in close cooperation with the national regulatory authority and should include in its bodies representative of the major groups of stakeholders. Especially in cases where consumers are beneficiaries of subsidies, it may be considered whether commercial entities with an interest in a swift transition to digital broadcasting (such as broadcasters offering pay-TV services) may be willing to contribute a part of financial resources to the fund in order to speed up the process. The Austrian Digitisation Fund in its platform-neutral alignment may serve as a model for deliberations by other states for creating their own support mechanisms to accelerate the digitisation of broadcasting.

5.2 Funding at the consumer level

Funding schemes operating at the consumer level may have as their purpose either to encourage consumers to switch to digital reception at an early stage in order to reach a critical mass of users of such equipment; or to support low-income consumers purchasing terminal equipment in order to prevent the exclusion of low-income households from access to digital television. The purpose of the funding scheme should be clearly defined. Before such definition is made, however, it needs to be established what kind of subsidies are necessary for successful switchover in the respective country. First, it needs to be clarified how people receive analogue television; that is the number of people who have cable, IPTV or direct satellite receivers vs. those that receive it via household antennas. This will determine how many people may need receiving equipment and what type of equipment is needed. The issue of whether there has been a significant amount of voluntary purchases also is important, as is the matter of other services and convergence, where there may be both more or less need for extra equipment.⁶¹

When planning any funding schemes, it should be taken into account that, in some aspects, the situation in SEE countries today differs significantly from the situation in Western and Central European countries at the time when they started the transition to digital broadcasting. Digital end user receiver equipment is now more easily available on the market, since it has been produced for several years now by most electronics brands. This also applies to receivers supporting MPEG4 encoding standard, which most SEE countries intend to apply. Another aspect concerning availability of digital end user equipment is the fact that the prices of such equipment have been falling steadily in recent years. Set top boxes that enable analogue TV sets to receive digital TV signal are relatively inexpensive and consumers may be able to afford the purchase of

⁶¹ Guide to Digital Switchover, p. 81.

such devices more easily than at the earlier stage when the prices were prohibitive for low-income households. It may be assumed, therefore, that a certain share of households (those who have bought new TV sets in the recent years) already owns integrated TV sets capable of receiving digital TV signal. This is particularly so since some digitally broadcast programmes are already available in all countries in the region and since digital switchover is already completed, or at least well under way, in some of the neighbouring countries.

These reasons speak against end user equipment subsidies aimed at consumers in general. It should also be taken into account, however, that SEE countries that are still in the early phases of digital switchover process are economically underdeveloped and that a more significant share of population in these countries is economically disadvantaged to that extent that they could not afford the purchase even of the most basic digital set-top boxes at unsubsidised price. This circumstance could slow down the analogue switch-off, the precondition for which a certain level of consumer penetration is needed, thus increasing the costs connected with a longer simulcasting phase.

It is essential, accordingly, to establish the approximate number of consumers or households that will need subsidies, and to decide on the basis of these numbers, whether there is a need for general STB subsidies or whether subsidies should be available only to vulnerable groups of consumers. The size of such groups and the funds required for subsidies should be established in advance. The current economic crisis should also be taken into account. On one hand, it may increase the vulnerability of consumers; on the other hand, it may reduce the public financial resources available for subsidies. Planning of any funding schemes should be realistic; it should not foresee the extent of subsidies exceeding the public financial resources actually available.

As for the type of subsidies to be used, vouchers that may be redeemed at the purchase of digital receiver devices seem most appropriate. The advantage of vouchers is that they confer the financial benefit to the consumers immediately, unlike tax deductions or licence fee reductions, which from the consumers' point of view operate with a delay. Tax deductions, reduced tax rates and licence fee reductions may be applied for subsidising the entire population, but seem less appropriate for the support of vulnerable groups of consumers. If subsidies are granted in the form of a reduction of TV licence fees, it is important that such reduction should not threaten the funding of the public service broadcaster.

Any funding measures should be designed in a way compatible with state aid rules applicable in the respective country. As stated by the European Commission, subsidies to consumers for the purchase of digital decoders must be technologically neutral – i.e. digital end user receiver equipment for any technical transmission platform (terrestrial, satellite, etc.) must be eligible for subsidies. Subsidies must be proportionate to the objective of promoting the transition to digital TV and to interoperability. In granting subsidies, the authorities may encourage the use of open standards for interactivity that enable consumers to benefit from interactive services offered by different operators (e.g. electronic programme guides, news search, games or e-commerce). In any case, subsidies should be temporary and should reduce in proportion to the falling cost of

receivers, in order to avoid over-compensation. EU Member States are recommended to notify any funding schemes to the European Commission.⁶²

5.3 Funding of broadcasters and network operators

Financial assistance to broadcasters and network operators may prove to be especially important in SEE countries where the (publicly owned) technical broadcasting infrastructure has been neglected and underdeveloped. At the same time, public broadcasters and network operators are often financially too weak to afford major investments in new digital broadcasting equipment and may have difficulties covering the additional costs connected with simulcasting. The criteria for assessing which forms of public support for the digital switchover may be deemed acceptable could be derived from decisions and communications of the European Commission and judgments of the European Court of Justice.

States may consider funding for the roll-out of a transmission network in areas where otherwise there would be insufficient TV coverage. They may fund pilot projects and research activities to test, for example, digital transmission technologies and interactive applications. They may apply grants to companies to develop innovative digital services such as electronic programme guides and mobile applications. The results of such research and development activities should be made available to the public as long as no justified interests on the part of the grant recipient are violated. This could limit the competitive distortions brought about by the funding of these measures.

States may grant 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.

States may grant subsidies to public or commercial broadcasters to compensate for additional transmission costs when broadcasting analogue and digital TV in parallel (the simulcast phase). Such aid should be based on objective criteria and may co-fund only the directly attributable, actually incurred eligible costs of broadcasters due to continued additional analogue transmission via cable, terrestrial or satellite transmission operators during a defined simulcast phase.

States may also grant financial support as fair compensation to broadcasters that are required to give up the use of analogue spectrum before the expiration of their analogue broadcasting licences. The compensation should take into account the actual costs of the switchover to broadcasters including costs to adapt equipment to digital transmission and to broadcast in another channel/-multiplex where applicable and including spectrum costs. Aid should not exceed additional costs.

⁶² COM(2004)541 final, at 3.4.2. IP/05/1394. 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 (C(2005)3903 final), at 133.

When calculating spectrum costs, the granting of digital transmission capacity should be taken into account. If broadcasters are given free digital broadcasting licences, this should also be included in the amount of state aid. However, this does not mean that the price of digital licences, which will replace the existing analogue licences, need to remain the same as in analogue broadcasting. Since digital replacement licences typically contain various obligations related to the digital switchover, the regulator may reduce the broadcasting licence fees. Considering this circumstance and due to the diminished scarcity value of the digital broadcasting licences, such reduction might not constitute state aid.

In any case, the measures of financial support should respect the principles of transparency, necessity, proportionality and technological neutrality:

- State aids should not favour a priori any given technology or transmission platform, e.g. DVB-T network over competing TV platforms, such as cable and satellite.
- Funding should only be provided for temporary activities related to the switchover.
- Beneficiaries should be selected in open calls for proposals based on clear pre-defined criteria; applicants from any Member States of European Economic Area should be eligible.
- Beneficiaries should be required to show that the co-funding is necessary, and may only claim the directly attributable, actually incurred eligible costs for the activities funded. They should be required to use all funds obtained for their specified purpose and in an economic and efficient manner. Potential overpayments should be reimbursed.

SEE states that are not yet bound by EU state aid rules have more leeway for providing financial assistance to companies for the digital switchover. As long as the publicly owned transmission network operator remains the only multiplex operator in the country, public funding of such operator should not be problematic, since it does not distort competition in the market. The same goes for financial support given to the public broadcasting service. Nevertheless, it is recommended that, when planning such measures, the states should clearly formulate the public policy goals that they wish to achieve with the measure, taking into account the exceptions to Article 107 TFEU.